IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 23-67

STATE OF WEST VIRGINIA ex rel.
THE CINCINNATI INSURANCE COMPANY,
Defendant Below/Petitioner,

v.

THE HONORABLE JASON A. CUOMO, JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY,
Respondent,

and

GRAE-CON CONSTRUCTION, INC.,
Plaintiff below/Respondent.

(On Original Jurisdiction re: Civil Action No. CC-35-2022-C-166, Circuit Court of Ohio County)

RESPONDENT'S BRIEF OF GRAE-CON CONSTRUCTION, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

QUESTIONS PRESENTED 1

SUMMARY OF ARGUMENT 1

STATEMENT REGARDING ORAL ARGUMENT AND DECISION 3

ARGUMENT 3

I. STANDARD OF REVIEW 3

II. A WRIT OF PROHIBITION IS NOT WARRANTED REGARDING THE CIRCUIT COURT'S DENIAL OF CINCINNATI'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION 5

III. A WRIT OF PROHIBITION IS NOT WARRANTED REGARDING THE CIRCUIT COURT'S DENIAL OF CINCINNATI'S MOTION TO DISMISS FOR IMPROPER VENUE 19

IV. A WRIT OF PROHIBITION IS NOT WARRANTED REGARDING THE CIRCUIT COURT'S DENIAL OF CINCINNATI'S MOTION TO DISMISS UNDER THE DOCTRINE OF *FORUM NON CONVENIENS* 21

V. A WRIT OF PROHIBITION IS NOT WARRANTED REGARDING THE CIRCUIT COURT'S DENIAL OF CINCINNATI'S MOTION TO DISMISS DUE TO THE PENDENCY OF CINCINNATI'S LAWSUIT FILED IN BUTLER COUNTY, OHIO 26

CONCLUSION 29

TABLE OF AUTHORITIES

WEST VIRGINIA CASES

Barnett v. Wolfolk, 149 W. Va. 246, 140 S.E. 2d 466 (1965) 5

Berger v. Berger, 177 W. Va. 58, 350 S.E. 2d 685 (1986) 27

Cannelton Indust. v. Aetna Cas. & Sur. Co. of America,
194 W. Va. 186, 460 S.E. 2d 1 (1994) 21

Carr v. Carr, 180 W.Va. 12, 375 S.E.2d 190 (1988) 12-14

Christian v. Sizemore, 181 W. Va. 628, 383 S.E. 2d 810 (1989) 24

Cincinnati Ins. Co. v. Mills, 208 W. Va. 723, 542 S.E.2d 886 (2000) 15

Dunfee v. Childs, 59 W. Va. 225, 53 S.E. 209 (1906) 27

Health Management, Inc. v. Lindell, 207 W. Va. 68 528 S.E. 2d 762 (1999) 4

Hinerman v. Levin, 172 W.Va. 777, 310 S.E.2d 843 (1983) 12

Hinkle v. Black, 164 W. Va. 112, 262 S.E. 2d 744 (1979) 4

Hodge v. Sands Manufacturing Company, 151 W. Va. 133, 150 S.E.2d 793 (1966) 12-13

In the Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E. 2d 177 (1996) 4, 21-22, 28

Lewis v. Fisher, 114 W. Va. 151, 171 S.E. 106 (1933) 4

Marlin v. Wetzel Cnty. Bd. of Educ., 212 W. Va. 215, 569 S.E.2d 462 (2002) 16

Morris v. Estate of Morris, 2016 WL 6678988 (W. Va. Nov. 14, 2016) 27

Noland v. Virginia Insurance Reciprocal, 224 W. Va. 372, 686 S.E. 2d 23 (2009) 10, 20

Pries v. Watt, 186 W. Va. 49, 410 S.E.2d 285 (1991) 11-13

S.R. v. City of Fairmont, 167 W.Va. 880, 280 S.E.2d 712 (1981) 12-13

State ex rel. Almond v. Rudolph, 238 W. Va. 289, 794 S.E. 2d 10 (2016) 3, 21

State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson,
201 W. Va. 402, 497 S.E. 2d 755 (1997) 5

State ex rel. Coral Pools, Inc. v. Knapp, 147 W.Va. 704, 131 S.E.2d 81 (1963) 12

State ex rel. Ford Motor Co. v. McGraw,
237 W. Va. 573, 788 S.E. 2d 319 (2016) 4, 6, 14, 17

State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E. 2d 12 (1996) 4-5, 7

State ex rel. Owners Ins. Co. v. McGraw, 233 W. Va. 776, 760 S.E. 2d 590 (2014) 1, 6-8, 23

State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E. 2d 425 (1977) 3, 19-20, 27

State ex rel. Piper v. Sanders, 228 W. Va. 792, 724 S.E. 2d 763 (2012) 27

State ex rel. Suriano v. Gaughan, 198 W. Va. 339, 480 S.E. 2d 548 (1996) 3

State ex rel. Third-Party Defendant Health Plans v. Nines,
244 W. Va. 184, 852 S.E.2d 251 (2020) 14, 17

State ex rel. Thornhill Group, Inc. v. King, 233 W. Va. 564, 759 S.E. 2d 795 (2014) 4, 19

