IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. EAN HOLDINGS, LLC, RENTAL INSURANCE SERVICES, INC., and EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Petitioners,

v.

DOCKET NO. 19-0900

THE HONORABLE RONALD E. WILSON, JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA; DAVID STANLEY CONSULTANTS, LLC; and MARK ASH, JR.

Respondents.

VERIFIED PETITION FOR WRIT OF PROHIBITION OF EAN HOLDINGS, LLC, RENTAL INSURANCE SERVICES, INC., AND EMPIRE FIRE AND MARINE INSURANCE COMPANY

(Circuit Court of Ohio County, West Virginia, Civil Action No. 18-C-152)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Other Authorities:

QUESTIONS PRESENTED

1. Did the Circuit Court commit clear legal error by failing to dismiss or transfer this matter to the State of Ohio due to improper venue where the alleged contract was formed in the State of Ohio, the motor vehicle accident at issue took place in the State of Ohio, all Petitioners are incorporated or organized outside of the State of West Virginia, and the only purported connection to the Circuit Court of Ohio County, is the allegation that one of the Petitioners herein does business in said county?

2. Alternatively, did the Circuit Court commit clear legal error in permitting discovery to proceed prior to resolving the issue of improper venue and failing to transfer this matter to the Circuit Court of Marion County?

STATEMENT OF CASE

The Complaint giving rise to this matter alleges that Plaintiff below and Respondent herein, David Stanley Consultants, LLC ("David Stanley Consultants") is a West Virginia limited liability with its principal office in Marion County, West Virginia and an office in Belmont County, Ohio. *See Appendix Record at 003, ¶ 1 (hereinafter AR_____).* The Complaint further alleges Plaintiff below and Respondent herein, Mark Ash ("Ash") is a resident of Marion County, West Virginia and is employed as the general manager of David Stanley Consultants. *AR003 at ¶ 2.*

With respect to the Defendants below and Petitioners herein, the Complaint alleges that EAN Holdings, Inc. ("EAN") is a Delaware Limited Liability Company, licensed to do business in the State of West Virginia and is a wholly owned subsidiary of Enterprise Holdings, Inc., located at 600 Corporate Park Drive, St. Louis, MO, 63105. *AR004 at ¶ 3.* The Complaint further alleges that Rental Insurance Services, Inc. ("RIS") is a Missouri Corporation located at 600 Corporate Park Drive, St. Louis, MO, 63105 and is an "affiliate" of EAN. The Complaint asserts that RIS handles all claims and collections for EAN. *AR004 at ¶ 4.* With respect to Empire Fire and Marine Insurance Company ("Empire"), the Complaint alleges that Empire is a Nebraska insurance company

admitted to transact the business of insurance in the State of West Virginia, located at 13810 FNB Parkway, Omaha, NE, 68154. *AR004 at ¶ 5.*

The Complaint asserts, without elaboration, that venue is proper in the Circuit Court of Ohio County, West Virginia pursuant to W. Va. Code § 56-1-1(a)(2). *AR004 at ¶ 7.*

As to the substance of the Complaint, David Stanley Consultants and Ash (hereinafter referred to collectively at times as "Respondents") assert that Ash rented a 2017 Nissan Maxima ("the Rental Vehicle") on behalf of himself and David Stanley Consultants from EAN at one of its locations in the State of Ohio on July 5, 2017. *AR004 at ¶ 8.*

Respondents assert that at this time Ash entered into a written Rental Agreement. *AR002 at ¶ 9.* Respondents generally allege that Ash purchased all available insurance and other products offered by EAN at the time the vehicle was rented. *AR005-AR007 at ¶¶ 14-21.* Respondents further assert that Nathan Crawford ("Crawford") was listed as an Additional Authorized Driver at an additional charge. *AR005 at ¶ 11.*

