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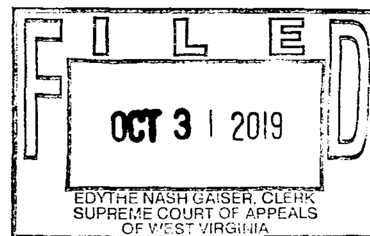

STATE OF WEST VIRGINIA, ex rel., EAN HOLDINGS, LLC, RENTAL INSURANCE SERVICES, INC., and EMPIRE FIRE AND MARINE INSURANCE COMPANY,

Petitioners,

v.

Docket No. 19-0900

HONORABLE RONALD E. WILSON, Judge of the Circuit Court of Ohio County, West Virginia; DAVID STANLEY CONSULTANTS, LLC; and MARK ASH, JR.

Respondents.

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

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

Holly S. Planinsic
W.Va. State Bar I.D. #6551
Jacquelyn J. Cowan
W.Va. State Bar I.D. #12972
Herndon, Morton, Herndon & Yaeger
83 Edgington Lane
Wheeling, West Virginia 26003
Phone: (304) 242-2300
Fax: (304) 243-0890
E-mail: hplaninsic@hmhy.com
E-mail: jcowan@hmhy.com

Robert P. Fitzsimmons, Esq.
W.Va. State Bar I.D. #1212
FITZSIMMONS LAW FIRM PLLC
1609 Warwood Ave
Wheeling WV 26003
Phone: (304) 277-1700
Fax: (304) 277-1705
E-mail: bob@fitzsimmonsfirm.com

Counsel for Respondents, David Stanley Consultants, LLC & Mark Ash, Jr.

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I. INTRODUCTION

The issues presented in the Petition arise out of the Circuit Court of Ohio County's *Memorandum Order* containing partial rulings on Petitioners Rental Insurance Services, Inc. ("RIS") and Empire Fire and Marine Insurance Company's ("Empire") *Motion for Protective Order and Stay of Discovery* ("*Motion for Stay of Discovery*") and *Motion to Dismiss and/or Transfer Venue.*[1] *AR001-AR002, AR016-AR025 and AR046-AR05.* The Circuit Court denied the *Motion for Stay of Discovery* and indicated that the action would not be dismissed but that Petitioners' request to transfer venue would continue to be considered, apparently recognizing the need for discovery on those issues. *AR001.* Petitioners now ask this Court to review the Circuit Court's brief *Memorandum Order* and dismiss this case and/or "transfer" it to the State of Ohio. *Petition, p. 1, Question #1*. However, Petitioners did not properly request an out-of-state transfer before the Circuit Court or before this Court in their *Petition for Writ of Prohibition* and have waived that procedure. Petitioners' alternate request to allow them to avoid all discovery unless this case is first transferred to Marion County should also be denied because venue is proper in Ohio County. *Petition, p. 1, Question #2.* Finally, Petitioners' intransigence has prevented Respondents David Stanley Consultants, LLC ("DSC") and Mark Ash, Jr. from developing the record as to Petitioners' businesses and interrelationships and is therefore premature.

Petitioners RIS and Empire unilaterally refused to participate in any discovery upon filing their *Motion for Stay of Discovery* in the Circuit Court. *AR045-AR054*. The Circuit Court's *Memorandum Order* denying the stay should have put an end to Petitioners' discovery stoppage, which included repeated and continued resistance to providing testimony of EAN's corporate

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[1] Petitioner EAN Holdings, LLC ("EAN") joined the *Motion to Dismiss and/or Transfer Venue* on July 22, 2019, almost a year after filing its Answer to Plaintiffs' Complaint. *AR062-AR066.*

representative through a properly noticed deposition. *AR001-AR002, AR055-AR059*. Despite Respondents' diligent efforts, very little meaningful discovery has taken place. Since filing their Answers to the Complaint, Petitioners[2] have expended substantial efforts to avoid, delay and derail discovery by failing to respond to routine inquiries, filing improper objections and incomplete responses, and using other tactics to avoid providing testimony.

Petitioners now ask this Court to find, in the absence of a record, that they may not be sued in Ohio County even though EAN rented a vehicle to Respondents for the specific purpose of transporting an employee to and from work at a mine site in Ohio County. *AR005, AR026-AR039*. Although not yet part of the record due to Petitioners' refusal to engage in discovery, Petitioner EAN maintains an inventory of vehicles with an assessed value of over $2,000,000 and physical retail rental outlets in Ohio County. EAN's former employee, Jake Nixon, who completed the transaction with Respondents and was listed as a witness by EAN, resides in Ohio County. There are numerous bases for venue in Ohio County and Respondents will satisfy any venue analysis when the case is permitted to proceed and a record is created.

Petitioners ask this Court for an extraordinary Writ of Prohibition dismissing the case and forcing the West Virginia Plaintiffs to the State of Ohio without having correctly raised the issue before the Ohio County Circuit Court and without having provided any relevant discovery. Petitioners' attempt to invoke this Court's original jurisdiction concerning the Circuit Court's interlocutory *Memorandum Order*, which neither exceeded its legitimate powers nor represents a substantial abuse of discretion or clear legal error, should be denied. The instant Petition should be refused and the case remanded for further proceedings so that, at the very least, discovery may occur and information may be developed as to Petitioners' venue arguments.

