IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE CINCINNATI INSURANCE COMPANY, Petitioner, v. THE HONORABLE JASON A. CUOMO, JUDGE, THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA Respondent, v. GRAE-CON CONSTRUCTION, INC.., Respondent.	)	Upon Original Jurisdiction In Prohibition No._____

PETITION FOR WRIT OF PROHIBITION

THE CINCINNATI
INSURANCE COMPANY

BY COUNSEL

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PETITION FOR WRIT OF PROHIBITION

Comes now Petitioner, The Cincinnati Insurance Company [hereinafter "Cincinnati"], by its undersigned counsel, and petitions this Honorable Court to issue a Writ of Prohibition against the Respondent, The Honorable Jason A. Cuomo, in his official capacity as Circuit Judge sitting in the Circuit Court of Ohio County, West Virginia, so as to prevent the Respondent from allowing the instant litigation to proceed despite a lack of personal jurisdiction over Cincinnati, lack of proper venue in West Virginia, improper forum under forum non conveniens, and pendency of a prior action regarding the same matter filed in Butler County, Ohio.

I. STATEMENT OF JURISDICTION

1. This Petition for Writ of Prohibition is filed pursuant to Article VIII, Section Three of the West Virginia Constitution, granting the Supreme Court of Appeals original jurisdiction in prohibition, and West Virginia Code Chapter 53, Article One, Section One, and Rule 16(a) of the West Virginia Rules of Appellate Procedure.

2. "The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va. Code § 53-1-1; *State ex rel. Allstate v. Honorable Martin Gaughan*, 203 W.Va. 358, 508 S.E.2d 75 (1998).

3. "The writ is no longer a matter of sound discretion, but a matter of right; it lies in all proper cases whether there is a remedy or not." *Norfolk & W. Ry. V. Pinnacle Coal Co.* 44 W. Va 574, 576, 30 S.B. 196, 197 (1898).

4. 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 a 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. 4, *State ex rel. Hoover v. Berger,* 199 W.Va 12,483 S.E.2d 12 (1996).

5. Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue." Syl. Pt. 2, *Woodall v. Laurita,* 156 W.Va. 207, 195 S.E.2d 717 (1973). Pursuant to the original jurisdiction of this Court, Cincinnati seeks relief in the form of a writ of prohibition as the Honorable Circuit Court of Ohio County, West Virginia lacks jurisdiction over Cincinnati in this case and has furthermore exceeded its legitimate powers by denying Cincinnati's Motion to Dismiss Plaintiff's Amended Complaint.

II. PARTIES

1. The Petitioner, The Cincinnati Insurance Company, is an Ohio corporation with its principal place of business in Fairfield, Ohio. Petitioner is the sole defendant in the action pending in the Circuit Court of Ohio County, West Virginia, Civil Action No. CC-35-303-C-166.

2. Respondent, the Honorable Jason A. Cuomo, is a Circuit Judge for the Circuit Court of Ohio County, West Virginia, entered the "Order Denying The Cincinnati Insurance Company's Motion to Dismiss Plaintiff's Amended Complaint" which is the subject of the instant Petition.

3. Respondent Grae-Con Construction, Inc. [hereinafter "Grae-Con"] is an Ohio corporation with a principal place of business in Steubenville, Ohio. Grae-Con is the sole Plaintiff in the action pending below.

4. Mohawk Construction and Supply Company, Inc. [hereinafter "Mohawk"] is a Pennsylvania corporation with a principal place of business in McMurray, Pennsylvania. Mohawk is a Rule 19 Party in the action pending below. There are no claims asserted against Mohawk.

5. The Ohio County Development Authority [hereinafter "OCDA"] is a West Virginia public Corporation with a principal place of business in Triadelphia, West Virginia. The OCDA is a Rule 19 Party in the action pending below. There are no claims asserted against the OCDA.

III. QUESTION PRESENTED

1. Whether the Circuit Court committed clear legal error in denying Cincinnati's Motion to Dismiss Plaintiff's Amended Complaint:

   a. Whether the Circuit Court erred in determining it had personal jurisdiction over Cincinnati in this case;

   b. Whether the Circuit Court erred in determining that venue was proper in West Virginia;

   c. Whether the Circuit Court erred in determining that the forum was appropriate under forum non conveniens; and

d. Whether the Circuit Court erred in determining that the instant action not be dismissed despite pendency of a prior declaratory judgment action on the same question filed by Cincinnati in Butler County, Ohio prior to Grae-Con's initiation of this suit in West Virginia.

IV. STATEMENT OF THE CASE

Grae-Con initiated the instant action in Ohio County, West Virginia on October 11, 2022, seeking declaratory judgment with regard to Cincinnati's refusal to defend and indemnify Grae-Con as an additional insured in a construction arbitration case. Grae-Con's original Complaint was not served on Cincinnati. Grae-Con filed an Amended Complaint on November 14, 2022, which was served on Cincinnati via the West Virginia Secretary of State on November 16, 2022. Cincinnati's Motion to Dismiss Plaintiff's Amended Complaint was filed on December 13, 2022. *See* Appendix [hereinafter "App."] at 1.

Grae-Con's Amended Complaint asserted that as general contractor, Grae-Con subcontracted with Mohawk on **September 20, 2011**, for Mohawk to provide roofing and siding services in accordance with architectural plans to construct a distribution center for the OCDA in Triadelphia, West Virginia. *Id.* at 10, 66. The Subcontract included an indemnification provision and furthermore required Mohawk to maintain liability insurance naming Grae-Con as an additional insured. *Id.* at 68. The Prime Contract between Grae-Con and OCDA, which was executed on September 26, 2011, **six days after the Subcontract** was executed, purportedly bound Mohawk to all obligations that Grae-Con had assumed to the OCDA in kind, including the various insurance and indemnification requirements therein. *Id.* at 32.

Grae-Con admitted in its Amended Complaint that Mohawk complied with its contractual obligations by producing a Certificate of Liability Insurance naming Grae-Con as an additional insured under a pre-existing policy of insurance through Cincinnati, which was effective from June

8, 2010, through June 15, 2013 [hereinafter "the Policy"]. *Id.* at 9-10, 13. Grae-Con further acknowledged that Mohawk completed work on the project in question in June 2012. *Id*. at 13.

On August 31, 2021, the OCDA initiated arbitration proceedings against Grae-Con based on allegations that the distribution center "suffered from moisture condensation and roof leaks." *Id*. at 10, 75. The OCDA requested the hearing take place in Pittsburgh, Pennsylvania. *Id*. at 77. Grae-Con claimed that these allegations related solely to the work of its roofing subcontractor Mohawk, whereby Mohawk violated specific installation requirements for the roof and caused the damages alleged by the OCDA. *Id*. at 10. Grae-Con further asserted that OCDA's allegations were "squarely within Mohawk's scope of work set forth in the Subcontract and [were] subject to the indemnification provisions in Article 13 of the Subcontract." *Id*. at 11. As a result of the OCDA's allegations, on September 24, 2021, Grae-Con initiated an arbitration proceeding against Mohawk seeking contractual indemnity and also requesting the hearing take place in Pittsburgh, Pennsylvania. *Id*. at 11, 85. Upon information and belief, at some point, the OCDA/Grae-Con arbitration and the Grae-Con/Mohawk arbitration were consolidated to be heard in West Virginia. *Id*. at 11.