Respondents allege that on July 9, 2017, Crawford was involved in an accident with the Rental Vehicle and "[a] police report was filed with the Ohio State Highway Patrol stating that Mr. Crawford was suspected of driving under the influence." *AR007 at ¶ 22.* The accident at issue occurred in Ohio. *AR007 at ¶ 22 (noting that the matter was investigated by the Ohio State Highway Patrol).* The Complaint further alleges that Ash was sent an invoice associated with the damage to the vehicle arising from the July 9, 2017 accident and further asserts that the debt was turned over to a collections agency. *AR009 at ¶ 32.*

Respondents seek declaratory judgment that EAN has failed to honor its "contract" and that Respondents have breached their duties. Respondents seek declaratory judgment regarding

the rights and obligations of the parties under the Rental Agreement. *AR0010 at ¶¶ 35-36.* Respondents assert a cause of action for unjust enrichment against EAN. *AR0010 at ¶¶ 37-38.* Respondents assert a claim against all Petitioners for breach of contract. *AR0010-AR011 at ¶¶ 39-40.* Respondents assert a claim against all Petitioners for breach of the covenant of good faith and fair dealing (i.e. common law "bad faith"). *AR011 at ¶¶ 41-44.* Respondents assert a claim for fraud against EAN in relation to purported false statements made to Respondents by EAN with respect to various coverages and protections purchased by Respondents. *AR0011-AR012 at ¶¶ 45-49* Respondents also assert a claim against all Petitioners under the Unfair Trade Settlement Practices Act, W. Va. Code § 33-11-4(9) ("UTPA"). *AR012-AR013 at ¶¶ 50-51.*

On October 11, 2018, RIS and Empire filed their *Motion to Dismiss and/or Transfer Venue. AR016-AR025.* Therein, RIS and Empire argued that the Court should dismiss this matter and/or transfer the matter as there is no basis to establish venue in the Circuit Court of Ohio County, West Virginia. RIS and Empire argued that all Defendants were incorporated or organized outside of the State of West Virginia. Furthermore, the Rental Agreement at issue was executed in the State of Ohio and the motor vehicle accident involving the Rental Vehicle took place in the State of Ohio. Therefore, RIS and Empire argued that the matter should be dismiss and/or transferred to the State of Ohio as venue in the Circuit Court of Ohio County was improper.

Alternatively, pursuant to W. Va. Code § 56-1-1(a)(5),[1] RIS and Empire argued that venue may be appropriate in the Circuit Court of Marion County as Respondents were legal residents in Marion County, West Virginia when the right of action accrued.

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[1] As explained in further detail below, W. Va. Code § 56-1-1(a)(5) provides as follows with respect to venue:

(a) Any civil action or other proceeding, except where it is otherwise specially provided, may

On December 18, 2018, Respondents filed their *Response in Opposition to Defendants Rental Insurance Services, Inc. and Empire Fire and Marine Insurance's Motion to Dismiss and/or Transfer Venue. AR026-AR039.* Therein, Respondents argued that venue was proper in Ohio County, West Virginia under West Virginia's general venue statute and relevant case law because Empire purportedly sells policies to West Virginia citizens "at the physical location of Defendant EAN Holdings, LLC in Ohio County" and RIS "also does business in Ohio County, West Virginia[.]" Respondents argued that venue was not appropriate in Marion County, West Virginia as W. Va. Code § 56-1-1(a)(5) is inapplicable.

On February 14, 2019, RIS and Empire filed their *Reply to Plaintiffs' Response in Opposition to Motion to Dismiss and/or Transfer Venue* and rebutted the arguments raised in Respondents' Response. *AR040-AR045.*

On May 15, 2019, RIS and Empire filed their *Motion for Protective Order and Stay of Discovery. AR046-AR054.* Therein, it was noted that on April 16, 2019, Respondents served written discovery requests on RIS. Said motion argued that the Circuit Court should issue a protective order and stay discovery until such time as the pending *Motion to Dismiss and/or Transfer Venue* had been resolved.

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hereafter be brought in the circuit court of any county: [...]