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[2] Petitioner EAN was initially cooperative and did provide substantive written discovery responses prior to changing counsel in July, 2019.

II. QUESTIONS PRESENTED

1. **Did the Circuit Court abuse its discretion by failing to dismiss or transfer this matter to the State of Ohio when venue is proper in Ohio County, West Virginia under W. Va. Code §56-1-1(a)(2) and Petitioners failed to raise any legal argument under the correct statute [W. Va. Code §56-1-1a] in the underlying Circuit Court action?**

2. **Did the Circuit Court abuse its discretion in permitting discovery to proceed while it is still considering whether to grant Petitioners' request to transfer the case to Marion County, West Virginia?**

III. STATEMENT OF FACTS

Respondents David Stanley Consultants, LLC, a West Virginia limited liability company, and Mark Ash Jr., an individual West Virginia resident, filed their Complaint in the Circuit Court of Ohio County, West Virginia on July 5, 2018, against Petitioners EAN, RIS and Empire, (collectively the "Petitioners") *AR003-AR015.* The Complaint seeks a declaratory judgment and asserts claims against Petitioners for Breach of Contract and accompanying Breach of the Covenant of Good Faith and Fair Dealing, and violations of the Unfair Claims Settlement Practices Act [W. Va. Code §33-11-4(9)]. The Complaint asserts additional separate claims against Petitioner EAN for Unjust Enrichment and Fraud.

The wrongful acts of Petitioners began on July 5, 2017, when Respondent Mr. Ash rented a vehicle from EAN on behalf of his employer DSC. *AR015, AR026-AR040.* Mr. Ash rented a 2017 Nissan Maxima from EAN in St. Clairsville, Ohio to be used by DSC employee Nathan Crawford to travel to and from work at a mine site in Ohio County, West Virginia where DSC had placed Mr. Crawford as a contract employee.[3] *AR003-AR015, AR026-AR040.* The vehicle was supplied by DSC to Mr. Crawford to transport him to and from Ohio County so that Mr. Crawford could keep his job. *Id.* Mr. Ash informed EAN's representative Jake Nixon of the

[3] Respondent David Stanley Consultants, LLC is a training and employment placement company that provides jobs to workers in the coal industry.

intended use of the vehicle and that he would not rent the vehicle unless no liability could be assessed against him or DSC for any uses of the rental car. Mr. Ash sought and received assurance that the vehicle would be fully insured and covered through insurance purchased from EAN, a licensed self-insurer in the State of West Virginia. *AR004-AR009*. Mr. Ash also unknowingly purchased an insurance policy from Empire, a licensed West Virginia insurer that sells polices throughout West Virginia at each EAN location, including Ohio County. *AR006.*

In reliance on Mr. Nixon and EAN's assurances, Mr. Ash rented the vehicle and purchased **all** available insurance products to avoid all possible liability. *AR004-AR007.* Unfortunately, on July 9, 2017, Mr. Crawford was in an accident with the rental vehicle in Ohio and was suspected by authorities of driving under the influence. *AR022.*

Following the accident, Petitioners EAN and RIS refused to honor any of the coverages or other protections purchased by DSC and Mr. Ash, and on August 16, 2017, Mr. Ash received a bill from EAN for $22,139.39, representing the value estimated by EAN and/or RIS of the damaged rental vehicle plus several other unsubstantiated charges. *AR007-AR009*. When he requested a copy of the insurance policy, Mr. Ash was informed incorrectly that there was no insurance and no insurance policy. *AR009.*

EAN, which, as a self-insurer, is subject to the same requirements as any insurer, sought to collect this alleged debt from Mr. Ash despite its prior assurances that the vehicle would be fully insured and covered through insurance purchased from EAN and/or Empire. *AR010-AR014.* When Mr. Ash questioned and disputed the debt and EAN's voiding of coverage for suspected impaired driving, EAN referred the matter to a collection agency and also reported to unrelated third-parties that Mr. Ash was involved in a car accident. *AR007-AR010*. On or around

December 21, 2017, Mr. Ash received a call at his home in West Virginia from a collection agency seeking to collect the alleged debt on behalf of EAN. *AR009*.