On January 4, 2022, Grae-Con contacted Cincinnati directly requesting defense and indemnification against the OCDA's arbitration claims pursuant to the terms of the Subcontract, the Prime Contract, and the Policy. *Id*. at 11, 138. On April 12, 2022, after exchanging correspondence on several occasions, Cincinnati issued a formal letter rejecting Grae-Con's tender for defense and indemnification as an additional insured in the AAA arbitration brought by the OCDA. *Id*. at 12, 144. Cincinnati's rejection letter clearly indicated that the additional insurance coverage under the Policy did not extend beyond the completed operations of its insured, Mohawk and, alternatively, that such coverage would not apply regardless, due to the contractual liability

exclusion of the Policy. *Id*. at 144. Grae-Con's Amended Complaint sets forth various provisions of the Policy in question raised by Cincinnati in its tender rejection letter to be interpreted by the Circuit Court in determining Cincinnati's contractual obligations to Grae-Con. *See generally id*. at 13-18.

As stated above, Grae-Con initiated the instant suit on October 11, 2022, at 10:59 p.m. However, by this time, **Cincinnati had already filed a declaratory judgment against Grae-Con in Butler County, Ohio** [hereinafter "the Ohio case"], seeking the Court's interpretation of the same factual circumstances and same policy language at issue in Grae-Con's Amended Complaint. *Id*. at 339. The Ohio case was filed on October 11, 2022, at 4:44 p.m., nearly six hours before Grae-Con filed suit in Ohio County, West Virginia. Cincinnati simultaneously served a copy of its Complaint in the Ohio case on Grae-Con's counsel via E-mail at the time of filing, hours before Grae-Con filed in this County, and requested acceptance of service of the same. Cincinnati's Complaint in the Ohio case specifically identified the same Policy provisions subsequently placed at issue in Grae-Con's West Virginia Complaint and Amended Complaint.

On December 13, 2022, Cincinnati filed a timely Motion to Dismiss Grae-Con's Amended Complaint in this case based on the following arguments: (1) Ohio County lacks personal jurisdiction over Cincinnati in this case because the underlying facts related to the issuance of the insurance policy at issue did not take place in West Virginia; (2) West Virginia is the improper venue to hear the claims of an Ohio corporation against another Ohio corporation under W.V. Code §56-1-1(c) where none of the underlying facts related to the insurance policy took place in West Virginia; (3) Grae-Con's claims should be dismissed pursuant to forum non conveniens; (4) Grae-Con's claims must be dismissed due to pendency of the prior action in Butler County, Ohio. *Id*. at 313.

All briefs on Cincinnati's Motion to Dismiss were submitted by January 4, 2023. On January 5, 2023, at 7:55 a.m., the Court entered an Order denying Cincinnati's Motion to Dismiss in its entirety. *Id*. at 702. To avoid the waiver of any rights available to review the Circuit Court's Order, Cincinnati has simultaneously filed a Notice of Appeal under the collateral order doctrine.

V. SUMMARY OF ARGUMENT

The Circuit Court's opinion denying Cincinnati's Motion to Dismiss, which largely adopts the factual and legal misrepresentations asserted by Grae-Con, clearly disregards applicable West Virginia law and encroaches on the duties of the Ohio Court in finding that Cincinnati is not entitled to its requested relief – namely dismissal of Grae-Con's Amended Complaint.

First, the Circuit Court erred in ruling that it had personal jurisdiction over Cincinnati in this case where the Policy in question, not the Certificate of Liability Insurance, was formed over a year before Mohawk's involvement in the OCDA project and where Grae-Con's claims did not give rise to or even relate to Cincinnati's alleged business conduct in West Virginia.

Second, the Circuit Court erred in determining that venue in West Virginia was proper where both Grae-Con and Cincinnati are nonresident corporations and where the underlying facts of this case pertaining to the execution and interpretation of the Policy in question did not occur in West Virginia.

Third, the Circuit Court erred in refusing to dismiss Grae-Con's Amended Complaint for forum non conveniens based on its unwarranted and unsupported legal conclusion that the OCDA would be joined as a necessary party in the Ohio case under Ohio law, that the Ohio Court would not have jurisdiction over the OCDA under Ohio law, and that West Virginia law, not Ohio law, would be applied to interpret the Policy language in question

Finally, the Circuit Court erred in refusing to dismiss Grae-Con's Amended Complaint due to the prior pendency of Cincinnati's declaratory judgment action in Butler County, Ohio. The Court reasoned that the OCDA was surely to be added as a necessary party to the Ohio case, yet contradictorily refused to dismiss Grae-Con's Amended Complaint due to pendency of the Ohio action because the OCDA is not currently a party to that action. Moreover, the Court had previously found that both the contractual and extra-contractual claims set forth in Grae-Con's Amended Complaint were all related to the interpretation of Cincinnati's duties under the Policy, which it claims occurred in West Virginia. Nonetheless, the Circuit Court refused to defer to the prior pending Ohio case because it found the claims raised in Grae-Con's Amended Complaint were distinct from the policy interpretation placed at issue in Ohio, ignoring the fact that Grae-Con has not yet filed an Answer or Counterclaims to Cincinnati's Complaint in Ohio.

For each and all of these reasons, this Honorable Court should issue a Writ of Prohibition as to the Circuit Court's improper denial of Cincinnati's Motion to Dismiss Plaintiff's Amended Complaint.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter under Rule 19 will aid this Court in its decision process. This case involves issues of settled law that are narrow in scope and involves the Circuit Court's clear legal error in applying that settled law. W. Va. R. App. P. 19(a)(1) and (4).

VII. ARGUMENT

A. This Honorable Court Should Grant The Requested Writ As To The Circuit Court's Denial Of Cincinnati's Motion To Dismiss For Lack Of Personal Jurisdiction.

West Virginia Courts have adopted a two-prong approach for determining whether jurisdiction exists over a foreign person or corporation: First, the court must "determine whether

the defendant's actions satisfy our personal jurisdiction statutes", and second, "whether the defendant's contacts with the forum state satisfy due process." *Lane v. Boston Scientific Corp*., 481 S.E.2d 753, 756 (W. Va. 1996). The Circuit Court improperly adopted all faulty factual and legal conclusions asserted by Grae-Con in finding that it had personal jurisdiction over Cincinnati in this case.

i. The Circuit Court improperly determined it had jurisdiction over Cincinnati under West Virginia's long-arm statute.

The sole provision of West Virginia's long-arm statute under which the Circuit Court found personal jurisdiction over non-resident Cincinnati in this case was by "contracting to insure any person, property, or risk located within this state **at the time of contracting**." [1] W. V. Code § 56-3-33(a)(7) (emphasis added). The Circuit Court determined that because "Cincinnati enforced and issued a Certificate of Liability Insurance insuring risk located in Triadelphia, West Virginia . . . [it had] engaged in 'contracting to insure any person, property or risk located within [West Virginia] at the time of contracting,' thereby . . . establishing personal jurisdiction." App. at 712. (citing W.Va. Code § 53-3-33(a)(7). Such finding is clearly erroneous for two reasons: (1) the issuance of the Certificate of Liability Insurance did not constitute the formation of a separate contract to insure any person, property, or risk in West Virginia, and (2) the Policy at issue, which is the actual contract Grae-Con alleges Cincinnati breached, was entered into over a year before Grae-Con subcontracted with Mohawk for the OCDA project.

At the heart of the Circuit Court's erroneous legal conclusion as to personal jurisdiction is its wholly inaccurate factual and legal finding that the Certificate of Liability Insurance provided

[1] The Circuit Court did not accept any other basis for jurisdiction under the West Virginia long-arm statute. The Circuit Court specifically stated that "Grae-Con [did] not proffer that personal jurisdiction is satisfied by way of W. Va. Code §56-3-33(a)(1) in this case", which pertains to jurisdiction for "transacting business in" West Virginia. *See* App. at 713; W.V. Code 56-3-33(a)(1).

by Mohawk to Grae-Con was "endorsed and issued by" Cincinnati as a separate contact to insure the OCDA project in Triadelphia, West Virginia. App. at 705. However, such conclusion ignores the plain language of the Certificate as well as West Virginia jurisprudence on the purpose and intent of such certificates.