(5) If it is to recover a loss under any policy of insurance upon either property, life or health or against injury to a person, where the property insured was situated either at the date of the policy or at the time when the right of action accrued or the person insured had a legal residence at the date of his or her death or at the time when the right of action accrued;

W. Va. Code § 56-1-1(a).

On June 13, 2019, Respondents filed their *Response in Opposition to Defendant Rental Insurance Services, Inc.'s Motion for Protective Order and Stay of Discovery. AR055-AR061.* Respondents argued that the Circuit Court should deny the *Motion for Protective Order and Stay of Discovery* and permit discovery to proceed despite the fact that the *Motion to Dismiss and/or Transfer Venue* was still pending and the venue issue had not been resolved.

On July 22, 2019, EAN filed its *Joinder in Defendant, Rental Insurance Services, Inc. and Empire Fire and Marine Insurance Company's Previously Filed Motion to Dismiss and/or Transfer Venue and Motion for Protective Order and Stay of Discovery. AR062-AR066.* Therein, EAN joined the previously filed *Motion to Dismiss and/or Transfer Venue* and *Motion for Protective Order and Stay of Discovery* and argued that the Circuit Court should dismiss the matter and/or transfer venue and stay discovery until such time as the Court has ruled upon the pending *Motion to Dismiss and/or Transfer Venue.*

On September 4, 2019, the Circuit Court entered its *Memorandum Order*, addressing the pending *Motion to Dismiss and/or Transfer Venue* and *Motion for Protective Order and Stay of Discovery. AR001-AR002.* Therein, the Circuit Court stated as follows:

> The Court has not yet reached a decision on the venue issue and continues to research that issue. However, after considering the arguments concerning the motion to dismiss and the motion for protective order and stay of discovery, there is no reason to delay a decision on those issues because, if the defendants' prevail on their venue motion the case will not be dismissed, but will be transferred to Marion County, West Virginia.

AR001.

SUMMARY OF ARGUMENT

As set forth below, the law is clear that the mere allegation that a corporation "does

business" in a particular county is insufficient to establish venue in that county pursuant to W. Va. Code § 56-1-1(a)(2). In this case, all events giving rise to Respondents' Complaint occurred in the State of Ohio. Respondents' allegation that EAN "does business" in Ohio County is insufficient to establish venue in Ohio County where the alleged business conducted in Ohio County has no connection to the matters alleged in the Complaint. Therefore, the Circuit Court exceeded its legitimate powers and clearly erred as a matter of law in failing to dismiss this matter or transfer this matter to the State of Ohio.

Alternatively, if venue is not appropriate in the State of Ohio, the Circuit Court exceeded its legitimate power and clearly erred as a matter of law in permitting discovery to proceed prior to resolving the issue of venue and failing to transfer this matter to the Circuit Court of Marion County. As further explained below, W. Va. Code § 56-1-1(a)(5) permits venue in the county wherein the person allegedly insured had a legal resident when the right of action accrued. Therefore, to the extent the alleged insurance at issue could be considered to have "insured" the Respondents (as opposed to the Rental Vehicle itself), then W. Va. Code § 56-1-1(a)(5) would permit venue in the Circuit Court of Marion County as that is the county wherein the person allegedly insured had a legal residence when the right of action accrued.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioners assert that oral argument is unnecessary, pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, as the dispositive issues have been authoritatively decided and the facts and legal arguments are adequately presented in the briefs and record on appeal, and the decisional process would not be significantly aided by oral argument. However, if the Court believes oral argument is warranted, Petitioners submit that any such argument would be

appropriate, pursuant to Rule 19 of the West Virginia Rules of Appellate Procedure, as this case involves the application of settled law.

STANDARD OF REVIEW

Pursuant to W. Va. Code § 53-1-1, a writ of prohibition lies as a matter of right in all cases of usurpation and abuse of power, when the inferior court exceeds its legitimate powers. "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953). The standard for issuance of a writ of prohibition when it is alleged a lower court has exceeded its authority is as follows:

> 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.