Respondents initiated discovery shortly after all Petitioners filed Answers to Plaintiffs' Complaint and proceeded diligently, as demonstrated by the following summary of the relevant events preceding Petitioners' *Petition for Writ of Prohibition*:

July 5, 2018	DSC and Mark Ash's Complaint filed in the Circuit Court of Ohio County
August 8, 2018	RIS and Empire Answer Complaint
August 28, 2018	EAN Answers Complaint
September 19, 2018	Interrogatories/Requests for Production served on EAN
October 11, 2018	RIS/Empire file Motion to Dismiss and/or Transfer Venue
November 2, 2018	EAN serves Answers to Plaintiffs' Interrogatories / Requests for Production
April 16, 2019	Interrogatories/Requests for Production served on RIS
May 15, 2019	RIS files Motion for Protective Order & Stay of Discovery
June 2, 2019	Notice of Rule 30(b)(7) Deposition Duces Tecum of EAN Holdings, LLC – date to be agreed
July 5, 2019	EAN changes counsel - Respondents renew requests for dates / reissue 30(b)(7) Notice
July 22, 2019	EAN Joins RIS & Empire Motion to Dismiss and/or Transfer Venue
July 31, 2019	Respondents send letter & Amended Notice for 09/10/19 depo
August 16, 2019	EAN & RIS advise Respondents that they will seek a Protective Order and not appear for scheduled testimony on 09/10/19
September 4, 2019	Order of this Court denying Protective Order and Stay of Discovery
September 19, 2019	letter sent to EAN to reschedule Second Amended Notice of Rule 30(b)(7) deposition and address

	discovery deficiencies
September 27, 2019	Petitioners filed an Application for Stay Pending Appeal with the Circuit Court of Ohio County
October 2, 2019	Petition for Writ Filed

IV. SUMMARY OF ARGUMENT

The *Petition for Writ of Prohibition* lacks merit and should be refused on numerous grounds. ***First***, Petitioners' primary request is to have this Court grant their *Motion to Dismiss*, and transfer this case out-of-state to Ohio. *Petition, p. 1, Question #1.* However, Petitioners did not raise or even mention the application of the doctrine of *forum non conveniens* in their *Motion to Dismiss and/or Transfer Venue* or in any pleading before the Circuit Court. Furthermore, Petitioners did not reference the only authority [W. Va. Code §56-1-1a] upon which an out-of-state transfer may be based in their Petition before this Court or at any time in these proceedings in Circuit Court. Neither the Circuit Court nor this Court has been asked to consider the factors enumerated in W. Va. Code §56-1-1a so there has not been and cannot be any abuse of discretion or clear legal error in granting relief not correctly requested.

Second, Petitioners' claims that venue is improper in West Virginia under W. Va. Code §56-1-1(a) are based on a limited depiction of the allegations of the Complaint and almost exclusive reliance on the analysis in *State ex rel. Airsquid Ventures, Inc. v. Hummel*, 236 W.Va. 142, 778 S.E.2d 591 (2015), which does not lead to an analogous result in this case. Based on the Complaint and evidence that has been wrested from Petitioners so far, venue in Ohio County is proper and additional discovery will lend even more support to that conclusion.

Third, the Petition represents an attempt to seek an interlocutory appeal at the very early stages of this litigation. Discovery is in its infancy solely because of Petitioners' constant efforts to delay, deny and avoid written discovery and depositions. Importantly, the Circuit Court stated

in its *Memorandum Order* that it was not ruling on the venue issue, implicitly finding that additional discovery could aid its decision. Under the facts presented here, Petitioners should not be rewarded for their intransigence and are certainly not entitled to extraordinary relief. At the very least, Respondents should have the opportunity to develop a record on the venue issue through discovery if the Court decides that the record in its present state is not sufficient.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary pursuant to W. Va. Rule of App. Proc. 18(a), because the Petition of EAN, RIS and Empire is without substantial merit; the dispositive issues have been authoritatively decided; 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. This matter is likely appropriate for a memorandum decision pursuant to W. Va. Rule of App. Proc. 21 because there are no substantial questions of law and the trial court's decision was correct; there is no prejudicial error; and other just cause exists for summary affirmance of the Circuit Court's interlocutory Order permitting discovery to proceed.

VI. ARGUMENT

A. Petitioners are not entitled to the extraordinary remedy of the issuance of a Writ of Prohibition because the Circuit Court did not abuse its discretion in refusing to dismiss this case and allowing discovery at this stage.

As this Court is well aware, "a writ of prohibition is an extraordinary remedy to be utilized in extremely limited instances." *State ex rel. Vanderra Res., LLC v. Hummel*, 829 S.E.2d 35, 45 (W. Va. 2019). Rule 16(a) of the West Virginia Rules of Appellate Procedure provides, in relevant part, that "[i]ssuance by the Court of an extraordinary writ is not a matter of right, but of discretion sparingly exercised." To justify this extraordinary remedy, Petitioners have the burden of showing either that the trial court (a) has no subject matter jurisdiction or (b) "has jurisdiction

but exceeds its legitimate powers and it matters not if the aggrieved party has some other remedy adequate or inadequate." *State ex rel. Nelson v. Frye*, 221 W.Va. 391, 394, 655 S.E.2d 137, 140 (2007); *see also* W.Va. Code §53-1-1. Consequently, "[t]he right to prohibition must clearly appear ... before the petitioner is entitled to such remedy." *State ex rel. Maynard v. Bronson*, 167 W. Va. 35, 41, 277 S.E.2d 718, 722 (1981).