United Bank, Inc. v. Blosser, 218 W. Va. 378, 624 S.E. 2d 815 (2005) 19-20

West Virginia ex rel. Chemtall Inc. v. Madden,
216 W. Va. 443, 607 S.E. 2d 772 (2004) 10, 20

Wilt v. State Auto. Mut. Ins., 203 W. Va. 165, 506 S.E. 2d 608 (1998) 10, 20

WEST VIRGINIA STATUTES

W. Va. Code 53-1-1 ..... 3, 19, 21, 27

W. Va. Code § 56-1-1a 2, 22

West Virginia Code § 56-3-33(a) 8-9, 11

W. Va. Code § 56-6-10 27

WEST VIRGINIA RULES

Rule 12(b)(2) of the West Virginia Rules of Civil Procedure 5

Rule 18(a) of the West Virginia Rules of Appellate Procedure 3

Rule 19 of the West Virginia Rules of Appellate Procedure 3

OHIO CASES

Calvary Industries, Inc. v. Coral Chemical Company,
12th Dist. Butler No. CA2016-12-233, 2017-Ohio-7279 22

Calvary Industries, Inc. v. Coral Chemical Company,
12th Dist. Butler No. CA2018-07-134, 2019-Ohio-1288 22-23

In re Estate of Rush, 12th Dist. Warren No. CA2013-10-103, 2014-Ohio-3293 22

Walp v. Walp, 3rd Dist. Auglaize No. 2-05-10, 2005-Ohio-4181 23

U.S. CONSTITUTION

U.S. Constitution, Fourteenth Amendment 13

U.S. SUPREME COURT CASES

Asahi Metal Industry Co. v. Superior Court,
480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987) 12, 14

Hanson v. Denckla, 357 U.S. 235, 253, 78 S.Ct. 1228, 2 L.Ed.2d 1283 (1958) 12

International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945) 12

Kulko v. Superior Court, 436 U.S. 84, 98 S.Ct. 1690, 56 L.Ed.2d 132, 140 (1978) 11-12

World–Wide Volkswagen Corp. v. Woodson, 444 U.S. 286,
100 S.Ct. 559, 62 L.Ed.2d 490 (1980) 12

OTHER FEDERAL CASES

Kenney v. Independent Order of Foresters, 744 F. 3d 901 (2014) 10, 20

QUESTIONS PRESENTED

Whether The Cincinnati Insurance Company ("Cincinnati") has met the high burden of proving to this Court that it should issue a writ of prohibition, preventing the Circuit Court from enforcing its order denying Cincinnati's motion to dismiss Grae-Con Construction, Inc.'s ("Grae-Con's") Amended Complaint.

SUMMARY OF ARGUMENT

The burden on a petitioner seeking a writ of prohibition is extremely high. A writ of prohibition will not issue to prevent a simple abuse of discretion. It is only available when there is clear error by the Circuit Court, and it is an inappropriate remedy where jurisdiction turns on contested issues of fact.

Regarding personal jurisdiction, Grae-Con need only make a *prima facie* showing of personal jurisdiction, with the Court viewing the allegations in the light most favorable to Grae-Con, and drawing all inferences in favor of jurisdiction.

The case of State ex rel. Owners Ins. Co. v. McGraw, 233 W. Va. 776, 760 S.E. 2d 590 (2014), is factually very similar to this matter, and should be treated by this Court as authoritative. This Court denied the petition for a writ of prohibition on a personal jurisdiction issue concerning an Ohio insurance company, involving many of the same facts and allegations at issue here.

The long-arm statute is satisfied in this instance because Cincinnati not only insured risks in West Virginia (i.e., the Triadelphia Project for the Ohio County Development Authority ("OCDA")), but it caused tortious injury to Grae-Con by its acts either in West Virginia, or outside West Virginia with the effects being felt by Grae-Con here. Cincinnati obviously regularly does business in West Virginia, because it is both licensed to do business in West

Virginia and it is an admitted insurance carrier regulated by the West Virginia Insurance Commissioner. Both common law and statutory bad faith are torts in West Virginia, and torts occur where the harm is felt by the injured party. Grae-Con feels the harm of Cincinnati's tortious actions in West Virginia, where Grae-Con faces liability to the OCDA and needs both a legal defense and indemnification.

The due process standards applicable to specific jurisdiction are satisfied here. It is not unfair to expect Cincinnati to respond to the instant lawsuit; Cincinnati has ample contacts with West Virginia to satisfy due process principles.

The standard of review for this Court's review of a trial court's ruling on a motion to dismiss for improper venue is for abuse of discretion, but the writ of prohibition will not issue to address a mere abuse of discretion. Venue is appropriate in West Virginia because that is where Grae-Con faces liability to the OCDA, and hence, where Cincinnati has failed to provide Grae-Con with the defense and indemnification it needs. Again, the tort of bad faith occurs where the harm is felt, and Grae-Con feels the harm of Cincinnati's actions in West Virginia, where it faces liability to the OCDA.

