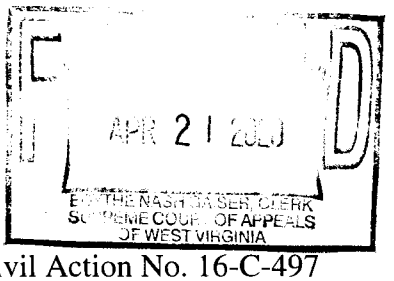
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 20-0257



STATE OF WEST VIRGINIA EX REL.,
WEST VIRGINIA MUTUAL INSURANCE
COMPANY,

Petitioner,

v.

(Civil Action No. 16-C-497
consolidated with 18-C-895)
(Kanawha County Circuit Court)

THE HONORABLE JENNIFER BAILEY,
JUDGE OF THE CIRCUIT COURT OF
KANAWHA COUNTY; A.H. AND
ADRIANA FLEMING, INDIVIDUALLY
AND ON BEHALF OF ALL OTHERS
SIMILARLY SITUATED; STEVEN R.
MATULIS, M.D.; CHARLESTON
GASTROENTEROLOGY ASSOCIATES,
PLLC; AND CHARLESTON AREA
MEDICAL CENTER, INC.,

Respondents.

RESPONSE OF A.H. AND ADRIANA FLEMING IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION

Respectfully submitted:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

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COME NOW the Respondents, A.H. and Adriana Fleming, individually and on behalf of all others similarly situated by their respective counsel,[1] and file their brief in opposition to the petition for a writ of prohibition filed by West Virginia Mutual Insurance Company ("WVMIC"). The decision of the Circuit Court below to consolidate the declaratory judgment action and the underlying tort claims before one judge within the same circuit is entirely discretionary under W.V.R.C.P. 42(a). The cases involve common questions of law and fact and consolidation is merited pursuant to Rule 42. Importantly, WVMIC has failed to meet the stringent standard for a writ of prohibition, as it has not shown clear error as a matter of law in this discretionary, interlocutory decision. Therefore, the petition for a writ of prohibition should be denied. In further opposition, these respondents state as follows:

I. QUESTIONS PRESENTED

1. Whether a writ of prohibition is an appropriate remedy under the facts and circumstances of these cases, where the petition is in essence an attempt to obtain an impermissible appeal of a discretionary, interlocutory order consolidating cases before one judge, all of which are pending in the same circuit and have common questions of fact and law.
2. Whether the Petitioner has met its heavy burden to show that the Circuit Court committed clear legal error in consolidating the declaratory judgment action with the underlying tort claims before one judge within the same circuit.

[1] These respondents have been permitted to state that underlying plaintiffs/respondents J.L.; P.W.; R.L.; T.W. & R.W.; D.C. & R.C.; R.K.; and Jane Doe 1 & Jane Doe 2 join in this response.

II. STATEMENT OF THE CASE

All of the cases consolidated by the Court below arise from allegations of wrongful conduct on the part of medical providers Charleston Gastroenterology Associates ("CGAS"), Steven Matulis and others. Pet. Appx. 71-104, 283-298, 314-441, 446-492. All were filed in the Circuit Court of Kanawha County. Pet. Appx. 71-104, 283-298, 314-441, 446-492. The first of these cases was filed by plaintiff T.W. in 2016, as civil action 16-C-497 and was assigned to the Honorable Jennifer Bailey. Pet. Appx. 248-261. Thereafter, several other complaints were filed, including those with plaintiffs K.H.; J.L.; J.W.; R.L. T.W. and R.W.; D.C.; P.W.; R.K. Jane Doe 1; Jane Doe 2; B.D.; Y.T.; L.B.; and A.H. and ADRIANA FLEMMING. Pet. Appx. 71-104, 283-298, 314-441, 446-492. Also later filed in 2017 was the declaratory judgment action of petitioner WVMIC versus those same plaintiffs, T.W.; K.H.; J.L.; J.W.; R.L. T.W. and R.W.; D.C.; P.W.; R.K. Jane Doe 1; Jane Doe 2; B.D.; Y.T.; L.B.; and A.H. and ADRIANA FLEMMING and defendants CGAS and Matulis.[2] Pet. Appx. 144-197. All were initially assigned to various Kanawha County Circuit Court judges. Pet. Appx. 71-104, 283-298, 314-441, 446-492.