The "extraordinary remedy" of prohibition may not be used as a substitute for an appeal. *State ex rel. W. Va. Nat. Auto Ins. Co. v. Bedell*, 223 W.Va. 222, 226–27, 672 S.E.2d 358, 362–63 (2008). As stated in *Wilfong v. Wilfong,* 156 W.Va. 754, 758-59, 197 S.E.2d 96, 99-100 (1973):

> The principle of non-appealability in interlocutory rulings is well grounded in reason. It prevents the loss of time and money involved in piece-meal litigation and the moving party, though denied of immediate relief or vindication, is not prejudiced. The action simply continues toward a resolution of its merits following a decision on the motion. If unsuccessful at trial, the movant may still raise the denial of his motion as error on the appeal subsequent to the entry of the final order.

Petitioners seek to appeal the Circuit Court's decision to deny their *Motion for Stay of Discovery* and *Motion to Dismiss and/or Transfer Venue* pursuant to W.Va. R. Civ. P. 12(b)(3). The Circuit Court has not issued a ruling on Petitioners' *Motion to Transfer Venue* so it is not an appropriate precursor to a Writ. *AR001-AR002*. However, even assuming that the Circuit Court denies Petitioners' *Motion to Transfer Venue*, "[t]his Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion." Syl. pt. 1, *United Bank, Inc. v. Blosser*, 218 W.Va. 378, 624 S.E.2d 815 (2005).

A writ of prohibition lies only where a trial court has "exceed[ed] its legitimate powers . . . ," Syl. pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W.Va. 314, 233 S.E.2d 425 (1977), by making "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…." Syl. pt. 1, in part, *Hinkle v. Black*, 164 W.Va. 112, 262 S.E.2d 744 (1979). When it is alleged that the Circuit Court exceeded its legitimate powers, Petitioners must satisfy the following five-factor test to determine whether a petition for writ of prohibition meets the rigorous standard established by this Court:

> (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. Hoover v. Berger*, 199 W.Va. 12, 15, 483 S.E.2d 12, 15 (1996). Petitioners have asserted that the Circuit Court committed a clear error as a matter of law by denying their *Motion for Stay of Discovery* that was filed to prevent Respondents from obtaining additional information that would be relevant to venue in Ohio County.

"In determining the third factor, the existence of clear error as a matter of law, [this Court employs] a *de novo* standard of review, as in matters in which purely legal issues are at issue." *Frye*, 221 W. Va. at 395, 655 S.E.2d at 141 (quoting *State ex rel. Gessler v. Mazzone,* 212 W.Va. 368, 372, 572 S.E.2d 891, 895 (2002)). This Court further explained in *Hinkle v. Black,*

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this 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 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, 164 W.Va. 112, 262 S.E.2d 744 (1979).

Petitioners' argument is that their Petition for Writ of Prohibition meets the high bar set by this Court but is lacking crucial details and only provides a superficial and incomplete analysis of the *Hoover* test. As set forth herein, Petitioners have not adequately raised or preserved the issues encompassed by the Petition and have prematurely requested an extraordinary writ without cooperating in the development of the necessary factual record.

B. Petitioners seek to dismiss and transfer this matter to the State of Ohio but failed to raise any legal argument under the appropriate statute [W. Va. Code §56-1-1a] in the underlying Circuit Court action and in their Petition for Writ of Prohibition.

The venue statute relied upon by Petitioners for relief [W.Va. Code §56-1-1] is distinct from the *forum non conveniens* statute. The *forum non conveniens* statute provides authority for litigants seeking transfer of a case filed in West Virginia to "a forum outside this State," while West Virginia's general venue statute is limited to intra-state transfers. *See* W. Va. Code §§ 56-1-1a, 56-1-1. *See also Airsquid*, 236 W. Va. at 147, n.18, 778 S.E.2d at 596; *State ex rel. Riffle v. Ranson*, 195 W. Va. 121, 464 S.E.2d 763 (1995).

West Virginia's general venue statute provides a mechanism to transfer venue between circuit courts of West Virginia when a civil action or proceeding is brought in the county where the cause of action arose but a different venue is more convenient to a party and the witnesses or when the interests of justice will be better served in a different venue. W. Va. Code §56-1-1(b). "W. Va. Code, 56-1-1(b) (1986), is the exclusive authority for a discretionary transfer or change of venue and any other transfer or change of venue from one county to another within West Virginia that is not explicitly permitted by the statute is impermissible and forbidden." Syl pt. 1,

Riffle, 195 W. Va. 121, 464 S.E.2d 763. This Court has made it clear that "the enactment of W. Va. Code, 56-1-1(b), represents the wholesale abandonment of the doctrine of *forum non conveniens* in all areas of intra-State transfers[.]" *Id.* at 128, 770. Therefore, the doctrine of *forum non conveniens*, not West Virginia's venue statute, governs transfers from a court within the State of West Virginia to a court in another state, including the transfer to Ohio requested by Petitioners. *See State ex rel. Am. Elec. Power Co. v. Nibert*, 237 W. Va. 14, 30, 784 S.E.2d 713, 729 (2016) (Loughry, dissenting) ("As this Court has made clear in our decisions issued after the enactment of the *forum non conveniens* statute, the statute is the controlling and governing law on whether in the interest of justice and for the convenience of the parties a case should be heard in a forum outside this State.") (*internal quotations omitted*).