The plain language of the Certificate in question explicitly establishes that it is not a separate contract issued by Cincinnati for insuring a property located in West Virginia. Rather, the Producer of the Certificate is unambiguously identified as Mohawk's insurance agent Huntington Insurance, Inc., which is based out of Westerville, Ohio. *See* App. at 74. Moreover, per the Policy declarations page, Mohawk first procured the Policy in 2010 through a Huntington Insurance office in Pennsylvania. *See id*. at 149. Cincinnati is referenced in the Certificate only as the "Insurer(s) affording coverage". *See id*. at 74. Additionally, the document plainly states:

> THE CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMNED, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. **THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER**.

Id. (emphasis added). There is simply no language in the Certificate by which the Circuit Court could have concluded that it was "endorsed or issued" by Cincinnati as an independent operating insurance contract wholly separate from the Policy already in affect at the time the Certificate was issued and under which Grae-Con now seeks coverage.

In the same sense, the Circuit Court's finding that this Certificate constituted a separate insurance contract made at the time Huntington issued it is contrary to clear West Virginia law. The Supreme Court of Appeals of West Virginia has held that "a certificate of insurance is evidence of insurance coverage, and is not a separate and distinct contract for insurance." *Marlin*

v. Wetzel Cnty. Bd. of Educ., 569 S.E.2d 462, 472 (W.Va. 2002). The *Marlin* Court reasoned that "a certificate of insurance is a form that is completed *by an insurance broker* at the request of an insurance policyholder . . . [to] evidenc[e] the fact that an insurance policy has been written and includes a statement of the coverage of the policy in general terms." *Id*. at 470 (citing Black Law Dictionary (5th Ed. 1979)) (emphasis added). As such, the *Marlin* Court determined that the certificate of insured was "not a part of the insurance contract." *Id*. Contrary to the Circuit Court's mischaracterization of the Certificate, this Court has previously and clearly recognized that a certificate of liability insurance does not constitute a separate insurance contract, nor is it is necessarily endorsed or issued by an insurance carrier.

In the absence of any case law that supplants the plain language of the Certificate or the this Court's characterization of a certificate of liability insurance generally, it was clear legal error for the Circuit Court to use the Certificate of Liability Insurance issued by Huntington to Mohawk on a pre-existing Cincinnati policy as a basis to establish personal jurisdiction under Section 7 of the West Virginia long-arm statute.

Where the Certificate of Liability Insurance issued by Huntington Insurance to Mohawk evidencing possession of coverage for the OCDA project is not a separate insurance contract, the only way to establish personal jurisdiction in this case would be if the Cincinnati Policy under which Grae-Con now seeks relief was formed for the specific purpose of insuring the OCDA project at the time of its inception. By all parties' own admissions, there is no factual or legal basis to conclude as much. It is undisputed that the Mohawk general liability Policy which is the subject of this action, incepted on **June 8, 2010**. *See* App. at 149. Mohawk did not contract with Grae-Con to perform work in West Virginia until **September 20, 2011**, over a year later. *See id.* at 66. Therefore, there is no basis to infer that Mohawk or Cincinnati had any expectation that they were

contracting to insure work at the OCDA site in West Virginia "at the time of contracting" in June 2010.

In addition to improperly concluding that jurisdiction was established under Section 7 of the long-arm statute, the Circuit Court further erred in determining that "Grae-Con's coverage and bad faith claims as set forth in the Amended Complaint stem directly from Cincinnati's conduct in West Virginia" because the OCDA project was located in West Virginia, and the underlying arbitrations are taking place in West Virginia. *See* App. at 712. Such improper and illogical conclusion underlies the entirety of the Circuit Court's denial of Cincinnati's Motion to Dismiss. In particular, the Circuit Court impermissibly strained to find jurisdiction by connecting Cincinnati's alleged conduct in West Virginia in 2022 to the issuance of an Ohio insurance policy to a Pennsylvania corporation in 2010, which was over a year before any insured was even involved in the West Virginia project.

The West Virginia long arm statute is clear that when jurisdiction exists over a foreign entity pursuant to that statute, "only a cause of action arising from or growing out of one or more of the [specified acts] may be asserted against [it]." W.V. Code §56-3-33(b). The West Virginia Supreme Court of Appeals has agreed that where "all actions relating to the cause of action took place outside the State of West Virginia . . . and the only contacts between the State of West Virginia, and each of the defendants [were] incidental and unrelated in any way, to the underlying cause of action," then the plaintiff has "fail[ed] to establish jurisdiction, pursuance to W. Va. Code 56-3-33." *Lane*, 481 S.E.2d at 764 (affirming trial court's dismissal for lack of personal jurisdiction over foreign corporate defendant where all activity by defendant in West Virginia was wholly unrelated to underlying allegations of plaintiff's complaint).

Here, Grae-Con's Amended Complaint sets forth claims for declaratory judgment, breach of contract, bad faith, and unfair trade practices, all of which stem directly from Cincinnati's refusal to accept Grae-Con's tender in defending the OCDA's claims at arbitration. As stated above, the Court inaccurately found that these claims stemmed from Cincinnati's conduct in West Virginia because it had "insured Mohawk and Grae-Con specifically for the Project in West Virginia", despite the Policy in question having been in effect for over a year before Mohawk's involvement in the OCDA Project. *See* App. at 712. For the reasons set forth more fully above, the Circuit Court's conclusion is contrary to the plain language of the Certificate as well as West Virginia law. Moreover, the Circuit Court improperly found that the underlying facts of this case also related to Cincinnati's conduct in West Virginia merely because it agreed to provide a defense to Mohawk in the arbitration brought by Grae-Con there. *See id.* Such conclusion ignores the fact admitted in Grae-Con's Amended Complaint that it initiated its proceedings against Mohawk in Mohawk's home state of Pennsylvania, not West Virginia. *See id*. at 85. To the extent that the location of the underlying arbitration is even relevant to a court's consideration of jurisdiction, it must be acknowledged that Grae-Con initiated its proceedings against Mohawk seeking indemnity under the Policy in question in **Pennsylvania**, not West Virginia.

Furthermore, the underlying facts of this case do not stem from any arbitration or construction project in West Virginia, but from the creation, content, and interpretation of an insurance policy which was not executed in West Virginia, did not insure or involve a West Virginia property or entity at the time of its execution, and did not result from any alleged business activity conducted by Cincinnati within West Virginia. Rather, the Policy was issued by Cincinnati, an Ohio corporation, to Mohawk, a Pennsylvania corporation, over a year before Mohawk subcontracted with Grae-Con to work on the OCDA Project in West Virginia. Grae-Con

also did not allege any relationship between the Policy in question and any specific conduct by Cincinnati taking place in West Virginia, asserting only that Cincinnati generally conducts business in the state.[2] *See* App. At 5-6. Moreover, the Cincinnati letter refusing to accept Grae-Con's tender was issued from its offices in Ohio. *See* App. at 144. The substance of the underlying arbitration and the alleged negligent performance of Mohawk's construction on the OCDA project are not at issue in this case and had no bearing on Cincinnati's denial of coverage to Grae-Con. Relatedly, Cincinnati itself is not actively named or participating in any arbitration related to the OCDA or Grae-Con's claims in the state of West Virginia or otherwise. As such, it continues to act in this action out of its offices in Ohio, with no relation to any business or conduct within West Virginia.

For the reasons stated above, the Circuit Court clearly erred in determining that it had jurisdiction over Cincinnati in this case under Section 7 of the long arm statute. The Certificate of Liability Insurance issued by Mohawk's insurance broker, Huntington Insurance, was not a separate insurance contract. The Policy which is in fact the subject of this action, was entered into over a year before Mohawk subcontracted to participate in the OCDA Project in West Virginia. Furthermore, even if the Certificate of Liability Insurance could be considered a separate insurance contract which insured a West Virginia property at its inception, the Circuit Court nevertheless improperly concluded that it had jurisdiction over Cincinnati in this specific case because Grae-Con's claims did not arise from any such conduct by Cincinnati taking place in or related to West Virginia.