Syl. Pt. 1, *State ex rel. Safe-Guard Products Intern., LLC v. Thompson*, 235 W. Va. 197, 772 S.E.2d 603 (2015)(quoting Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)).

The issue before the Court concerns venue. This Court has previously held that a writ of prohibition is an appropriate remedy "to resolve the issue of where venue for a civil action lies,"

because "the issue of venue [has] the potential of placing a litigant at an unwarranted disadvantage in a pending action and [] relief by appeal would be inadequate." *State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 645, 713 S.E.2d 356, 360 (2011) (brackets in original) (quoting *State ex rel. Huffman v. Stephens*, 206 W. Va. 501, 503, 526 S.E.2d 23, 25 (1999)). Moreover, "in every case that has had a substantial legal issue regarding venue," this Court has "recognized the importance of resolving the issue in an original action." *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 124, 464 S.E.2d 763, 766 (1995).

It is true that this Court's review of a Circuit Court's decision concerning venue is subject to abuse of discretion rule. Syl. Pt. 1, *United Bank, Inc. v. Blosser*, 218 W. Va. 378, 624 S.E.2d 815 (2005). However, in this case, the issues at hand implicate the venue statute, W. Va. Code § 56-1-1(a). The interpretation and application of a statute and the questions of law implicated thereby are subject to *de novo* review. Syl. Pt. 1, *Chrystal R.M. v. Charlie A.L.*, 194 W. Va. 138, 459 S.E.2d 415 (1995).

ARGUMENT

A. The Circuit Court exceeded its legitimate powers and clearly erred as a matter of law in failing to dismiss this matter or transfer this matter to the State of Ohio.

Rule 12(b)(3) of the West Virginia Rules of Civil Procedure provides:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion [...] (3) improper venue[.]

W. Va. R. Civ. P. 12(b)(3). "Where properly questioned by a motion to dismiss under Rule 12(b)(3) [...] venue must be legally demonstrated independent of *in personam jurisdiction* of the defendant."

Syl. Pt. 1, *Wetzel County Sav. & Loan Co. v. Stern Bros.*, 156 W.Va. 693, 195 S.E.2d 732 (1973). Respondents carry the burden of proving venue. *See generally Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 672 S.E.2d 255 (2008).

Venue is controlled by statute. W. Va. Code § 56-1-1(a) provides, in pertinent part:

> (a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:
>
> (2) If a corporation be a defendant, wherein its principal office is or wherein its mayor, president or other chief officer resides; or if its principal office be not in this state, and its mayor, president or other chief officer do not reside therein, wherein it does business [...]

W. Va. Code § 56-1-1(a)(2). W. Va. Code § 56-9-1 permits a Circuit Court to transfer an action to another venue.

As noted above, the Complaint in this matter asserted that venue was proper in the Circuit Court of Ohio County, West Virginia pursuant to W. Va. Code § 56-1-1(a)(2). *AR002 at ¶ 7.* In their *Response in Opposition to Defendants Rental Insurance Services, Inc. and Empire Fire and Marine Insurance's Motion to Dismiss and/or Transfer Venue,* in arguing that venue was proper in the Circuit Court of Ohio County, Respondents relied solely on the portion of W. Va. Code § 56-1-1(a) which provides that a corporation is subject to venue in a county "wherein it does business[.]" *AR027-AR028.* Respondents argued that venue was proper in the Circuit Court of Ohio County because EAN "has a location in Ohio County where it conducts business on a daily basis, and from which [EAN's] insurance policies are sold." *AR032.*

However, this argument is directly contrary to *State ex rel. Airsquid Ventures, Inc. v. Hummel*, which addressed a nearly identical set of circumstances as the case *sub judice*. 236 W. Va. 142, 778 S.E.2d 591 (2015). In *Airsquid*, this Court interpreted the "wherein it does business"

portion of W. Va. Code § 56-1-1(a)(2). The decedent plaintiff in *Airsquid* was a participant in a "Tough Mudder" event which took place in Berkley County. The decedent plaintiff drowned during the event and a wrongful death suit was instituted in Marshall County. The decedent plaintiff had signed an agreement which stated that if a legal action was brought "the appropriate state or federal trial court for the state in which the [event] is held has the sole and exclusive jurisdiction[.]" The trial court found that jurisdiction was proper in any West Virginia court that had subject matter jurisdiction over the case based on this provision. The defendants sought a writ of prohibition with this Court based on the court's finding of venue in Marshall County. *Id.* at 144-145, 593-594.