Any transfer of this case to a forum outside the State of West Virginia, as requested by Petitioners, is governed by West Virginia's statute on *forum non conveniens*, which states

> if a court of this State, upon a timely written motion of a party, finds that in the interest of justice and for the convenience of the parties a claim or action would be more properly heard in a forum outside this State, the court shall decline to exercise jurisdiction under the doctrine of *forum non conveniens* and shall stay or dismiss the claim or action, or dismiss any plaintiff.

W. Va. Code § 56-1-1a(a). If the Court even considers Petitioners' request to decline jurisdiction in order to have this case heard in the State of Ohio, "[t]he plaintiff's choice of a forum is entitled to great deference" when deciding venue issues between West Virginia and a forum outside the State. *Id.* When deciding a motion to dismiss under the doctrine of *forum non conveniens*, the court is to[4] consider the following factors:

[4] "By using the term 'shall,' the Legislature has mandated that courts must consider the eight factors enumerated in West Virginia Code § 56-1-1a" when deciding whether "a claim or action should be stayed or dismissed on the basis of forum non conveniens." Syl. pt. 5, *State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 713 S.E.2d 356 (2011).

(1) Whether an alternate forum exists in which the claim or action may be tried;

(2) Whether maintenance of the claim or action in the courts of this State would work a substantial injustice to the moving party;

(3) Whether the alternate forum, as a result of the submission of the parties or otherwise, can exercise jurisdiction over all the defendants properly joined to the plaintiff's claim;

(4) The state in which the plaintiff(s) reside;

(5) The state in which the cause of action accrued;

(6) Whether the balance of the private interests of the parties and the public interest of the State predominate in favor of the claim or action being brought in an alternate forum . . . ;

(7) Whether not granting the stay or dismissal would result in unreasonable duplication or proliferation of litigation; and

(8) Whether the alternate forum provides a remedy.

Id. "[T]he ultimate decision for a court considering a motion to dismiss on the basis of *forum non conveniens* under this statute is whether 'in the interest of justice and for the convenience of the parties a claim or action would be more properly heard in a forum outside this state.'" *State ex rel. Mylan, Inc. v. Zakaib*, 227 W. Va. 641, 649, 713 S.E.2d 356, 364 (2011). When the factors in a particular case weigh in favor of dismissal and other factors weigh in favor of the plaintiff's forum choice, a court is not required to ignore the plaintiff's preference of forum. *See State ex rel. Khoury v. Cuomo*, 236 W. Va. 729, 737, 783 S.E.2d 849, 857 (2016). Petitioners have failed to raise or address any of the factors to be considered for an out-of-state transfer.

The Petition filed in this case states that 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." *Petition, p. 1, Question #1, p. 8.* However, Petitioners never invoked the doctrine of *forum non conveniens* or cited the appropriate statute or properly interpreted legal authority in

their underlying *Motion to Dismiss and/or Transfer Venue*, their Reply in support of the same or in their Petition before this Court. *AR016-AR025 and AR040-AR045.*

Petitioners are seeking a transfer of venue outside the State of West Virginia but cannot rely on W. Va. Code § 56-1-1(b) because (1) the case was not filed in the county where the cause of action arose and (2) Petitioners are seeking a transfer outside the state of West Virginia.[5] Therefore, West Virginia's statute of *forum non conveniens* controls. W.Va. Code §56-1-1a.

Petitioners' failure to raise and invoke the appropriate legal basis for transfer defeats their request for dismissal and transfer to the State of Ohio. The requested remedy of dismissal and transfer to Ohio has not been properly developed in the underlying record and *forum non conveniens* is not available to Petitioners by Writ or in the Circuit Court so this Court should refuse the Petition and allow the case to proceed in Respondents' chosen forum. At the very least, a decision to transfer a case out of state requires factual development, which is missing from the underlying record. The sparse record in this case is devoid of necessary facts to perform the required analysis under W. Va. Code §56-1-1a and Petitioners have not advanced any evidence or argument that would even implicate the correct statute. This Court should refuse to issue a rule to show cause to allow the parties the opportunity to develop the record below.

C. The Circuit Court Did Not Exceed its Legitimate Powers by Denying Homeland's The Petition should be refused because venue for this case is proper in Ohio County, West Virginia under West Virginia Code §56-1-1 and this Court's analysis in *State ex rel. Airsquid Ventures, Inc. v. Hummel*, 236 W. Va. 142, 778 S.E.2d 591 (2015) and other applicable law. Also, the Circuit Court has not ruled on the issue.

Under West Virginia Code §56-1-1, a plaintiff is permitted to choose any of the seven listed methods that apply to the case. *See Banner Printing Co. v. Bykota Corp.,* 182 W.Va. 488, 491, 388 S.E.2d 844, 847 (1989) ("[V]enue of an action against a corporate defendant lies in the

[5] It is arguable that even Petitioners' secondary argument to transfer the case to Marion County is governed by the statute of *forum non conveniens* [W. Va. Code §56-1-1a] because of the inapplicability of W. Va. Code §56-1-1(b).

county where the cause of action arises, **in addition** to those locations specified in W.Va. Code, 56-1-1(a)(2).") (*emphasis added*). W. Va. Code §56-1-1(a)(2) provides:

> (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 or other corporate entity is 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[.]