[2] Again, the Circuit Court affirmatively stated that "Grae-Con [did] not proffer that personal jurisdiction [was] satisfied by way of" Cincinnati's conducting or transacting business in West Virginia. *See* App. at 713.

ii. The Circuit Court lacked jurisdiction over Cincinnati where due process requirements were not satisfied.

Cincinnati initially asserted in its Motion to Dismiss that because Grae-Con could not establish jurisdiction under the West Virginia long arm statute, review of the second prong of jurisdictional analysis as to due process considerations was not required. However, the Circuit Court ordered further briefing limited to due process jurisdictional analysis, which was submitted just hours before the Court rendered its decision. *See* App. at 618. Cincinnati maintains this Court's analysis does not reach the question of due process or minimum contacts with West Virginia due to lack of jurisdiction under the long-arm statute. Nonetheless, regardless of the application of the long-arm statute, there is no averment of fact to support any finding by the Circuit Court that due process requirements have been satisfied as to either general or specific jurisdiction over Cincinnati in this case.

In order to establish personal jurisdiction over Cincinnati in this case, the Circuit Court was required to analyze whether Cincinnati's "contacts with West Virginia are such that the maintenance of the suit does not offend constitutional due process concerns of fair play and substantial justice." *State ex. Rel. Ford Motor Company v. McGraw*, 788 S.E.2d 319, 328 (W.Va. 2016). Personal jurisdiction over a foreign defendant, like Cincinnati, "depends on whether the defendant's contacts with the forum state provide the basis for the suit." *Id*. When analyzing the question of due process, the Court must examine whether the foreign defendant's "activities or contacts with the forum . . . make it reasonable to require a corporation to defend in the forum. *Id*. at 330 (discussing *International Shoe v. Washington*, 326 U.S. 310 (1945)). In that respect, the basis for personal jurisdiction over a foreign defendant may be either general or specific:

> General jurisdiction, also known as all-purpose jurisdiction applies in those situations where the cause of action is distinct from and is not related to a non-resident defendant's contacts with a forum. Specific jurisdiction, also known as

> case-linked jurisdiction, refers to jurisdiction which arises out of or relates to the defendant's contacts with a forum. In other words, general jurisdiction is dispute-blind, while specific jurisdiction requires the activities of the nonresident defendant in the forum be related to or give rise to the liabilities sued on.

Id. at 328-29.

The Circuit Court did not specify whether it performed its cursory evaluation of due process under a theory of general or specific jurisdiction. However, the Circuit Court seems to have accepted specific jurisdiction analysis as applicable herein, indicating that "[o]ne essential inquiry [of due process analysis] is whether the defendant has purposefully acted to obtain benefits or privileges in the forum state" App. at 713. (quoting Syl. Pt. 2, *Pries v. Watt*, 410 S.E.2d 285, 288 (W. Va. 1991)).

With respect to specific jurisdiction, the West Virginia Supreme Court of Appeals requires "examination of whether the nonresident defendant purposefully availed itself of the privilege of conducting activities within the forum; two general methods for assessing minimum contacts for purposes of specific personal jurisdiction are stream of commerce and stream of commerce plus." *McGraw*, 237 W. Va. at 335. The Circuit Court performed no such analysis as to Cincinnati's role in the "stream of commerce". Instead, without citing to any case law or averments of fact or evidence of record beyond the generic and conclusory allegations of Grae-Con's Amended Complaint, the Circuit Court improperly determined that "Cincinnati has sufficient minimum contacts with West Virginia such that due process is satisfied . . . [because it] is in the business of insuring risk and adjusting claims all over the country, including routinely in West Virginia" and is registered to do business in West Virginia. App. at 713. However, such rudimentary allegations cannot be found to factually or legally support a finding that Grae-Con's Amended Complaint satisfied specific jurisdiction due process concerns.

Cincinnati maintains in this Writ as it did before the Circuit Court in its Motion to Dismiss that specific jurisdiction does not apply to extend personal jurisdiction over Cincinnati in this case because, as consistently asserted by Cincinnati throughout these filings, Grae-Con's claims and alleged damages do not stem from any conduct by Cincinnati within the state of West Virginia. Of poignant note, in its Response in Opposition to Cincinnati's Motion to Dismiss, Grae-Con did not argue that any specific conduct by Cincinnati within West Virginia gave rise to the instant action. *See* App. at 584-85. Such de facto admission supports the inapplicability of specific jurisdiction analysis and bolsters Cincinnati's simultaneously advanced arguments that West Virginia is an improper venue and its courts lack jurisdiction because this case does not arise from any conduct by Cincinnati within West Virginia. Instead, Grae-Con's Response to Cincinnati's Motion to Dismiss seemed to invoke general personal jurisdiction based on Cincinnati's authorization to conduct business in West Virginia, its "regular participa[tion] for profit in [West Virginia's] economy and stream of commerce", and its general "business of insuring risk and adjusting claims all over the country" *See* Pl. Resp. at 11. As such, for the reasons already stated herein, specific jurisdiction analysis does not apply to this case where Grae-Con's acknowledges by omission that the instant action does not arise from any specific conduct by Cincinnati within the state of West Virginia.

To the extent that the Circuit Court's finding that Cincinnati's general business conduct in West Virginia and registration with the West Virginia Secretary of State supports the conclusion that Plaintiffs' Amended Complaint satisfied general jurisdiction due process considerations, such reasoning is similarly incorrect. Under West Virginia law, "a court may assert general personal jurisdiction over a nonresident corporate defendant to hear any and all claims against it when the corporation's affiliations with the state are so **substantial, continuous, and systematic** as to

render the nonresident corporate defendant essentially at home in the State." *McGraw*, 237 W. Va. at 332 (citing *Daimler AG v. Bauman*, 571 U.S. 117, 136–37 (2014) and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)) (emphasis added). This Court has also recognized that general jurisdiction analysis does not focus "solely on the magnitude of the defendant's in-state contacts" but also requires "appraisal of a corporations activities in their entirety, nationwide and worldwide." *Id.* at 333 (citing *Daimler*, 571 U.S. at 138–39). Such inquiry was based on the point that "general jurisdiction was not merely synonymous with 'doing business' tests that evolved prior to *International Shoe* and the recognition of specific jurisdiction." *Id*. (referencing *International Shoe*, 326 U.S. 310 (1945)). In the *McGraw* case specifically, the Court held the trial court "failed to conduct an appropriate analysis of the issues including the due process requirements relevant to general jurisdiction" when it "applied a 'doing business' approach rather than conducting an appraisal of the nature and substance of [the foreign defendant's] operations." *Id*.

Based on the foregoing standards required to be applied by the Circuit Court, its ruling regarding due process analysis was starkly cursory and incomplete. The Circuit Court committed clear error by failing to assess Cincinnati's contacts in West Virginia beyond the simple question of whether Cincinnati generally conducted business of any kind therein or whether Cincinnati had conducted "substantial, continuous, and systematic" activity within the state to render it "essentially at home" therein. Specifically, Grae-Con alleged that "Cincinnati is engaged in all facets of insurance in the State of West Virginia" and that "in the conduct of said business, among other things, Cincinnati sells, underwrites, and issues insurance policies in the State of West Virginia" and "employs insurance adjusters who work in all counties of West Virginia." *Id*. at 6.

These broad conclusory allegations as to Cincinnati's general conduct in West Virginia and nationally fail to establish a prima facie claim of personal jurisdiction over Cincinnati.