This Court concluded that the use of the term "appropriate" within the contract language incorporated the State's general venue statute, W. Va. Code § 56-1-1. *Id.* at 146, 595. In analyzing the venue statute, this Court noted that "the primary factors for determining venue are the county in which 'any of the defendants may reside or the cause of action arose.'" *Id.* This Court further noted that "[w]hen the defendant is a corporation, its residency is determined based on either the location of its principal office or the location of its 'mayor, president or other chief officer." Id.

Like the Respondents, the plaintiff in *Airsquid* asserted that venue was appropriate in Marshall County based on the defendants' corporate sales and marketing (i.e. "doing business" in the county). However, the Court found this analysis "unpersuasive":

> Each and every critical event that took place relevant to the alleged wrongful death occurred in Berkeley County. The fact that General Mills sells products in Marshall County is wholly insignificant to the venue-determinative facts of this case. Because it also sells products in Berkeley County, there is nothing statistically significant about the sales by General Mills of products in Marshall County that could tip the proverbial scales of justice in favor of venue existing in Marshall County. In the same fashion, we do not find the reach of the internet to advertise or promote either General Mills products or the Event to be significant in terms of identifying the venue-determinative facts of this case. All of the corporate defendants have a

> connection to Berkeley County and the underlying alleged wrongful death; the same is not true of Marshall County. The singular nexus between the underlying suit and Marshall County, and one that is statutorily insignificant, is the location of [the decedent plaintiff's] local lawyers within Marshall County. Were we to find that the sales of General Mills products in Marshall County are sufficient to permit this action to proceed in that county over the county that clearly has extensive ties to the underlying lawsuit, we would be violating the venerated ideals of fair play and substantial justice that are traditionally recognized to control venue determinations.

Id. at 147-148, 596-597. Thus, the Court found that venue was not appropriate in Marshall County and found that defendants were entitled to a writ of prohibition.

This case is strikingly similar to *Airsquid*. All Petitioners herein (Defendants below) are incorporated or organized outside of the State of West Virginia. *AR004 at ¶¶ 3-5.* The Rental Agreement at issue was formed and executed in the State of Ohio. *AR004 at ¶¶ 8-9.* Ash rented the vehicle at issue from EAN at one of its locations in the State of Ohio. *AR004 at ¶ 8.* The accident involving the Rental Vehicle took place in the State of Ohio and was investigated by the Ohio State Highway Patrol. *AR007 at ¶ 22.* David Stanley Consultants has an office in the State of Ohio. *AR003 at ¶ 1.* As was the case in *Airsquid*, the singular nexus between the allegations of the Complaint and Ohio County appears to be that it is the location of the Respondents' lawyers, which is "statutorily insignificant." *Airsquid*, 236 W. Va. at 147-148, 778 S.E.2d at 596-597.

Respondents only attempt to distinguish *Airsquid* was to argue that *Airsquid* was inapplicable because it "was based on the analysis of a venue provision contained in a contract." *AR031.* Respondents are correct that *Airsquid* involved the application of a venue provision in a contract. However, this Court found that the venue provision at issue in *Airsquid* required the application of the general venue statute, W. Va. 56-1-1(a). *Id.* at 146, 595. Therefore, this Court analyzed the venue statute in reaching its conclusion that venue was not demonstrated – not the terms

of the contract.