By order dated August 15, 2018, all of the underlying tort actions pending were consolidated before Judge Bailey, as the judge assigned the first filed case, as were subsequently filed related actions as specified by the order. Pet. Appx. 544-547. Likewise, by order dated March 3, 2020, the declaratory judgment action 17-C-748, originally assigned to Honorable Judge Charles King, was consolidated before Judge Bailey. Pet. Appx. 1-5.

The underlying tort actions plead multiple causes of action and many facts supporting those causes of action. Pet. Appx. 71-104, 283-298, 314-441, 446-492. Civil Action 17-C-748 is a declaratory judgment action by Petitioner WVMIC which seeks a determination of the duty to

[2] WVMIC added all of the plaintiffs in subsequent amended complaints. Pet. Appx. 144-197.

defend and to indemnify defendants Charleston Gastroenterology Associates and Steven Matulis for those underlying civil suits pending before the Honorable Judge Bailey and alleges that, under those same facts, there is no coverage. Pet. Appx. 144-197. CGAS and Matulis filed a counter claim, alleging coverage under those same facts and bad faith on the part of WVMIC. Pet. Appx. 493-534. The Circuit Court correctly found that the cases involve common questions of law and fact and consolidation is merited pursuant to Rule 42 of the West Virginia Rules of Civil Procedure. Pet. Appx. 1-5.

III. SUMMARY OF ARGUMENT

Petitioner is seeking through the guise of a writ a prohibition an impermissible interlocutory appeal of the Circuit Court's discretionary decision to consolidate a declaratory judgment action with the multiple underlying tort claims, all of which are pending in the same circuit and all of which involve resolving common questions of law and fact. The Circuit Court did not commit clear error or exceed its power by consolidating these claims before one judge, rather than having two judges in the same circuit addressing the overlapping factual issues and risking duplicative discovery, scheduling delays and inconsistent findings. Petitioner simply disagrees with the Circuit Court's discretionary decision, which is not sufficient to meet its heavy burden to justify the extraordinary relief of a writ of prohibition. Accordingly, Petitioner's writ of prohibition should be denied.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISIONS

These Respondents believe that the issues presented are neither novel, nor do they present unsettled areas of law. While Respondents always welcome oral argument under W.Va.R.App.P. 18(a), should the Court deem it appropriate in this case, these Respondents concede that this matter

may be appropriate for memorandum decision under W.Va.R.App.P. 21. Should the Court grant oral argument, Respondents believe that this case would fall under W.Va.R.App.P. 19.

V. ARGUMENT

A. A Writ of Prohibition should not issue because the Circuit Court was well within its discretion to consolidate the matters before the same judge, and did not exceed its jurisdiction and legitimate powers.

1. The Circuit Court has wide discretion under WVRCP 42 to consolidate civil actions.

It is well settled that a trial court, pursuant to the provisions of W.V.R.C.P., Rule 42, has a wide discretionary power to consolidate civil actions. Pickett v. Taylor, 178 W. Va. 805, 806, 364 S.E.2d 818, 819 (1987), citing Syllabus Point 1, Holland v. Joyce, 155 W.Va. 535, 185 S.E.2d 505 (1971). This Court considers the following factors when exercising its discretion in deciding consolidation: (1) whether risks of prejudice and possible confusion outweigh considerations of judicial dispatch and economy; (2) what burden on parties, witnesses, and available judicial resources would be imposed by multiple lawsuits; (3) the length of time required to conclude multiple lawsuits as compared to the time required to conclude a single lawsuit; and (4) the relative expense to all concerned of the single-trial and multiple-trial alternatives. Syl. Pt. 2, State ex rel. Appalachian Power Co. v. Ranson, 190 W. Va. 429, 438 S.E.2d 609 (1993).

In this case, and others consolidated and pending before Judge Bailey, the underlying plaintiffs have asserted, *inter alia*, claims against CGAS, Matulis and others for lack of informed consent (Count I of Complaint); medical negligence, including the failure to obtain informed consent (Count II); negligence as a result of the failure of Charleston Gastroenterology Associates ("CGAS") to intervene and protect Plaintiffs from Dr. Matulis (Count III); negligence as a result of the failure of CGAS to report Dr. Matulis for his wrongful actions (Count IV); sexual

harassment in violation of West Virginia Human Rights Act (Count V); common law sexual harassment (Count VI); statutory negligence under W.Va. Code § 55-7-9 (Count VII); fraud (fraudulent concealment) (Count VIII); invasion of privacy (Count IX); and negligence as a result of the failure of CGAS to provide sufficient oversight of and protection from Dr. Matulis as an impaired physician (Count X).[3] Pet. Appx. 446-492. The claims of A.H and Fleming also contain class action allegations. Pet. Appx. 446-492.