Moreover, the only actual fact pleaded by Grae-Con regarding Cincinnati's general activity throughout the country and within West Virginia is that Cincinnati is licensed to conduct business in West Virginia. *See* App. At 5-6. Although Cincinnati may be authorized to do business in West Virginia, the existence of such licensure does not alone establish actual "substantial, continuous, and systematic" conduct by Cincinnati within the state rendering it "essentially at home" therein needed to satisfy the Fourteenth Amendment's due process requirements. *See, e.g.*, *Chufen Chen v. Dunkin' Brands, Inc.*, 954 F.3d 492, 499 (2d Cir. 2020) (holding that "a foreign corporation does not consent to general personal jurisdiction in New York by merely registering to do business in the state and designating an in-state agent for service of process"); *Medici v. Lifespan Corp*., 239 F.Supp.3d 355, 368–69 (D. Mass. 2017) (holding that the court lacked general jurisdiction where the company "maintain[ed] two locations in Massachusetts, employ[ed] people in Massachusetts, and serve[d] some proportion of its patients in Massachusetts," but was "incorporated under Rhode Island Law and ha[d] its principal place of business in Rhode Island") (citing *Daimler*, 571 U.S. at 126–27 and Goodyear, 564 U.S. at 924); *Eaton v. Allstate Prop. & Cas. Ins. Co*., 2021 WL 3662451, at *1 (Del. Super. Apr. 28, 2021) (holding that Delaware court could not exercise general jurisdiction over Illinois insurer because "continuous and systematic" requirement was not met where Illinois insurer only did business and was not "essentially at home" in Delaware) (citing, inter alia, *Goodyear*, 564 U.S. 915 (2011)).

The Circuit Court's limited independent analysis and simplistic adoption of Grae-Con's erroneous conclusions of law resulted in a faulty and poorly-reasoned decision which has no basis in West Virginia law. In short, the Circuit Court did not perform the proper analysis required of it

under state and federal law with respect to either specific or general jurisdiction, and has committed clear error as a result. For those reasons, this Honorable Court should issue a Writ of Prohibition as to the Circuit Court's denial of Cincinnati's Motion to Dismiss for lack of personal jurisdiction in this case.

B. This Honorable Court Should Grant The Requested Writ As To The Circuit Court's Denial Of Cincinnati's Motion To Dismiss For Improper Venue.

Under W.V.Code § 56-1-1(c), a nonresident of West Virginia may not bring an action in West Virginia "unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." Such limitation does not apply if the civil action is filed against a West Virginia citizen, resident, or corporation. *Id. See also* Syl. Pt. 2, *Savarese v. Allstate Ins. Co.*, 672 S.E.2d 255 (W. Va. 2008) ("Pursuant to West Virginia Code §56-1-1(c) (2003), a nonresident plaintiff must establish that all or a substantial part of the acts giving rise to his or her claims occurred in West Virginia in order to establish that venue is appropriate in West Virginia where no claims are asserted **against a West Virginia resident**."). A foreign corporation is considered a "nonresident" for venue purposes. *See* Syl. Pt. 1, *Quesenberry v. People's Bldg., Loan & Sav. Ass'n*, 30 S.E. 73 (W. Va. 1898). *See also Savarese*, 672 S.E.2d at 265 (declaring defendant foreign corporation was not "a West Virginia resident" for purposes of establishing exception to nonresident venue limitations of W.V. Code § 56-1-1(c)).

Grae-Con is admittedly a foreign nonresident corporation, incorporated and with a principal place of business in Ohio. *See* Am. Compl. at ¶ 1. Although Grae-Con has included Mohawk and OCDA as Rule 19 parties to this action, Grae-Con's Amended Complaint only asserts claims against and seeks recovery from Cincinnati, which is also incorporated and has a principal place of business in Ohio. Therefore, Grae-Con is a nonresident plaintiff asserting claims against a nonresident defendant and therefore must establish that "all or a substantial part of the acts giving

rise to [its] claims occurred" in West Virginia to successfully establish venue therein. *See* W.V. Code § 56-1-1(c).

The aforementioned faulty reasoning which underpinned the Circuit Court's analysis as to personal jurisdiction similarly infected its analysis of venue. Again, the Circuit Court reiterated its improper factual and legal conclusion that the instant litigation was somehow born out of any conduct or action by Cincinnati in West Virginia because the Certificate of Liability Insurance was a separate independent insurance contract to specifically insure the OCDA project. *See* App. at 714. The Circuit Court ruled, in adopting Grae-Con's faulty reasoning and conclusions, that "[t]his Court is the proper venue for Grae-Con's claims because 'all or a substantial part of the acts or omission giving rise to the claim asserted occurred in this state.'" *Id*. at 713 (quoting W. Va. Code 56-1-1(c)). The Circuit Court furthermore improperly reasoned that "Grae-Con's claim[s] for declaratory judgment and breach of contract derive[d] from Cincinnati's duties and obligations under the Mohawk Policy and its breach of those duties . . . [in] its denial of defense and indemnity to Grae-Con" in the arbitration brought by the OCDA.[3] *Id*. at 713-14. The extra-contractual claims of bad faith and statutory violations were found to similarly stem from Cincinnati's refusal to accept Grae-Con's tender for defense and indemnification in the underlying arbitration. *Id*. at 714. The Circuit Court also reasoned that since the OCDA initiated the arbitration against Grae-Con in West Virginia, and is seeking a defense therein, the harm resulting from Cincinnati's refusal to accept tender is "manifesting" therein. *Id*.

[3] This specific line or reasoning interestingly does not contain any qualifying language regarding Grae-Con's *allegations* of breach of contract, which it then defines as Cincinnati's "denial of defense and indemnity to Grae-Con . . . in the Underlying Arbitration". Rather, this statement seems to affirmatively accept or insinuate that the Circuit Court has already determined the factual and legal questions of breach and damages, which are not presently before it. *See* App. at 713-14.

As established above in Cincinnati's arguments regarding personal jurisdiction, Grae-Con's contractual and extra-contractual claims are filed pursuant to the Policy in question, not the Certificate of Liability Insurance, regardless of where the underlying arbitration takes place. In its faulty reasoning, the Circuit Court has implicitly adopted a rule of law that does not exist – that venue for contractual and extra-contractual policy-based disputes is always proper wherever the alleged insured is being sued and thereby seeks coverage. That is not the standard to be applied by the Courts of West Virginia when analyzing venue and, if applied in this case, would allow for proper venue to be found in West Virginia even if the project was located in Alaska. Rather, the substantial actions giving rise to these proceedings, thereby supporting proper venue, took place in Ohio where Cincinnati issued its letter refusing to accept Grae-Con's tender and at Grae-Con's principal place of business from which its claim of defense and indemnification originated. The interpretation of the Ohio insurance policy issued by Cincinnati in 2010 and all ancillary claims are entirely unrelated to the actual OCDA project, the underlying West Virginia arbitration proceedings, or West Virginia as a whole, particularly where the Policy in question was issued to a Pennsylvania corporation over a year before work began in West Virginia. Moreover, the actual damage purportedly suffered by Grae-Con is not located in West Virginia where the arbitration proceedings are being held, but where Grae-Con may feel the effects of those proceedings should it be unsuccessful in its defense – its pocketbooks in Steubenville, Ohio.

Based on the foregoing, the Circuit Court improperly determined that Grae-Con, a nonresident foreign corporation, established proper venue in West Virginia against nonresident Cincinnati despite the apparent lack of facts or evidence suggesting its interpretation of the Policy in question and its denial of coverage to Grae-Con had any relation to West Virginia. Again, the Policy was entered into between Cincinnati and Mohawk separate from and wholly unrelated to

any West Virginia person, property, or entity. As such, the Circuit Court clearly erred in determining that "all or a substantial part" of the conduct underlying Grae-Con's Amended Complaint took place in or even relates to West Virginia. Where the issuance of the Policy, the denial of coverage, and the alleged financial impacts of Cincinnati's denial of coverage all took place in Ohio, the Circuit Court's ruling was improper. For those reasons, this Honorable Court should issue a Writ of Prohibition as to the Circuit Court's denial of Cincinnati's Motion to Dismiss for improper venue in West Virginia.