Despite *Airsquid's* clear holding, Respondents argue that venue is proper in any county where any corporate defendant conducts business. Therefore, according to Respondent's analysis, Respondents could have brought suit in any of the fifty-five (55) counties within West Virginia if any Petitioner conducts business in such counties despite the county chosen having no connection to this matter whatsoever. Obviously, this would be an absurd result and is directly contrary to the holding of *Airsquid.* Moreover, Respondents do not argue that Petitioners' alleged "doing business" in Ohio County has any connection to the allegations at issue or gave rise to any cause of action asserted herein.

Respondents also asserted that pursuant to *Kidwell v. Westinghouse Elec.*, 178 W. Va. 161, 358 S.E.2d 420 (1986), venue is proper in any county wherein any defendant "does business" so long as the corporation has sufficient minimum contacts so as to not "offend traditional notions of fair play and substantial justice." *AR029-AR030.* However, this argument confuses personal jurisdiction with venue. In fact, an identical argument was specifically rejected by *Airsquid*:

> In her attempt to keep this case in Marshall County, [plaintiff] relies heavily on the sales of products by [defendant] within Marshall County. Her attempt to convince us that [defendant] conducts sufficient business in Marshall County so as not to offend traditional notions of fair play and substantial justice is unavailing. *See Kidwell v. Westinghouse Elec. Co.*, 178 W.Va. 161, 163, 358 S.E.2d 420, 422 (1986) (interpreting "wherein it does business" provision of venue statute and recognizing that whether corporation is subject to venue in particular county depends on corporation's minimum contacts in such county). The due process concerns pertaining to personal jurisdiction that underlie the issue of minimum contacts are not implicated in this case. The Defendants are not challenging being haled into the courts of this state on grounds of personal jurisdiction; they are objecting to being improperly required to defend against claims in the wrong county of this state on grounds of venue.

Airsquid, 236 W. Va. at 147, 778 S.E.2d at 596. As in *Airsquid*, Petitioners are challenging venue – not jurisdiction. Thus, Respondents' reliance on *Kidwell* is misplaced and in direct conflict with *Airsquid*.

As noted above, the Circuit Court's *Memorandum Order* stated that it had "not yet reached a decision on the venue issue" and "continues to research that issue." *AR001*. Yet, the Circuit Court stated that if the Petitioners prevail on their venue motion, the case "will be transferred to Marion County, West Virginia." *AR001*. It is unclear why the Circuit Court refused to dismiss or transfer this matter to the State of Ohio in light of the fact that it had "not yet reached a decision on the venue issue" and "continues to research that issue." *AR001*.

To be clear, the only connection to Ohio County, West Virginia advanced by Respondents' herein is the location of Respondents' counsel and the allegation that one or more of the Petitioners "do business" therein. Both of these arguments were specifically rejected as a basis for venue by the Court in *Airsquid*. Thus, the Circuit Court exceeded its legitimate powers and clearly erred as a matter of law in refusing to dismiss this matter or transfer this matter to the State of Ohio. For all the reasons set forth above, the Court should issue a Rule to Show Cause and thereafter grant the Writ of Prohibition preventing the Circuit Court from enforcing its *Memorandum Order* which denied Petitioners' *Motion to Dismiss and/or Transfer Venue* as it relates to the State of Ohio.

B. Alternatively, if venue is not appropriate in the State of Ohio, the Circuit Court exceeded its legitimate powers and clearly erred as a matter of law in permitting discovery to proceed prior to resolving the issue of venue and failing to transfer this matter to the Circuit Court of Marion County.

Petitioners contend that venue is most appropriate in the State of Ohio as that is where practically all acts giving rise to Respondents' suit occurred. However, should the Court find that the

State of Ohio is not a proper venue, Petitioners believe that the Circuit Court of Marion County is a more appropriate venue than the Circuit Court of Ohio County.

