

Memorandum Order

State of West Virginia ex rel. Amos Martin and Tammy Martin,  
Petitioners

vs.) 34949

The Honorable James Stucky and  
Bassam Haffar, M.D., Respondents

This case is before the Court upon the filing of a Petition for a Writ of Prohibition by Petitioners Amos and Tammy Martin. This Court is asked to determine whether the Circuit Court of Kanawha County abused its discretion by granting the motion of Respondent Bassam Haffar, M.D., for leave to file a third-party complaint against the Cleveland Clinic Foundation in the underlying medical malpractice action.

On June 27, 2008, Petitioners filed a medical malpractice action against Dr. Haffar, alleging negligence in failing to promptly inform the Petitioners that Mr. Martin's cancer had metastasized. Dr. Haffar's treatment of Mr. Martin had initially included a referral to the Cleveland Clinic Foundation, and colon surgery to treat Mr. Martin's rectal cancer was performed at the Cleveland Clinic in October 2005. A pre-operative CT scan, conducted at the Cleveland Clinic in October 2005, allegedly revealed the presence of lesions on Mr. Martin's liver and nodules on his lung. The Cleveland Clinic suggested a follow-up within four to six months. Mr. Martin underwent an additional surgery at Cleveland Clinic on

January 10, 2006, to close the ileostomy. In subsequent testing, a May 2, 2006, examination at Cleveland Clinic revealed an elevated CEA level<sup>1</sup> in Mr. Martin's blood work, with a recommended follow-up in three months.

On July 31, 2006, a CT scan performed at the direction of Dr. Haffar in West Virginia indicated the development of extensive liver cancer. The primary subject of the current litigation is the issue of communication of the result of that CT scan to Mr. Martin. Dr. Haffar contends that he specifically informed Mr. Martin of the result of that CT scan in August 2006. Conversely, Mr. Martin maintains that Dr. Haffar did not communicate the result to him and that Mr. Martin therefore did not seek chemotherapy or other treatment until he underwent another CT scan in October 2007 and thereafter learned of his advanced liver and lung cancer.

A Scheduling Order was entered by the trial court on September 24, 2008, specifying a deadline of October 31, 2008, for the filing of third-party complaints. The parties, recognizing the severity of Mr. Martin's disease, expedited this matter and set the trial date for April 20, 2009. On March 25, 2009, three weeks *prior* to the scheduled trial and almost five months *after* the deadline for the filing of third-party complaints, Dr. Haffar filed a Motion for Leave to File Third-Party Complaint and a continuance of the trial date.

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<sup>1</sup>CEA is a reference to carcinoembryonic antigen, one of an extensive variety of tumor markers which can be indicative of a particular disease process.

On April 8, 2009, the trial court held a hearing on said motion and ultimately granted the motion, permitting Dr. Haffar to file a third-party complaint against the Cleveland Clinic and continuing the trial date. On April 23, 2009, Petitioners Mr. and Mrs. Martin filed the petition for a writ of prohibition currently under consideration by this Court.

In explanation of the delay in requesting leave to file a third-party complaint, Dr. Haffar contends that he did not have sufficient knowledge of Cleveland Clinic's alleged deviation from the standard of care until the depositions of Petitioners' experts, Dr. Daniel Laheru and Dr. Narender Jogenpally, were taken in March 2009. The Petitioners, however, maintain that Dr. Haffar could have formulated his allegations of Cleveland Clinic deviation significantly earlier in the litigation. In fact, as Petitioners emphasize, Dr. Haffar admitted in his October 10, 2008, deposition that he believed, as early as February 2006, that Cleveland Clinic had deviated from the standard of care by failing to provide chemotherapy or radiation.<sup>2</sup> Dr. Haffar explains that while he may have had suspicions concerning the general standard of care provided by Cleveland Clinic as early as February 2006, he (1) did not have any *portions* of medical records regarding Cleveland Clinic's treatment of Mr. Martin until late 2007; (2) did not have a *complete set* of Cleveland Clinic's medical records

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<sup>2</sup>Dr. Haffar contends that his initial conception of Cleveland Clinic's deviation was premised upon Cleveland Clinic's failure to recommend chemotherapy or radiation at the time of the original surgery. However, Dr. Haffar's ultimate conclusion, upon which he seeks to base his third-party complaint, was that Cleveland Clinic's deviation from the standard of care occurred when it failed to adequately follow-up on the 2005 CT scan and elevated CEA levels.

upon which to premise his ultimate conclusion that Cleveland Clinic failed to adequately follow-up on the 2005 CT scan and elevated CEA levels until December 2008; and (3) did not have the benefit of the opinions of Petitioners' experts regarding Cleveland Clinic's alleged deviations from the standard of care until March 2009.<sup>3</sup>

In analyzing matters involving the alteration of scheduling orders and leave to file third-party complaints, this Court has specifically stated that scheduling orders are not to be modified except upon a showing of good cause. *State ex rel. Pritt v. Vickers*, 214 W.Va. 221, 227, 588 S.E.2d 210, 216 (2003) (discussing necessity for seeking leave of court to modify scheduling order and explaining that demonstration of good cause was prerequisite to obtaining extension); *see also Walker v. Option One Mortg. Corp.*, 220 W.Va. 660, 665-66, 649 S.E.2d 233, 238-39 (2007).

This Court has also explained that while the provisions for impleader under Rule 14 of the West Virginia Rules of Civil Procedure are within the sound discretion of a trial court, a motion for leave to file a third-party complaint is *not* to be granted when there is a possibility of prejudice to the original plaintiff or to the third-party defendant to be included. The analysis required by this Court in determining the issue of potential prejudice is readily discernable from our prior pronouncements. In *Bluefield Sash & Door Co., Inc. v. Corte*

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<sup>3</sup>Interestingly, the opinions of Petitioners' experts were premised upon the same medical documents to which Dr. Haffar and his own experts had access.