C. This Honorable Court Should Grant The Requested Writ As To The Circuit Court's Denial Of Cincinnati's Motion To Dismiss Under Forum Non Conveniens.

Under West Virginia law, a trial court may dismiss an action under forum non conveniens "in the interest of justice and for the convenience of the parties" if "a claim or action would be more properly heard in a forum outside" West Virginia. W.V. Code § 56-1-1a(a). Although a "plaintiff's choice of a forum is entitled to great deference," such "preference may be diminished when the plaintiff is a nonresident and the cause of action did not arise in this state". W.V. Code § 56-1-1a(a). The West Virginia forum non conveniens statute explicitly directs the trial court to consider the following to evaluate a defendant's motion to dismiss for forum non conveniens:

(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, which shall include consideration of the extent to which an injury or death resulted from acts or omissions that occurred in this state. Factors relevant to the private interests of the parties include, but are not limited to, the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling witnesses; the cost of obtaining attendance of willing witnesses; possibility of a view of the premises, if a view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. Factors relevant to the public interest of the state include, but are not limited to, the administrative difficulties flowing from court congestion; the interest in having localized controversies decided within the state; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty;
>
> (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.

W.V. Code § 56-1-1a(a). Upon review of these factors, West Virginia courts have generally found that "West Virginia has no real interest in trying non-resident plaintiffs' claims against non-resident defendants involving causes of action that accrued in states other than West Virginia" because such claims "arose in other states [and] can be tried substantially more inexpensively and expeditiously in those other states where the sources of proof will be more easily accessible." *State ex rel. J.C. ex rel. Michelle C. v. Mazzone*, 772 S.E.2d 336, 345 (W. Va. 2015). Since both Grae-Con and Cincinnati are Ohio corporations, Ohio is the more appropriate forum to hear Grae-Con's claims.

As to the first forum non conveniens factor regarding the existence of an alternate forum to hear Grae-Con's claims, the Circuit Court clearly erred in its reasoning. "[A]an alternate forum is presumed to exist where the defendant is amenable to process". *Mace v. Mylan Pharmaceuticals, Inc.*, 714 S.E.2d 223, 233 (W.Va. 2011). Cincinnati asserted in its Motion to Dismiss that an alternative forum exists where Cincinnati had already initiated a declaratory judgment action against Grae-Con in Butler County, Ohio at No. CV 2022 10 1719 on October 11, 2022, in which

Grae-Con may bring counter-claims against Cincinnati based on the same causes of action set forth in Grae-Con's Amended Complaint currently before this Court.[4] The Circuit Court unquestioningly accepted Grae-Con's hopeful speculation that it will achieve dismissal of the Ohio case for improper venue and failure to join a necessary party. *See* App. at 714-15. However, neither of these arguments asserted in Grae-Con's Motion to Dismiss would ever logically result in dismissal of Cincinnati's Ohio action in its entirety. Even if Grae-Con is victorious in its Motion to Dismiss in Ohio, at the very worst, the Ohio Court will be compelled to transfer the case to Grae-Con's home county **in Ohio**. Moreover, to the extent that Grae-Con's Motion to Dismiss seeks to compel the inclusion of the OCDA as a necessary party to the Ohio action, such relief nonetheless does not result in dismissal of Cincinnati's declaratory judgment action therein. Furthermore, without litigating the Motion to Dismiss pending before the Ohio Court, Grae-Con's allegations as to the need to join a party (the OCDA) against which neither Cincinnati nor Grae-Con seeks relief, is tenuous at best, if not disingenuous in an attempt to cast doubt in the West Virginia Circuit Court as to the viability of the Ohio action. Therefore, the Circuit Court clearly erred in finding that this factor did not weigh in favor of dismissal under forum non conveniens.

As to the second factor, the Circuit Court again clearly erred in finding that the underlying arbitrations are in any way related to the instant coverage action, particularly where the Circuit Court was aware from Grae-Con's own pleadings that denial of coverage was not based on any fact regarding the type of work done or any other fact related to the OCDA's substantive claims against Grae-Con. *See* App. at 144. Rather, Cincinnati clearly refused to accept Grae-Con's tender in the OCDA arbitration because it found coverage did not extend beyond the period of completion of Mohawk's work on the project over a decade ago and alternatively because the claims asserted

[4] Expiration of the statute of limitations in the alternative forum of Ohio is a non-issue since Cincinnati has already initiated a declaratory judgment action against Grae-Con in Ohio on October 11, 2022. *See* W.V. Code § 56-1-1a(c).

by the OCDA against Grae-Con were excluded from coverage. *Id*. Moreover, the results of the underlying arbitration, including the facts and issues to be addressed therein regarding the alleged negligent installation of the roof, have no bearing on and will in no way affect the outcome of this litigation which solely involves a dispute as to the interpretation of language in a policy that was issued by an Ohio corporation, under Ohio law to a Pennsylvania corporation over a year before the insured became involved in the Project. As such, compelling both Ohio corporations to litigate the interpretation of this policy would cause a substantial injustice to both parties to force them to a foreign venue where travel will be required to attend court proceedings, particularly where Cincinnati will in no way be involved in the underlying arbitration. Therefore, the Circuit Court clearly erred in finding that this factor did not weigh in favor of dismissal under forum non conveniens.

As to the third factor, the Circuit Court again erred by strictly accepting Grae-Con's speculative and conclusory allegation that it will be successful in joining the OCDA as an additional defendant in the Ohio case. The Circuit Court goes even further in its abuse of discretion to make a final determination as to Grae-Con's pending Motion to Dismiss in Ohio, finding that the OCDA is in fact a necessary party to the Ohio action, but also finding that the Ohio Court will be unable to exercise personal jurisdiction over the OCDA, thereby defeating it as an alternative forum. The Circuit Court found that based on the language of the Ohio Declaratory Judgment Act, the OCDA has an "interest that would be affected by the declaration" to be made by the Ohio Court and is therefore necessary. *App*. at 715. (Quoting R.C. 2721.12(a)). The Circuit Court made no further inquiry as to the meaning of this language, or any Ohio jurisprudence regarding the interpretation of this language particularly in cases where, like here, the party seeking coverage is already covered under its own policy of insurance, thereby mitigating any risk that the OCDA

would be unable to recover in the underlying arbitration, as it has no real interest in who insures Grae-Con so long as they are insured. Instead, the Circuit Court generically assumed, without any evidence or input from the OCDA itself, that the OCDA is a necessary party to the Ohio action even if its ability to recover against Grae-Con is unaffected by the results of any declaratory judgment action against Cincinnati.

Beyond these unsolicited, bold assumptions as to the OCDA's status as a necessary party, the Circuit Court further erred in drawing unsubstantiated conclusions as to Ohio's ability to exercise jurisdiction over the OCDA if it is joined to Cincinnati's declaratory judgment action. There is no question that the OCDA is a West Virginia public corporation, headquartered in Ohio County, West Virginia. However, the Circuit Court goes on to assert, without any evidentiary or legal support, that "the OCDA does not transact any business in Ohio" and therefore "does not have 'minimum contacts' within Ohio to satisfy due process" such that "Ohio does not have personal jurisdiction over the OCDA." *App*. at 715-16. Such improper conclusory findings not only usurp the duty of the Ohio Court in determining the Motion to Dismiss pending before it, but furthermore ignores that the OCDA indisputably did contract with Grae-Con, an Ohio corporation, thereby potentially subjecting itself to personal jurisdiction in Ohio. The OCDA may even choose to waive jurisdiction in the Ohio case because neither Cincinnati nor Grae-Con intends to assert any claims against it, as is the case in this litigation. To this extent, allocating financial resources to challenge jurisdiction in Ohio would constitute an unnecessary expenditure if the OCDA is not at risk of any judgment entered therein. For these reasons, the Circuit Court committed clear error in finding that this factor did not weigh in favor of dismissal under forum non conveniens.