Civil Action Number 17-C-748, West Virginia Mutual Insurance Company v. Steven Matulis, M.D.; Charleston Gastroenterology Associates, P.L.L.C.; T.W.; K.H.; J.L.; J.W.; R.L. T.W. and R.W.; D.C.; P.W.; R.K. Jane Doe 1; Jane Doe 2; B.D.; Y.T.; L.B.; and A.H. and ADRIANA FLEMMING is a declaratory judgment action arising out of the same facts, was filed subsequently in 2017, and was initially assigned to the Honorable Judge Charles King in the Kanawha County Circuit Court. Pet. Appx. 144-197. All of the claims, including the declaratory judgment action, name CGAS and Matulis as defendants. Pet. Appx. 71-104, 144-197, 283-298, 314-441, 446-492.

Consolidation of the pending declaratory judgment action with the underlying cases was appropriate pursuant to Rule 42(a) of the West Virginia Rules of Civil Procedure. Rule 42(a) provides that "[w]hen actions involving a common question of law or fact are pending before the court, ... it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays. Here, determinations in the declaratory judgment action require findings of fact and law in common with the underlying cases. The parties overlap to great extent. The cases are undoubtedly intertwined. Consequently, Civil

[3] The complaints vary to some degree, but contain the same or similar causes of action. Some of the complaints also name CAMC, and some name Day Surgery, Francis Saldanha and D.S. Holdings for procedures that occurred there. **All complaints named CGAS and Matulis**. Pet. Appx. 71-104, 283-298, 314-441, 446-492.

Action No. 17-C-748 was consolidated properly with the other cases to promote the interests of judicial dispatch and economy, and avoid inconsistent findings, unnecessary costs and delay. The Circuit Court appropriately addressed the factors for consolidation in its order:

> 9. Pursuant to Rule 42(a) of the West Virginia Rules of Civil Procedure, consolidation of 17-C-748 with and into 16-C-497 is appropriate because the cases involve common questions of fact and law. Specifically, it is alleged that some of the acts that are described as sexual acts or intentional torts were actually performed by Dr. Matulis for medical reasons. If such facts are developed through discovery to support such contentions, but Dr. Matulis failed to obtain proper consent for such acts, then negligence causes of action would be established as opposed to sexual misconduct or intentional torts. Essentially, what actions Dr. Matulis' committed and what those actions legally constitute are questions of fact and law that are germane to all causes of action. As the declaratory judgment action and the underlying cases stem from and turn on the application of the same set of facts, consolidation is warranted.
>
> 10. Moreover, in regard to the factors announced in *Ranson*, supra, consolidating these matters would promote judicial economy and would avoid unnecessary costs and delay by the parties as consolidation would stream line discovery. Discovery of the facts of the underlying cases is paramount to the determination of coverage under The Policy. As such, the risk of prejudice and possible confusion do not outweigh the significant consideration of judicial economy. Further, the burden on the parties, witnesses, and available judicial resources would be lessened by a streamlined discovery process and having all cases on one schedule before one court as opposed to multiple discovery processes and hearings before multiple courts, which would likely be a scheduling quagmire for the respective parties and has the potential for inconsistent or differing rulings by different judges within the circuit with some decisions subject to interlocutory appeal and other rulings subject to appeal only upon entry of a judgment order. In addition, there is likely no danger of increased time to conclude multiple lawsuits as compared to the time to conclude a single lawsuit as discovery would be streamlined and, as mentioned above, discovery of the facts in the underlying civil actions are paramount to resolution of all cases herein discussed. Lastly, in regards to a single trial compared to multiple trials, there would likely have to be multiple trials regardless of whether civil action 17-C-748 was consolidated with 16-C-497 as the coverage issues would likely have to be bifurcated for trial from the issues of liability. Therefore, there is likely no danger of increased expense with regards to consolidating these matters. Pet. Appx. 4.