*Constr. Co.*, 158 W. Va. 802, 216 S.E.2d 216 (1975), *overruled in part on other grounds by Haynes v. City of Nitro*, 161 W. Va. 230, 240 S.E.2d 544 (1977), for instance, this Court affirmed the denial of a requested impleader based upon the lack of similarity of issues and possible jury confusion. In explaining its approach, this Court stated as follows in syllabus point three: “Impleader under Rule 14(a), West Virginia Rules of Civil Procedure, should not be allowed if there is a possibility of prejudice to the original plaintiff or the third party defendant.”

Applying the principles of *Bluefield Sash* in *Shamblin v. Nationwide*, 183 W. Va. 585, 396 S.E.2d 766 (1990), this Court affirmed a trial court’s denial of an attempted impleader four years after the civil action was filed based upon the prejudice to the plaintiff caused by the unexplained delay and the risk of confusion of issues between legal malpractice and bad faith insurance claims. The argument was forwarded in *Shamblin* that the “third-party action was merely a delay tactic . . . made about two months prior to trial, . . . more than four years after the filing of the lawsuit . . . and more than two and one-half years after the appellant first mentioned the possibility of bringing a claim. . . .” 183 W.Va. at 597, 396 S.E.2d at 778.

Addressing this issue of attempts to file late third-party complaints again in *State ex rel. Leung v. Sanders*, 213 W.Va. 569, 584 S.E.2d 203 (2003), this Court reversed the trial court decision and permitted a third-party complaint based specifically upon the *absence of*

*a deadline* in the scheduling order and the *absence of prejudice* to the plaintiff. The *Leung* Court found that discovery was incomplete and that the trial date would have been delayed even if impleader had not been permitted. “Thus, we cannot attribute any significant delay in this case as flowing from the impleader motion. We conclude that the circuit court failed to consider this material fact in denying leave to implead and, thus, abused its discretion.” 213 W.Va. at 576, 584 S.E.2d at 210 (footnote omitted).

In *State ex rel. Thrasher v. Fox*, 218 W.Va. 134, 624 S.E.2d 481 (2005), this Court affirmed the trial court’s denial of impleader based upon delay and prejudice to the plaintiff and the proposed third-party defendant. The *Thrasher* Court found “that granting the impleader motion would have resulted in further significant delay, prejudice, and confusion of the issues in litigation.” 218 W.Va. at 140, 624 S.E.2d at 487.

Thus, the matters of primary concern which conspicuously emerge from a review of this Court’s prior decisions include the extent and justification for the delay, the possibility of prejudice to the plaintiff and the proposed third-party defendant, and the potential for jury confusion. While the potential for jury confusion is insignificant in the present case since extraneous legal issues are unlikely to be introduced, the extent of delay is significant, and the possibility of prejudice is extreme.

With regard to the delay in bringing the request for inclusion of the third-party

defendant, we find that the delay occasioned in this case must be deemed extensive, particularly given the fact that the necessity for expediting trial was acutely obvious to all parties and the trial court at the outset of this litigation. Further, we do not find the justifications offered by Dr. Haffar for the delay to be particularly strong. The Cleveland Clinic records upon which he allegedly bases his conclusions regarding Cleveland Clinic's deviation from the standard of care were either in his possession or available to him substantially prior to the depositions of the Petitioners' experts in March 2009.

With regard to the prejudice evaluation, we find that the possibility of prejudice to the Petitioners is exceedingly significant and did not, according to the portions of the hearing transcript provided to this Court on writ of prohibition, receive extensive analysis by the trial court. The primary focal point and determinative factor of this litigation is the personal communication between two individuals, Dr. Haffar and Mr. Martin. At its essence, this is an issue of whom to believe. A jury will be charged with the monumental task of determining which individual is telling the truth. The realities concerning the need to expedite the trial, with the specific question of whether Mr. Martin will be capable of testifying as one of those individuals, was recognized by all participants at the beginning of this litigation, and the trial court proficiently enunciated a scheduling order to guide the litigation. Upon motion by Dr. Haffar to include a third-party defendant, however, the deadline established in that scheduling order for the filing of third-party complaints was abrogated. In arriving at the conclusion to permit the third-party complaint, the portion of

the record before this Court does not indicate that the trial court engaged in an analysis of good cause for modification of the originally contemplated scheduling order and, more significantly, did not engage in an analysis of any factors contributing to the “possibility of prejudice” as required by *Bluefield Sash* and its progeny.

In *Gentry v. Mangum*, 195 W.Va. 512, 466 S.E.2d 171 (1995), this Court explained that “an abuse of discretion occurs when a material factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and no improper factors are assessed but the circuit court makes a serious mistake in weighing them.” 195 W.Va. at 520 n. 6, 466 S.E.2d at 179 n. 6. Based upon this Court’s review of this case and specifically cognizant of this Court’s admonition toward remaining cautiously mindful of whether good cause has been shown for scheduling order modification and whether the original plaintiff and/or third-party defendant will suffer prejudice, this Court finds that the trial court abused its discretion in this case. Consequently, the Petitioner is entitled to a writ of prohibition to prevent the trial court from permitting the filing of a third-party complaint.

Accordingly, this matter is hereby remanded to the Circuit Court of Kanawha County with directions to place this matter on the docket for trial as expeditiously as possible.

The mandate of this Court shall issue contemporaneously herewith.

Writ granted.