West Virginia law "does not require a plaintiff to separately establish venue for each defendant." *Morris v. Crown Equip. Corp.,* 219 W. Va. 347, 633 S.E.2d 292, 301 (2006) (*citations omitted*).

Petitioners argue that if this case is not transferred to the State of Ohio, it should be transferred to Marion County under W. Va. Code §56-1-1(a)(5), which provides that venue is proper "where the property insured was situated either at the date of the [insurance] policy or at the time when the right of action accrued[.]" *AR023*. This is an interesting argument given Petitioners' position that the product they sold in this case is not insurance. Nevertheless, because venue is proper under any one of the seven methods listed in the general venue statute, the case may proceed in Ohio County under W. Va. Code §56-1-1(a)(2).

Petitioner EAN maintains an actual rental office, an inventory of vehicles subject to personal property tax, employees and physical locations in Ohio County. In addition, from the EAN locations, Empire, a licensed West Virginia insurance carrier, sells policies of insurance to consumers who physically come to the EAN retail rental location. Under any analysis of W. Va. Code §56-1-1(a)(2), venue is proper as to each EAN and Empire in Ohio County, even though Respondents need only show that a single Petitioner does business in Ohio County.[6]

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[6] Although not yet part of the record in this case, Respondents will present Petitioner Empire's judicial admission that it "transacts a regular course of business in Ohio County, West Virginia, as an insurer in accordance with Chapter 33 of the West Virginia Code." Empire was sued in Ohio County Circuit Court in a case where it was alleged that it transacted business in Ohio County. *See Dijkstra v. Carenbauer*, et al, Civil Action No. 08-C-430, removed to U.S. District Court for the Northern District of West Virginia,

Petitioners argue that W. Va. Code §56-1-1(a)(2) does not provide a basis for venue in Ohio County, West Virginia based on this Court's opinion in *State ex rel. Airsquid Ventures, Inc. v. Hummel*, 236 W. Va. 142, 778 S.E.2d 591 (2015). Petitioners rely heavily on this case despite the many factual inconsistencies with the instant case.

Airsquid arose out of the wrongful drowning death of a young man who participated in a "Tough Mudder" event. The decedent's mother filed an action in Marshall County against various defendants who argued that venue was proper only in Berkeley County, where the Tough Mudder event took place, pursuant to a contractual form selection clause.[7] The *Airsquid* plaintiffs were non-residents of West Virginia and none of the defendants had any physical presence in the county where the case was filed. The *Airsquid* defendants sought an intra-state transfer (county-to-county)—not the dismissal and/or out-of-state transfer sought by Petitioners.

Airsquid recognized that W.Va. Code §56-1-1(a)(2) provides a basis for venue if a corporation does business in the forum county and acknowledged that "the factors used to identify a corporation's residency, does not abrogate the applicability of [W.Va. Code §56-1-1(a)(1)] . *Airsquid*, 236 W.Va. at 147, 778 S.E.2d at 596, quoting *Banner Printing Co. v. Bykota Corp.*, 182 W.Va. 488, 491, 388 S.E.2d 844, 847 (1989) ("[V]enue of an action against a corporate defendant lies in the county where the cause of action arises, **in addition** to those locations specified in W.Va. Code §56-1-1(a)(2).") (*emphasis added*). Petitioners have described the facts of this case as "strikingly similar" to *Airsquid* and inaccurately state that the only connection of the lawsuit to Ohio County is the location of Respondents' counsel. *Petition, p. 11.*

5:08-cv-00187. Public court records further reveal that Empire has been sued in Mingo, Jackson, Taylor, Nicholas, Fayette, Kanawha, Raleigh, Logan, McDowell, Webster, Brooke and Hancock Counties, but not in Marion County.

[7] The Rental Agreement in this case is a contract of adhesion in the view of several reviewing Courts. *See, e.g., MacDonald v. Cabaniss,* 1999 Me.Super.LEXIS 66, *Lauvetz v. Alaska Sales & Serv*, 828 P.2d 162 (1991). Nonetheless, although Petitioners had the ability to include a forum selection clause, they did not.

In *Airsquid*, the Court noted that all of the defendants had a connection with Berkeley County and that the location of plaintiff's counsel in Marshall County was the "***singular nexus*** between the underlying suit and Marshall County." *Id.* at 148, 597 (*emphasis added*). Contrary to Petitioners' contentions, Respondents have never advanced the location of their counsel as a basis for venue in Ohio County. Rather, the claims in this case are based on dealings between a West Virginia limited liability company, its manager Mr. Ash, a West Virginia resident, and EAN's West Virginia resident representative that was specifically and purposefully directed to accomplish a particular business purpose in Ohio County. Unlike the defendants in *Airsquid*, who did not reside or conduct significant business in the forum county, EAN conducts business daily at a retail location in Ohio County and Empire's insurance policies are sold on EAN's premises. *Id.* at 145, 594.