Judge Bailey correctly reasoned at hearing that not consolidating the cases could put the many cases before her in a complete holding pattern waiting for Judge King to decide the declaratory judgment action and bad faith counter claim, because coverage affects and applies to all the cases. Pet. Appx. 834, 836. She made a finding that there will be common discovery, and

the same attorneys. Pet. Appx. 836. Judge Bailey inquired of counsel for WVMIC why, as a practical matter, it made more sense for a second judge to oversee one part of the cases, with all the scheduling problems that would create. Pet. Appx. 837. WVMIC could not articulate a convincing reason. Judge Bailey correctly pointed out that since there is no prohibition on consolidation, i.e., it is discretionary, she was concerned about efficiency and she made a finding that it was more efficient to consolidate the cases. Pet. Appx. 839, 844. She found that consolidating would keep the parties moving forward and aid in scheduling. Pet. Appx. 845.

As explained in State ex rel. Appalachian Power Co. v. MacQueen, 198 W. Va. 1, 6, 479 S.E.2d 300, 305 (1996) "The trial court is in the best position to determine the immediate wisdom of consolidating cases for purposes of resolving common issues of law and fact, and we refuse to second guess the experience and talent of the trial judge[,]" (finding no abuse of discretion in consolidating asbestos cases in a two-phase plan and finding it in conformity with the criteria established in *Ranson.*) Here, Judge Bailey is in the best position, with her vast knowledge of the several related cases, to determine the wisdom of consolidating these cases.

2. Contrary to WVMIC's argument, there are common issues of fact to resolve the coverage issue.

WVMIC incorrectly argues that there are no facts to decide in the declaratory judgment action and, by extension, the counter claim for bad faith. Even if true, which it is not, this would not preclude consolidation before the same judge. Moreover, the interpretation and application of the insurance policy (and/or potential policies) at issue is not as clear cut as WVMIC argues in its petition. Instead, the declaratory judgment action turns on the substance of the allegations and application of the facts at issue in the underlying cases.

It is well established West Virginia law that, "an insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the **facts** necessary to the

operation of that exclusion." *Syl. Pt. 6*, Murray v. State Farm Fire & Cas. Co., 203 W.Va. 477, 509 S.E.2d 1 (1998) (emphasis added). Here, WVMIC seeks to avoid coverage through the application of the "intentional acts" exclusion and the "sexual acts" exclusion.[4] The underlying complaints include allegations of negligence stemming from Charleston Gastroenterology Associates' independent negligent acts. Such negligent acts stem from CGAS's own failures and are separate from Dr. Matulis' sexual misconduct or intentional acts. CGAS had its own independent duties that it failed to adhere to, and as a result, patients suffered damages. All would be covered under the WVMIC policy.

In addition, Dr. Matulis has indicated that vaginal examinations were performed for medical reasons. Plaintiffs have alleged and maintain that, even if such were the case, Dr. Matulis breached the standard of care in failing to obtain an informed consent prior to performing such vaginal examinations. If the facts are developed through discovery to support such contention that the examinations were required for medical treatment, but Dr. Matulis failed to obtain the proper consent, then negligence causes of action would be established. Such negligence claims would be covered by the WVMIC policy, as well.

Coverage depends on whether the finder of fact determines that the underlying plaintiffs' injuries arose from the above conduct. The cases are not entirely separate, as WVMIC argues, if they involve resolution of common operative facts to determine coverage. Importantly, as the declaratory judgment action and the underlying cases arise from and turn on the application of the same set of facts, the Circuit Court's consolidation was warranted.

3. WVMIC has not shown prejudice because it can seek the same relief before Judge Bailey as it could before Judge King.

[4] Even if the insured were required to meet a prima facie burden to show that the claims fell within the scope of coverage, discovery is required for that reason alone.

There is no prejudice to WVMIC because it has the ability to seek any relief before Judge Bailey that it would have sought before Judge King. This includes moving for a hearing on its motion once it can show the discovery is at a place where the matter is ripe to be decided. Any motion of WVMIC made before Judge King would be met with the same response from the underlying plaintiffs -- that discovery is needed to address the issues in the declaratory judgment action, including the application of the exclusions -- so having it before Judge King rather than before Judge Bailey makes no practical difference, except that having it before Judge King could result in duplicative discovery and, as found by Judge Bailey, problems coordinating the cases in both courts. Pet. Appx. 1-5, 834-836. Therefore, WVMIC cannot show that it will be damaged or prejudiced in any way by consolidation.