W. Va. Code § 56-1-1(a)(5) provides that venue is appropriate as follows:

> If it is to recover a loss under any policy of insurance upon either property, life or health or against injury to a person, where the property insured was situated either at the date of the policy or at the time when the right of action accrued or the person insured had a legal residence at the date of his or her death or at the time when the right of action accrued;

W. Va. Code § 56-1-1(a).

In this case, the property allegedly insured (*i.e.* the Rental Vehicle) was situated in the State of Ohio when the Rental Agreement was executed. *AR004 at ¶¶ 8-9.* Moreover, when the right of action allegedly accrued (*i.e.* when the motor vehicle accident at issue occurred), the property was located in the State of Ohio. *AR007 at ¶ 22.*

However, to the extent the alleged insurance at issue could be considered to have "insured" the Respondents (as opposed to the Rental Vehicle itself), then W. Va. Code § 56-1-1(a)(5) would permit venue in the Circuit Court of Marion County as that is the county wherein the person insured had a legal residence when the right of action accrued. As noted above, David Stanley Consultants is alleged to have its principal office in Marion County, West Virginia. *AR003 at ¶ 1.* Further, Ash is alleged to be a resident of Marion County, West Virginia. *AR003 at ¶ 2.*

Yet, the Circuit Court has not yet ruled on this issue and is instead permitting discovery to proceed in a clearly improper venue. As noted above, the *Motion to Dismiss and/or Transfer Venue* has been pending since October 11, 2018 and has been fully briefed by the parties since February 14, 2019. *AR003-AR045.* However, the Circuit Court has yet to take action on the issue and notes that it still continues to research the matter. *AR001.*

By failing to decide the venue issue and permitting discovery to proceed in the Circuit Court of Ohio County, Respondents are effectively being forced to litigate this matter in an improper venue. This has the potential of placing Petitioners "at an unwarranted disadvantage[.]" *State ex rel. Huffman v. Stephens*, 206 W. Va. 501, 503, 526 S.E.2d 23, 25 (1999). Furthermore, as the Circuit Court has not yet issued a scheduling order or established a trial date, there would be no prejudice to Respondents if the matter were stayed until the resolution of the venue issues.

Thus, if venue is not appropriate in the State of Ohio, the Circuit Court exceeded its legitimate powers and clearly erred as a matter of law in failing to transfer this matter to the Circuit Court of Marion County and permitting discovery to proceed prior to resolving the issue of venue. For all the reasons set forth above, the Court should issue a Rule to Show Cause and thereafter grant the Writ of Prohibition preventing the Circuit Court from enforcing its *Memorandum Order* which permitted discovery to proceed without resolving the issue of venue.

C. Prohibition is the only remedy to correct the clear legal error created as a result of the Circuit Court's refusal to dismiss this matter or transfer venue and permitting discovery to proceed prior to determining the appropriate venue.

As stated above, this Court examines five (5) factors in determining whether an issuance of a writ of prohibition is the appropriate remedy:

> In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of

> prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

State ex rel. Safe-Guard Products Intern., LLC v. Thompson, 235 W. Va. 197, 772 S.E.2d 603 (2015)(quoting Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996)).

Here, Petitioners lack an effective remedy by appeal. The only alternative is to litigate this matter in what is clearly an improper venue. For the same reason, Petitioners will be prejudiced in a way that is not correctable on appeal. *See State ex rel. Riffle v. Ranson,* 195 W. Va. 121, 124, 464 S.E.2d 763, 766 (1995) (noting the "inadequacy of the relief permitted by appeal"). Otherwise, Petitioners would be required to litigate this matter to its conclusion in an incorrect venue and following a direct appeal re-litigate the matter in the correct venue. Moreover, the Circuit Court's failure to dismiss this matter and/or transfer the same to the State of Ohio is clearly erroneous as a matter of law given the clear holding of *Airsquid, supra.* Additionally, this Court has specifically recognized that the issuance of a writ of prohibition is the proper remedy to correct a lower court's erroneous decision on venue. *State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 645, 713 S.E.2d 356, 360 (2011); *Riffle*, 195 W. Va. at 124, 464 S.E.2d at 766.