Further, in *Airsquid*, "[n]ot a single defendant, corporate or individual, [had] a physical residency in [the forum county]" and the Court found that many fact witnesses were not residents of the forum county. *Id.* at 147, 596. In this case, EAN has a large physical presence, an inventory of vehicles assessed for personal property tax purposes at over $2,000,000 and physical retail rental locations in Ohio County.[8] EAN has also identified its former employee Jake Nixon as a relevant witness in discovery and Mr. Nixon resides in Ohio County, West Virginia.[9] Petitioner EAN and its ex-employee witness have a specific connection to Ohio County and this Court would not be "violating the venerated ideals of fair play and substantial justice that are traditionally recognized to control venue determinations" by finding venue proper

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[8] Discovery is needed to determine the extent of the other Petitioners' physical presence in Ohio County but, at a minimum, EAN sells Empire's insurance policies from its locations in Ohio County.

[9] Respondents can establish Mr. Nixon's residency. However, no discovery has been directed to Respondents and Petitioners failed to provide responsive information.

in Ohio County in this case. *Id.* at 148, 597, citing *Westmoreland Coal Co. v. Kaufman*, 184 W.Va. 195, 197, 399 S.E.2d 906, 908 (1990).

Petitioners also incorrectly assert that the cause of action occurred at the time of Mr. Crawford's motor vehicle accident. *Petition, p. 14*. Although the car accident that damaged the rental vehicle occurred in the State of Ohio, the accident itself is not the event giving rise to Respondents' claims. *AR003-AR015*. The formation of the parties' contract was based on the need for DSC employee to obtain transportation to his job at a mine site in Ohio County and representations made by EAN that no liability could attach to DSC or Mr. Ash as a result of their rental of the vehicle for Mr. Crawford. Respondents' claims are based on the denials of coverage in violation of West Virginia public policy and other wrongful acts. Moreover, as stated herein, Petitioners' request to have this case transferred to the State of Ohio were not presented to the Circuit Court or raised in their Petition filed with this Court.

While EAN has other locations in West Virginia where it conducts business and where venue would be proper, Respondents chose to bring their suit in Ohio County, where Mr. Crawford's assigned jobsite was located and where EAN has a rental office, as permitted by West Virginia Code §56-1-1(a)(2). In *Airsquid*, the Court found that plaintiff "failed to identify any venue-determinative event associated with [the forum] County." *Airsquid*, 236 W. Va. at 145, 778 S.E.2d. at 594. In the case at bar, Respondents advised EAN that the vehicle was to be used specifically to transport an employee to and from a mine site in Ohio County.

The only holding of *Airsquid* was that choice of law provisions in contracts that apply substantive law of West Virginia to disputes do not exclude West Virginia's procedural laws and that West Virginia procedural law applies to cases brought in the courts of West Virginia. *Id.* at syl. pt. 1. Since it was decided, *Airsquid* has been cited only for that limited proposition. *See,*

e.g., *J.A. St. & Assocs., Inc. v. Bitco Gen. Ins. Corp.*, No. 17-0079, 2019 W. Va. LEXIS 205 (May 1, 2019); *Cal. State Teachers' Ret. Sys. v. Blankenship*, 240 W. Va. 623, 814 S.E.2d 549 (2018); *Ashland Specialty Co. v. Steager*, 818 S.E.2d 827 (W. Va. 2018).

Petitioners, to a lesser extent, rely on *Savarese v. Allstate Ins. Co.*, 223 W. Va. 119, 672 S.E.2d 255 (2008), but that case is likewise inapposite. *Savarese* involved a lawsuit filed by a resident of the State of Ohio for an automobile accident in Ohio. The only connection to West Virginia, the *Savarese* Court found, was the location of the plaintiff's attorney. *See id.* at 123, 259. *Savarese* is not remotely analogous to the facts of this case in which both Respondents are citizens of West Virginia. Additionally, this is not a car accident case and the site of the accident has nothing to do with Respondents' claims. Venue for this case lies in Ohio County and the Circuit Court would not be abusing its discretion if it ultimately rules in that manner.

D. The Circuit Court did not abuse its discretion in permitting discovery to proceed while it considers Petitioners' Motion to Transfer Venue and Respondents should be permitted to conduct discovery on the issue.

Under the most generous reading, the issues raised by Petitioners in their *Motion to Dismiss and/or Transfer Venue* may not be resolved independently of disputed facts. Rather, factual development is crucial but has been frustrated by Petitioners at every opportunity. By holding in abeyance its ruling on the venue *Motion*, the Circuit Court has tacitly acknowledged that discovery could aid in this determination. *AR001*. At present, without any discovery from two of the Petitioners and limited discovery from the other Petitioner, Respondents are not able to provide this Court with all facts that would be relevant to a venue determination.