As further found by Circuit Court, there is no resultant prejudice to WVMIC in consolidating these matters for purposes of discovery and pre-trial proceedings before one judge. Pet. Appx. 844. Plaintiffs did not object to the bifurcation of the trial, if so needed, of the coverage issue from the underlying cases and Judge Bailey noted that bifurcation routinely occurs within the same case while pending before the same judge.[5] Pet. Appx. 836. Since the declaratory judgment action may be bifurcated before Judge Bailey, there is no material difference in having the matter before her rather than Judge King.

4. Consolidation promotes judicial economy and avoids unnecessary duplication of efforts by the parties.

Moreover, the Court consolidating these matters promotes judicial economy and avoids unnecessary costs and delay. As noted above, discovery of the facts of the underlying cases is

[5] **At hearing, counsel for WVMIC conceded that it would be okay to bifurcate, Pet. Appx. 836, and so effectively concedes that there is no need for a Writ of Prohibition.**

paramount to the determination of coverage under the WVMIC policy.[6] WVMIC admits that the outcome of the underlying lawsuits may have a bearing on whether there is a duty to indemnify. Pet., p. 15. The resulting repetitious written discovery and duplicate discovery depositions in cases pending before two different judges in the same Circuit Court on these facts is not cost effective and creates additional time delays.

As Judge Bailey is already familiar with the significant facts and issues surrounding these matters, it is beneficial to all parties and supports notions of judicial economy for such matters to continue to be consolidated before her Court. It would not be in the interests of judicial economy for two judges be required to review and address the overlapping facts and circumstances. All parties would benefit from one stream-lined discovery to avoid unnecessary costs, delays, and needless repetition of discovery. As such, the Circuit Court was justified and well within its discretion in consolidating these cases, did not exceed its legitimate powers, and WVMIC has failed to show otherwise.

B. A Writ of Prohibition should not issue because the Petitioner has failed to meet the standard for it and a Writ of Prohibition may not act as a substitute for an impermissible appeal of an interlocutory order.

Importantly, WVMIC has not met the standard for awarding a writ of prohibition. It has not shown that the Circuit Court exceeded its legitimate powers, or shown any other clear legal error, or contended that the Circuit Court was without jurisdiction to consolidate the cases. At best, all WVMIC shows is that it disagrees with the decision. Even showing an abuse of discretion is not sufficient for an extraordinary writ of prohibition and WVMIC has failed to show even this. A review of the questions presented by the Petition for Writ of Prohibition readily reveals that the

[6] Again, WVMIC seeks not just a determination of the duty to defend, but a determination that it has no duty to indemnify and there is no coverage. Pet. Appx.722. As explained *supra*, the coverage determination here depends upon findings of fact.

Petitioners are essentially seeking--through the guise of a petition for writ of prohibition--an appeal of the Circuit Court's clearly discretionary, interlocutory decision.

1. A writ of prohibition is issued only in extraordinary circumstances, not under the discretionary findings made here, even if there was an abuse of discretion.

As to writs of prohibition, this Court has pronounced:

> This Court has explained the standard of review applicable to a writ of prohibition, stating that "[a] writ of prohibition **will not issue to prevent a simple abuse of discretion by a trial court.** It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W.Va. Code 53–1–1." Syl. pt. 2, State ex rel. Peacher v. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977) . . . .
>
> **We have held that an extraordinary writ . . . is not to be used as a substitute for an appeal.** "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). In addition, "[t]his Court is 'restrictive in its use of prohibition as a remedy.' State ex rel. West Virginia Fire Cas. Co. v. Karl, 199 W.Va. 678, 683, 487 S.E.2d 336, 341 (1997)." State ex rel. Allstate Ins. Co. v. Gaughan, 220 W.Va. 113, 118, 640 S.E.2d 176, 182 (2006). In syllabus point 4 of State ex rel. Hoover v. Berger, [199 W.Va. 12, 483 S.E.2d 12 (1996)], this Court said:
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> > "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. Owners Ins. Co. v. McGraw, 233 W.Va. 776, 779-80, 760 S.E.2d 590, 593-94 (2014) (per curiam) (emphases added). "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. State ex rel. Vanderra Res., LLC v. Hummel, 242 W. Va. 35, 829 S.E.2d 35 (2019).