As to the fourth factor, the Circuit Court acknowledged that Grae-Con is in fact a resident of Ohio, not West Virginia, but neglected to acknowledge that this factor weighed in favor of dismissal under forum non conveniens. *See* App. at 716.

As to the fifth factor, the Circuit Court again repeated its improper and incorrect finding that "Grae-Con's cause of action accrued in West Virginia" because the "Policy directly related to a risk insured in West Virginia, and Cincinnati's obligation to provide a defense and indemnification to Grae-Con against claims by a West Virginia plaintiff, arising from a West Virginia construction project, involving an insured risk located in West Virginia." *Id*. at 716. Cincinnati maintained in its Motion to Dismiss, and as set forth more fully above in this Petition, that Grae-Con's contractual and extra-contractual claims are based solely on the insurance Policy issued by Cincinnati to Mohawk, which was formed over a year before Mohawk's involvement in the OCDA project, without any relation to West Virginia. Accordingly, Grae-Con's claims accrued not in West Virginia as the Circuit Court accepted, but in either Ohio or Pennsylvania where those contracting entities are incorporated and domiciled, and where Mohawk's insurance agent, Huntington Insurance, is located. *Id*. at 149. Again, Grae-Con's claims do not bring into question whether actual negligent construction was committed by Mohawk on the OCDA project, particularly where the nature of the underlying work performed does not serve as the basis for Cincinnati's denial of coverage to Grae-Con. As such, the location of the project and the underlying arbitration brought by the OCDA against Cincinnati is irrelevant to Grae-Con's burden of proof, Cincinnati's defenses, personal jurisdiction, and proper venue. Consequently, the Court erred in finding that this factor did not support dismissal under forum non conveniens.

As to the sixth factor, the Circuit Court again plainly errs in evaluating the private interests of the parties, particularly with respect to the conflict of laws issue created by hearing the instant

declaratory judgment action in West Virginia, rather than Ohio. The Circuit Court improperly concluded that neither party would "have more difficulty and expense litigating this matter in West Virginia than they would otherwise in the Underlying Arbitration." *App*. at 716. This statement is factually inaccurate. Cincinnati is not and has never been averred to be directly involved in the underlying arbitration between the OCDA and Grae-Con or Grae-Con and Mohawk. Cincinnati's role in its defense and indemnification to Mohawk is clearly limited to paying any costs associated with such defense and indemnification, not litigating the OCDA's claims of negligent construction or breach of contract. Therefore, the Circuit Court's determination as to the convenience of the parties is detrimentally flawed based on its misunderstanding and misstatement of Cincinnati's role in the underlying arbitrations.

In the same sense, the Circuit Court clearly erred in concluding that there would be no conflict of laws issue in this declaratory judgment action because West Virginia law would apply to interpret the Policy in question. West Virginia law is clear: "The law of the state in which a contract is made and to be performed governs the construction of a contract when it is involved in litigation in the courts of [West Virginia]". *See Nadler v. Liberty Mut Fire Ins. Co., 424* S.E.2d 256 (W.Va. 1992)) (holding insurer and insureds reasonably expected the law of Ohio to control the interpretation of the insurance contract where the policy was issued in Ohio and the insureds resided in Ohio at the time of the underlying incident). The Policy in question was prepared by Cincinnati in its corporate headquarters in Ohio. The Policy was furthermore to be performed in Ohio, where Cincinnati would make any coverage decisions and from where any benefits afforded to its insured would originate, or Pennsylvania, where the named insured Mohawk is based and received the policy. Therefore, under West Virginia law, the Policy in question is meant to be

interpreted under Ohio or Pennsylvania law. West Virginia had nothing to do with the inception of the Policy. Accordingly, no basis exists to apply West Virginia law to the Policy.

Furthermore, the "more significant relationship" test set forth in *Howe v. Howe, infra*, on which Grae-Con relied, and which was improperly adopted by the Circuit Court, is wholly inapplicable to this case and misrepresents the binding law to be applied in this action. *See* App. at 717. In *Howe,* the plaintiff husband and wife, both residents of Ohio, were traveling by motorcycle in West Virginia when they were involved in an accident and suffered serious injuries. 625 S.E.2d 716, 718 (W.Va. 2005). At the time, the plaintiff husband possessed four separate insurance policies. The plaintiff wife, who was a passenger, suffered injuries, and filed suit in West Virginia, seeking in part declaratory relief as to availability of liability coverage and UIM coverage on those four policies. The question before the *Howe* Court was whether Ohio law or West Virginia law applied to interpret these insurance contracts. In analyzing the same, the Supreme Court of Appeals for West Virginia acknowledged, "The law of the state in which a contract is made and to be performed governs the construction of a contract when it is involved in litigation in the courts of this state." *Id*. at 721. The *Howe* Court further stated that this general rule was modified "when addressing coverage available **under a motor vehicle policy of insurance**" by the adoption of "a modified modern more significant relationship test". *Id*. at 721-22 (emphasis added). Such test dictates that "the provisions **of a motor vehicle policy** will ordinarily be construed according to the laws of the state where the policy was issued and the risk insured was principally located, unless another stated has a more significant relationship to the transaction and the parties." *Id*. at 722 (emphasis added).

This "more significant relationship test" proffered by Grae-Con and improperly adopted by the Circuit Court is clearly inapplicable to the instant case as it pertains solely to interpretation

of **motor vehicle policies**. The Circuit Court's adoption and adherence to the more significant relationship test in its choice of law analysis directly contradicts the undisputed law before set forth by this Honorable Court – that an insurance policy must be interpreted under the law of the state where the policy was issued. As such, the Circuit Court clearly erred, and Cincinnati vehemently disputes, that West Virginia law would apply to interpret the Policy in question. Therefore, the Circuit Court erred in finding that this factor did not support dismissal under forum non conveniens.

As to the seventh factor, the Circuit Court disputed that continuing this litigation in West Virginia would create a proliferation of litigation because, again, the Circuit Court improperly reasoned that these coverage issues are directly related to the substantive construction occurring in West Virginia and the claims asserted as a result of such construction. *See* App. at 717. There is an absolute and apparent risk of proliferation of litigation in West Virginia to the extent that nonresident plaintiffs may feel empowered to bring suit against nonresident corporate defendants, namely insurance companies, in an effort to inconvenience and burden those defendants or seek a perceived benefit under West Virginia law. Such proliferation would result, as here, in West Virginia courts being implored to apply another state's law to interpret foreign contracts or other agreements subject to the broad reach of declaratory judgment. As such, the Circuit Court erred in finding that this factor did not weigh in favor of dismissal under forum non conveniens.

As to the eighth and final factor, the Circuit Court clearly erred by concluding that "the alternative forum of Butler County, Ohio cannot provide a remedy" because "Grae-Con has filed a Motion to Dismiss Cincinnati's Complaint", which the Circuit Court already improperly decided on its own cursory review of Ohio law. *See* App. at 717.[5] As stated above, the grounds on which

[5] Grae-Con's Motion to Dismiss the Ohio case remains pending as of filing this Petition. In its Ohio briefing, Grae-Con cited to the Circuit Court's Order when urging the Ohio court to granting the Motion to Dismiss. This

Grae-Con has filed its Motion to Dismiss cannot possibly lead to the dismissal of Cincinnati's declaratory judgment action in its entirety where the only relief afforded to Grae-Con is transfer of the case to its home county in Ohio or the joinder of the OCDA as an additional party. Again, the question of whether the Ohio court would have jurisdiction over the OCDA is not presently before it and furthermore has not been raised by the OCDA itself. Therefore, the forum of Butler County, or another county in Ohio, remain an available alternative forum. Therefore, the Circuit Court clearly erred in finding that this factor did not weigh in favor of dismissal under forum non conveniens.