Petitioners' arguments regarding venue are based, in part, on the factual record vacuum caused by their own refusal to respond to discovery requests. For example, RIS filed "Protective Objections" and asserted various privileges instead of producing the requested information as to

how RIS is related to the other Petitioners and what representations it has made to the West Virginia Insurance Commissioner about its activities in this State. EAN did the same in terms of refusing to provide relevant information. Respondents believe that additional information can be developed through discovery that would demonstrate overwhelmingly that Ohio County is the appropriate venue and that this case may proceed as filed.

Given the circumstances of this case, where discovery has been stymied by Petitioners' failure and refusal to respond and there is ample legal support for the Court's decision, the Petition should be refused. Respondents should be given the opportunity to develop the material facts underlying the claims set forth in their Complaint, including those related to the venue issue if not already developed sufficiently.

VII. CONCLUSION

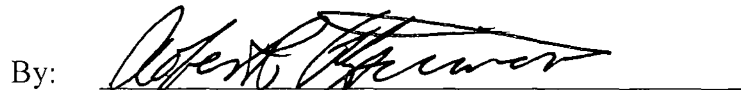
For the reasons discussed herein, the Circuit Court neither exceeded its legitimate powers nor committed a substantial abuse of discretion when it refused to facilitate Petitioners' efforts to halt discovery in this case. The Circuit Court properly denied Petitioners' *Motion to Dismiss* because Petitioners failed to invoke the appropriate mechanism provided by statute to transfer the proceedings to the State of Ohio as requested in the Petition. Now that Petitioners have questioned the denial of the *Motion to Dismiss* in their Petition to this Court, they have waived any *forum non conveniens* argument. To the extent Petitioners are permitted to go back to the Circuit Court to assert a right to transfer under W.Va. Code §56-1-1a, the required analysis will make discovery necessary as to each factor to be considered by the Court. Respondents have met their burden of showing that venue is proper in Ohio County and Petitioners' excessive reliance on *Airsquid* is unavailing. To the extent that this Court is not satisfied that the *Motion to Transfer Venue* should be denied, at the very least, Petitioners should be required to provide the

discovery requested by Respondents that will further establish venue in Ohio County and permit the development of a record sufficient for the Circuit Court to make the determination not covered by the *Memorandum Order* subject to the instant Petition.

WHEREFORE, for all the foregoing reasons, and based upon the limited record, the *Verified Petition for a Writ of Prohibition of EAN Holdings, LLC, Rental Insurance Services, Inc., and Empire Fire and Marine Insurance Company* should be refused in its entirety.

Respectfully Submitted,

DAVID STANLEY CONSULTANTS, LLC and MARK ASH, JR., ***Respondents,***

By: 

Robert P. Fitzsimmons Esq. (#1212)
FITZSIMMONS LAW FIRM PLLC
1609 Warwood Avenue
Wheeling, WV 26003
Phone: (304) 277-1700
Fax: (304) 277-1705
E-mail: bob@fitzsimmonsfirm.com

Holly S. Planinsic Esq. (#6551)
Jacquelyn J. Cowan Esq. (#12972)
Herndon, Morton, Herndon & Yaeger
83 Edgington Lane
Wheeling, WV 26003
Phone: (304) 242-2300
Fax: (304) 243-0890
E-mail: hplaninsic@hmhy.com
jcowan@hmhy.com

RPF/klc: 10/30/19

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**

HONORABLE RONALD E. WILSON, Judge of the Circuit Court of Ohio County, West Virginia; DAVID STANLEY CONSULTANTS, LLC; and MARK ASH, JR.

Respondents.

CERTIFICATE OF SERVICE

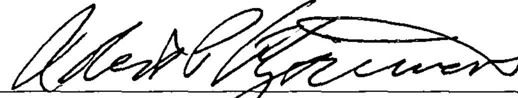
I, Robert P. Fitzsimmons, counsel for Respondents, do hereby certify that service of the foregoing **RESPONSE IN OPPOSITION PETITION FOR WRIT OF PROHIBITION** was made upon Petitioners' counsel by regular, United States mail, postage prepaid, on this 30th day of October, 2019.

Nathaniel D. Griffith, Esq.
Edgar Allen Poe, Jr., Esq.
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
2414 Cranberry Square
Morgantown, WV 26508
Counsel for Petitioners

The Honorable Ronald E. Wilson
Hancock County Courthouse
P.O. Box 428
102 Court Street
New Cumberland, West Virginia 26047

Respectfully Submitted,

DAVID STANLEY CONSULTANTS, LLC and MARK ASH, JR., ***Respondents,***

By: 

Robert P. Fitzsimmons Esq. (#1212)
FITZSIMMONS LAW FIRM PLLC
1609 Warwood Avenue
Wheeling, WV 26003
Phone: (304) 277-1700
Fax: (304) 277-1705
E-mail: bob@fitzsimmonsfirm.com

Holly S. Planinsic Esq. (#6551)
Jacquelyn J. Cowan Esq. (#12972)
Herndon, Morton, Herndon & Yaeger
83 Edgington Lane
Wheeling, WV 26003
Phone: (304) 242-2300
Fax: (304) 243-0890
E-mail: hplaninsic@hmhy.com
jcowan@hmhy.com