The Petitioner here has not and cannot demonstrate its entitlement to relief by way of prohibition. As this Honorable Court has repeatedly cautioned, "[t]o justify this extraordinary remedy, the petitioner[s] ha[ve] the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy." State ex rel. Stewart v. Alsop, 533 S.E.2d 362, 364 (W.Va. 2000) (citing State ex rel. Paul B. v. Hill, 201 W.Va. 248, 254, 496 S.E.2d 198, 204 (1997) (*quoting* State ex rel. Allen v. Bedell, 193 W.Va. 32, 37, 454 S.E.2d 77, 82 (1994) (Cleckley, J., concurring))).

"A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers." Syl. Pt. 4, State ex rel. Jeanette H. v. Pancake, 529 S.E.2d 865 (W.Va. 2000); State ex rel. Lambert v. King, 208 W.Va. 87, 538 S.E.2d 385 (2000). A heavy burden of proof is required to demonstrate that a circuit court's finding is clearly erroneous. As explained by this Court in State ex rel. Owners Ins. Co. v. McGraw, 233 W.Va. at 780, 760 S.E.2d at 594:

> "A finding is `clearly erroneous' when, although there is evidence to support the finding, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. However, **a reviewing court may not overturn a finding simply because it would have decided the case differently, and it must affirm a finding if the circuit court's account of the evidence is plausible in light of the record viewed in its entirely**."

(emphasis added) (quoting Syl. Pt. 1, in part, In the interest of Tiffany Marie S., 196 W.Va. 223, 470 S.E.2d 177 (1996)). WVMIC essentially is disagreeing with the Circuit Court for consolidating these cases, but that does not meet the standard for extraordinary relief it seeks.

2. WVMIC has an adequate means to obtain its desired relief and cannot show prejudice.

Taking the first factor for a writ of prohibition and as noted above, WVMIC has the ability to seek any relief before Judge Bailey that it would have sought before Judge King. This includes

moving for a hearing on its motion once the discovery is at a place where the matter can be decided. Any motion of WVMIC made before Judge King would be met with the same response from the underlying plaintiffs -- that discovery needed to be done to address the issues in the declaratory judgment action, including the application of the exclusions -- so having it before Judge King rather than before Judge Bailey makes no practical difference, except that having it before Judge King could result in duplicative discovery and, as found by Judge Bailey, problems coordinating the cases in both courts. For these same reasons, WVMIC cannot show factor two—that it will be damaged or prejudiced in a way that is not correctable on appeal.

3. There is no evidence that WVMIC's declaratory judgment action would be resolved slower if pending before Judge Bailey rather than Judge King.

Addressing WVMIC's specific arguments, there is no clear legal right to a specific judge within the same circuit. WVMIC claims it wanted a fast resolution of the declaratory judgment action, but there is no evidence that it would be any slower before Judge Bailey than before Judge King. This is evidenced by the fact that the declaratory judgment action was pending before Judge King for two years before it was consolidated. Not once during that two years did WVMIC seek a Writ of Mandamus to compel a decision from Judge King. This is because WVMIC knows these cases are factually intertwined and knows it could not meet the standard. At best, WVMIC's argument about the need for expediency is negated by its own inaction. It certainly lends credence to the inference that WVMIC believes that it will have a more favorable treatment from Judge King than Judge Bailey, which is an improper basis for file for a writ of prohibition.

WVMIC claims that consolidation will force the declaratory judgment action to the "back of the line," but it has no evidence of this. Again, nothing prevents WVMIC from bringing the

declaratory judgment action for hearing, when it can show it is ripe.[7] The Circuit Court never ordered otherwise. WVMIC reads more into the order than it says because it knows it does not meet the standard for a writ of prohibition. Again, WVMIC admits that the outcome of the underlying lawsuits may have a bearing on whether there is a duty to indemnify. Pet., p. 15. A decision of whether the declaratory judgment action is ripe for decision would have to be made no matter which judge made the decision and, importantly, Judge King would have needed to make the decision of whether it is ripe by reviewing the same factual development that Judge Bailey would have to review in the underlying cases, creating unnecessary duplication of judicial resources.

4. There is no practical difference in discovery with the cases consolidated.

WVMIC claims that if the case is before Judge Bailey, it will be forced to engage in unneeded discovery. It fails to specify how this will be so, since the same factual discovery to determine coverage would need to occur whether before Judge Bailey or Judge King (except that it might have to be duplicated if the case remained before Judge King). In addition, WVMIC is able to choose which depositions it wants to take and in what depositions it wishes to participate, or none at all. Nothing requires WVMIC to participate in discovery not directed to it. If WVMIC believes that a certain deposition does not pertain to it, it can choose not to attend. The same lawyers for the underlying plaintiffs, CGAS and Matulis are participating in the declaratory judgment action, so the availability for scheduling of depositions will be the same while the case is pending before Judge Bailey as it would have been before Judge King.