Accordingly, prohibition is an appropriate remedy herein and this Court should issue a Rule to Show Cause and thereafter grant the Writ of Prohibition to prohibit the Circuit Court from enforcing its *Memorandum Order*.

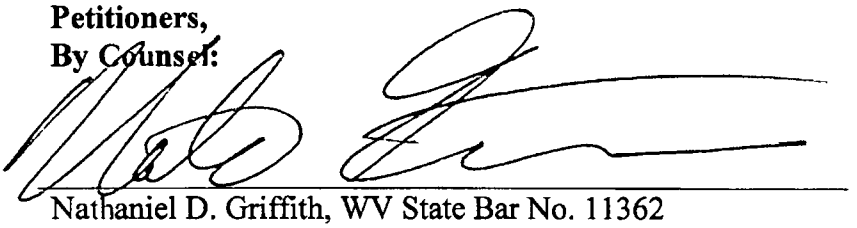
CONCLUSION

Put simply, the allegations of the Complaint in this matter have no legally significant connection to Ohio County, West Virginia. Pursuant to *Airsquid*, Respondents allegation that one of the Petitioners herein "does business" in Ohio County, West Virginia is insufficient to establish

venue. Practically all of the events giving rise to the Complaint occurred in the State of Ohio. Thus, Circuit Court exceeded its legitimate powers and clearly erred as a matter of law in failing to dismiss this matter or transfer this matter to the State of Ohio. In the alternative, the Circuit Court exceeded its legitimate powers and clearly erred as a matter of law in permitting discovery to proceed prior to resolving issue of venue and failing to transfer this matter to the Circuit Court of Marion County pursuant to W. Va. Code 56-1-1(a)(5).

Dated this 2nd day of October, 2019.

Petitioners,
By Counsel:



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. EAN HOLDINGS, LLC, RENTAL INSURANCE SERVICES, INC., and EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Petitioners,

v. **DOCKET NO. _____**

THE HONORABLE RONALD E. WILSON, JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA; DAVID STANLEY CONSULTANTS, LLC; and MARK ASH, JR.

Respondents.

VERIFICATION

The undersigned, counsel of record for Petitioners, hereby verifies that the contents of the foregoing *Verified Petition for Writ of Prohibition of EAN Holdings, LLC, Rental Insurance Services, Inc., and Empire Fire and Marine Insurance Company* are true to the best of his information and belief and to the extent that they are based upon information and belief, he believes them to be true.

Nathaniel D. Griffith, WV State Bar No. 11362
Edgar Allen Poe, Jr., WV State Bar No. 2924
Counsel for Petitioners

Subscribed and sworn to me this 2nd day of October, 2019.

Notary Public

OFFICIAL SEAL
Megan J. Cummons
Notary Public
State of West Virginia
My Commission Expires
September 04, 2023
1004 TWIN OAKS DRIVE
MORGANTOWN, WV 26508

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. EAN HOLDINGS, LLC, RENTAL INSURANCE SERVICES, INC., and EMPIRE FIRE AND MARINE INSURANCE COMPANY,

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Respondents.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioners, does hereby certify that on October 2, 2019 a true and correct copy of the foregoing **VERIFIED PETITION FOR WRIT OF PROHIBITION** and **APPENDIX** were served upon all counsel of record by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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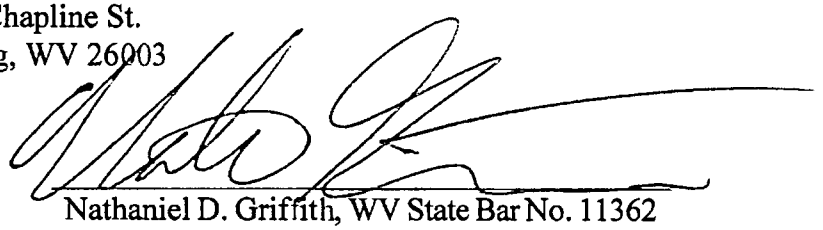

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