Upon consideration of the eight aforementioned factors, and the diminished preference for Grae-Con's choice of forum as Grae-Con is a nonresident and the cause of action did not arise in West Virginia, the Circuit Court improperly denied Cincinnati's Motion to Dismiss for forum non conveniens. This Honorable Court should grant a writ of prohibition as a result.

D. This Honorable Court Should Grant The Requested Writ As To The Circuit Court's Denial Of Cincinnati's Motion To Dismiss Due To Pendency Of A Prior Identical Action In Butler County, Ohio.

As set forth above in discussion of the facts of this case, Cincinnati initiated its declaratory judgment action against Grae-Con in Butler County, Ohio approximately six hours before Grae-Con filed suit in Ohio County, West Virginia. Moreover, the same question presented herein as to interpretation of the Policy in question, the extent of any alleged breach of the Policy by Cincinnati's refusal to accept Grae-Con's tender, and any alleged resulting damages are all identically at issue in the Ohio case which was initiated before this West Virginia case. Upon

highlights the problem with the Circuit Court heedlessly opining on the merits of Grae-Con's motion. A self-fulfilling prophecy develops: the Circuit Court finds that by the mere act of filing a motion to dismiss, Ohio is not an alternative forum, which Grae-Con then cites as evidence that the Ohio case should be dismissed, which could lead Grae-Con to prevail, without regard for the merits of the motion or the law. While the Circuit Court's Order contains many errors, the unfounded conclusion that Grae-Con's mere act of filing a motion to dismiss renders another forum unavailable is the most insidious because its ill-effects are not limited to this litigation.

review of applicable West Virginia law, the Circuit Court should have definitively dismissed Grae-Con's Amended Complaint due to the pendency of this prior litigation in Ohio.

West Virginia Courts have consistently held "that where there is litigation on the same subject between the same parties pending in another state, our courts should not consider the matter until the proceedings in the other state are resolved." *Morris v. Estate of Morris*, 2016 WL 6678988 at *5 (W.Va. Nov. 14, 2016) (citing *Berger v. Berger*, 350 S.E.2d 685 (W. Va. 1986)). In *Morris*, the plaintiffs repeated allegations and claims which had already been presented in litigation in New Jersey. *Id*. In both states, the court was tasked with deciding the question of whether a will should have been probated in West Virginia or New Jersey. Id. Affirming the trial court's dismissal of the West Virginia action on defendant's Motion to Dismiss, the Supreme Court of Appeals of West Virginia reasoned that "a redundant proceeding in West Virginia would not be judicially economical and could produce contradictory results." *Id*. Such determination was based on the Supreme Court's prior ruling in *Berger*, *supra*, wherein a husband initiated divorce proceedings in West Virginia after his wife had already filed in both Virginia and North Carolina. *See Berger*, 350 S.E.2d at 686. The wife filed a motion to dismiss in the West Virginia trial court due to the pendency of the two other actions, but the trial court denied such motion and referred the case to a divorce commissioner who entered a final order allocating the couple's wealth of assets. Id. On appeal, the Supreme Court of Appeals of West Virginia readily agreed with the wife that the West Virginia divorce proceeding should have been dismissed and that the trial court erred in denying such dismissal "because there was then pending a proceeding on exactly the same subject between the same parties" in another state. *Id*. at 686-87.

Ignoring the clear dictates of West Virginia law, the Circuit Court found that "Cincinnati's reliance on the pendency of the Ohio action to support dismissal of this action [was] misplaced, as

Grae-Con has filed a Motion to Dismiss Cincinnati's Complaint in Butler County, Ohio for improper venue and failure to join a necessary party." *App.* at 718. Again the Circuit Court improperly concludes, to the extent that such consideration is even relevant to the question of deference to a prior pending action, that Cincinnati's Ohio case is subject to dismissal in its entirety based on Grae-Con's Motion to Dismiss, even though such result is a factual impossibility. The Circuit Court goes on to state that "Grae-Con's Amended Complaint pending in this Court is more inclusive of all claims and all interested parties" because "the only claim currently pending in Ohio is Cincinnati's Complaint for Declaratory Judgment." *Id.*

The Circuit Court points out that this action brought by Grae-Con includes other contractual and extra-contractual claims. However, as the Circuit Court stated in its own Opinion, **all of these claims are directly related to and stem from the interpretation of Cincinnati's obligations and duties under the Policy which were already placed at issue by Cincinnati in Butler County, Ohio when Grae-Con first initiated this litigation**. *See* App. at 713-14 (discussing purported proper venue of Grae-Con's claims where all claims "derive[d] from Cincinnati's duties and obligations under the Mohawk Policy and its breach of those duties" "in conjunction with its denial of defense and indemnity to Grae-Con in the West Virginia arbitration".). The Circuit Court again contradicts itself by asserting that "the parties in both actions are not substantially the same" because "the OCDA is not a party to the Ohio action." *Id.* at 718. However, as set forth above, the Circuit Court had already determined in its brief review of the plain language of the Ohio Declaratory Judgment Act that the OCDA would undoubtedly be added as a necessary party to the Ohio litigation upon disposal of Grae-Con's Motion to Dismiss. *See* App. at 715.The Circuit Court's justification for disregarding the prior pending action in Butler County, Ohio is blatantly contradictory to the reasoning relied upon to support its denial

of Cincinnati's Motion to Dismiss. For these reasons, this Honorable Court must grant a writ of prohibition as to the Circuit Court's denial of Cincinnati's Motion to Dismiss due to pendency of the prior action in Butler County, Ohio.

VIII. CONCLUSION

For the foregoing reasons, The Cincinnati Insurance Company's Writ of Prohibition should be granted and the Circuit Court directed to grant Cincinnati's Motion to Dismiss Plaintiff's Amended Complaint.

Dated: February 3, 2023

Respectfully submitted,

THE CINCINNATI INSURANCE COMPANY

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE CINCINNATI INSURANCE COMPANY,	)	Upon Original Jurisdiction
	)	In Prohibition
	)	No._____
Petitioner,	)	
	)	
v.	)	
	)	
THE HONORABLE JASON A. CUOMO, JUDGE, THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA	)	
	)	
Respondent,	)	
	)	
v.	)	
	)	
GRAE-CON CONSTRUCTION, INC..,	)	
	)	
Respondent.	)	

VERIFICATION

COMMONWEALTH OF PENNSYLVANIA

COUNTY OF ALLEGHENY, TO WIT:

In accordance with W.V. St. § 53-1-3, the undersigned, after being first duly sworn, states that the information contained in the foregoing Petition for Writ of Prohibition is true to the best of my knowledge, information and belief. To the extent that any information is based upon information provided to me or on my behalf, it is believed to be true.

Trisha A. Gill

Taken, subscribed and sworn before the undersigned authority this 1st day February, 2023.

My Commission expires July 23, 2024.

Commonwealth of Pennsylvania - Notary Seal
Mary Lynn Lockhart, Notary Public
Allegheny County
My commission expires July 23, 2024
Commission number 1270807
Member, Pennsylvania Association of Notaries

Mary Lynn Lockhart
Notary Public

CERTIFICATE OF SERVICE

The undersigned, counsel for The Cincinnati Insurance Company, hereby certifies that on the 3rd day of February, 2023, the foregoing Writ of Prohibition was served via ECF on all counsel of record.

/s/ Trisha A. Gill
Trisha A. Gill, Esquire