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[7] Whether indemnification is ripe for adjudication depends on facts and circumstances under consideration but an important factor is whether resolution of the tendered issues is based on events and determinations which may not occur as anticipated. Camden-Clark Mem'l Hosp. Corp. v. St. Paul Fire And Marine Ins. Co., 717 F. Supp. 2d 529, 539 (S.D.W. Va. 2010), citing A/S J. Ludwig Mowinckles Rederi v. Tidewater Constr. Corp., 559 F.2d 928, 932 (4th Cir.1977). Indemnity claims are not ripe until liability is fixed by judgment or settlement. Tidewater, 559 F2d at 932.

WVMIC argues that discovery in the declaratory judgment action will include claim files and underwriting files, which are not discoverable in a tort claim. This argument lacks merit because the same parties were named in the declaratory judgment action as in the tort claims, so the parties would have the same access to information, whether the case is before Judge Bailey or Judge King.

5. WVMIC has failed to show that consolidation was clearly erroneous as a matter of law.

WVMIC does not show the most important factor-- whether the lower tribunal's order to consolidate within the same circuit is clearly erroneous as a matter of law—because it cannot show the Circuit Court's order was clearly erroneous as a matter of law. It cites State ex rel. Energy Corp. of Am. v. Marks, 235 W. Va. 465, 774 S.E.2d 546 (2015), but that was a permissive joinder case under Rule 20, not a consolidation case, with the *Marks* defendant arguing the Harrison County Court's lack of venue over the subject matter, where the injury occurred in Pennsylvania and the complaining defendant (who was an underlying tortfeasor, not the insurer) was not a resident of Harrison county. This Court found it not appropriate under Rule 20 to join a car wreck case with a dispute over a med pay claim to obtain venue over the underlying tortfeasor where there was not venue.

Unlike *Marks*, this is a consolidation case under Rule 42, **where it is undisputed that all the cases are properly pending in the same Circuit Court**, since WVMIC filed its case in Kanawha County Circuit Court. The issue here is simply whether one judge or two judges in the same Circuit Court will hear the cases, which is different. Since the *Marks* case dealt with different legal issues and was not factually similar to this case, it is not controlling here.[8] Moreover, *Marks*

[8] Even if it were controlling, the cases here would still meet the standard for joinder because they arise out of the same occurrence or transaction (something the *Marks* court conceded) and there is at least one common issue of fact in determining coverage and liability, as conceded by WVMIC in its brief by saying that the outcome of the underlying lawsuits may have a bearing on whether there is a duty to indemnify. Pet. Brief 15.

and the cases WVMIC cites from other jurisdictions where the court found *joinder* under Rule 20 was not merited under different facts, do nothing to show that the Circuit Court here committed a clear error of law in deciding to *consolidate* under Rule 42 under the facts of these cases. "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 the 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, Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 7445 (1979) (superseded by statute on other grounds as stated in State ex rel. Thornhill Grp., Inc. v. King, 233 W. Va. 564, 570, 759 S.E.2d 795, 801 (2014)). *See also* State ex rel. DeFrances v. Bedell, 191 W.Va. 513, 446 S.E.2d 906 (1994).

There is no case these Respondents could find that says it is never permissible and clear error as a matter of law to consolidate a declaratory judgment action with an underlying tort case, before one judge in the same circuit, especially with bifurcation, and the Petitioner does not cite such a case for this Court. Instead, it depends on the facts of the cases. Here, since what each tortfeasor did determines whether coverage exists, then there are common questions of fact and discovery is necessary to flesh that out for a coverage determination. It certainly was not an abuse of power to consolidate the cases under these facts. As such, WVMIC has not shown the third factor.

6. The arguments of WVMIC do not go to prove clear error as a matter of law.

WVMIC claims that what Matulis did or did not do is separate from whether WVMIC has the obligation to defend and indemnify Matulis or CGAS. Even if this absurd argument were true, which it is not, that does not prove the decision to consolidate was clearly wrong as a matter of law. Second, that premise fails because it is not simply the conduct of Matulis that is at issue, it is the actions of other CGAS providers for which there is coverage. Third, as explained above, there is conduct of Matulis that would fall under coverage, if shown by the facts during discovery.[9]

WVMIC argues that the duty to defend is based upon allegations in the complaint, not the truth of the facts pleaded. Assuming this to be true, it does not prove that the decision to consolidate was clearly wrong as a matter of law. Judge Bailey can make the decision on the duty to defend the same as Judge King. Finally, WVMIC is not seeking only a determination on the duty to defend. Pet. Appx. 722. Instead, it asks that the Court declare there is no coverage, which requires factual findings. In short, WVMIC argues the law that applies to standards for declaratory judgment actions, but that is not enough to meet the standard for a writ of prohibition because it does not show that it was clear error of law to consolidate the cases.

WVMIC claims that coverage depends on the application of policy terms and exclusions as a matter of law. This is not correct by its own admission, as it conceded that the outcome of the underlying lawsuits may have a bearing on whether there is a duty to indemnify. Pet. Brief p.15. Whether an exclusion applies to defeat coverage depends upon the underlying facts. Again, arguing the law that applies to declaratory judgment actions is not enough to meet the standard for a writ of prohibition because it does not show that it was clear error of law to consolidate the cases.

[9] The parties have not had the opportunity to depose Matulis, which would be necessary for the underlying claims and for the declaratory judgment action.

WVMIC says that bifurcation on coverage from the tort claims is mandatory where bad faith is asserted. While not before the Circuit Court at the time, Judge Bailey noted this at hearing and in the order, and never ordered that there would not be bifurcation. Bifurcation is almost always before the same judge and in no way does this show that consolidation was a clear error of law. In addition, WVMIC fails to point out that the bad faith counter claim also involves common questions of fact, further supporting consolidation.

Addressing the remaining factors for a writ of prohibition, WVMIC does not contend that what the Circuit Court did is an oft repeated error or manifests persistent disregard for either procedural or substantive law, nor can it seriously make this argument given the broad discretion accorded the Circuit Court under W.V.R.C.P. 42. Neither does WVMIC contend that the order raises new and important problems or issues of law of first impression, because this is well settled law. As such the fourth and fifth factors are not satisfied.

7. WVMIC really seeks an appeal of an interlocutory order under the guise of a petition for a writ of prohibition.

As explained by the West Virginia Supreme Court of Appeals in State ex rel. Arrow Concrete Co. v. Hill, 194 W.Va. 239, 460 S.E.2d 54 (1995):

> 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.

Citing Wilfong v. Wilfong, 156 W.Va. 754, 758-59, 197 S.E.2d 96, 99-100 (1973).

Although for obvious reasons WVMIC resists categorizing this request for prohibition as an appeal of the consolidation of the cases, essentially that is what this proceeding involves. WVMIC fails to convincingly show circumstances in this case meeting the standard for

prohibition. Accordingly, the decision to consolidate is interlocutory and is, therefore, not immediately appealable, and the Petitioner may not indirectly raise this issue by seeking a writ of prohibition.

8. A writ of prohibition is not to be used to resolve disputed facts.

Moreover, there is no dispute that writs of prohibition will not be granted when there are issues of disputed fact. As explained, "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, State ex rel. USF&G v. Canady, 194 W.Va. 431, 460 S.E.2d 677 (1995) (emphases added, internal citation omitted). *Accord* Syl. Pt. 2, State ex rel. Allstate Ins. Co. v. Gaughan, *supra*. The Circuit Court made factual findings that keeping these particular cases separate before two different judges would create delays, duplication of effort and scheduling problems and found that there were common questions of fact. While WVMIC may dispute these findings, a writ of prohibition will not be issued to resolve disputed facts.

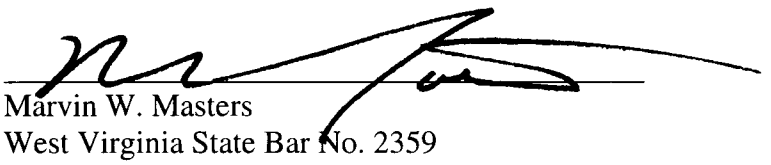
VI. CONCLUSION

For the foregoing reasons, these Respondents respectfully request that Your Honorable Court deny the Petitioners' Writ of Prohibition.

RESPECTFULLY SUBMITTED,

A.H. and Adriana Fleming, individually and on behalf of all others similarly situated,

By counsel



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