The standard of review for this Court's review of a trial court's ruling on a motion to dismiss for *forum non conveniens* is also for abuse of discretion, but the writ of prohibition will not issue to address a mere abuse of discretion. Moreover, the relevant statute, W. Va. Code § 56-1-1a, entitles the Circuit Court to great deference. A detailed examination of the factors the Circuit Court was obligated to consider under W. Va. Code § 56-1-1a shows that the Circuit Court was justified in choosing not to dismiss the instant action. The alternate forum is uncertain to take the matter, Cincinnati does not face substantial injustice litigating here in West Virginia, the OCDA is not a party to the Ohio action, Grae-Con's cause of action accrued in West

Virginia, the balance of private and public factors favor litigating the dispute in West Virginia, and denying a dismissal or stay of this action will not cause unreasonable duplication or proliferation of litigation.

The standard of review for this Court's review of a trial court's ruling on a motion to dismiss for a prior pending action in another state is also for abuse of discretion, but the writ of prohibition will not issue to address a mere abuse of discretion. For the same reasons as already stated regarding the doctrine of *forum non conveniens*, the Circuit Court did not clearly err in its exercise of discretion in not dismissing this action.

Cincinnati faces an extremely high burden to convince this Court to issue a writ of prohibition. It has come nowhere close to meeting that burden. The writ should be denied.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this matter according to the criteria outlined in Rule 18(a) of the West Virginia Rules of Appellate Procedure, because the Petition is frivolous. If oral argument is to be conducted, it should be pursuant to Rule 19.

ARGUMENT

I. STANDARD OF REVIEW

"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).

The extraordinary remedy of a writ of prohibition is to be used sparingly. State ex rel. Suriano v. Gaughan, 198 W. Va. 339, 345, 480 S.E. 2d 548, 554 (1996). As this Court repeated in State ex rel. Almond v. Rudolph, 238 W. Va. 289, 295, 794 S.E. 2d 10, 16 (2016), citing the

relevant portion of Syllabus Point 1 of Hinkle v. Black, 164 W. Va. 112, 262 S.E. 2d 744 (1979), superseded by statute on other grounds as stated in State ex rel. Thornhill Group, Inc. v. King, 233 W. Va. 564, 759 S.E. 2d 795 (2014):

> [T]his 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.

In Syllabus Point 1 of In the Interest of Tiffany Marie S., 196 W. Va. 223, 470 S.E. 2d 177 (1996), this Court defined the term "clearly erroneous" as follows:

> 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 entirety.

"[R]elief in prohibition is inappropriate where jurisdiction turns on contested issues of fact." State ex rel. Ford Motor Co. v. McGraw, 237 W. Va. 573, 580, 788 S.E. 2d 319, 326 (2016). See also Health Management, Inc. v. Lindell, 207 W. Va. 68, 72, 528 S.E. 2d 762, 766 (1999); and Lewis v. Fisher, 114 W. Va. 151, 154, 171 S.E. 106, 107 (1933).

In Syllabus Point 4 of State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E. 2d 12 (1996), this Court stated:

> 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.

Finally, given Cincinnati's narrow focus on the specific bases cited by the Circuit Court for its denial of Cincinnati's motion to dismiss, it is helpful to remember the wisdom of Syllabus Point 3 of Barnett v. Wolfolk, 149 W. Va. 246, 140 S.E. 2d 466 (1965):

> This Court may, on appeal, affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason or theory assigned by the lower court as the basis for its judgment.

II. A WRIT OF PROHIBITION IS NOT WARRANTED REGARDING THE CIRCUIT COURT'S DENIAL OF CINCINNATI'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

An additional standard of review must be considered when examining the Circuit Court's exercise of personal jurisdiction over Cincinnati. In Syllabus Point 4 of State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson, 201 W. Va. 402, 497 S.E. 2d 755 (1997), this Court stated:

> When a defendant files a motion to dismiss for lack of personal jurisdiction under W. Va. R. Civ. P. 12(b)(2), the circuit court may rule on the motion upon the pleadings, affidavits and other documentary evidence or the court may permit discovery to aid in its decision. At this stage, the party asserting jurisdiction need only make a *prima facie* showing of personal jurisdiction in order to survive the motion to dismiss. In determining whether a party has made a *prima facie* showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction. If, however, the court conducts a pretrial evidentiary hearing on the motion, or if the personal jurisdiction issue is litigated at trial, the party asserting jurisdiction must prove jurisdiction by a preponderance of the evidence.

As shown by the Appendix, the Circuit Court did not conduct a pretrial evidentiary hearing on Cincinnati's motion to dismiss for lack of personal jurisdiction, and of course, the trial of the matter has not yet occurred. Therefore, the central question for this Court as to Cincinnati's personal jurisdiction argument is whether Grae-Con made a *prima facie* showing to the Circuit Court that the Circuit Court has personal jurisdiction over Cincinnati. In reviewing the Circuit

Court's finding that Grae-Con met that burden, this Court must view Grae-Con's allegations in the light most favorable to Grae-Con, and draw all inferences in favor of jurisdiction.

Moreover, since this review is taking place in the context of a petition by Cincinnati for an extraordinary writ, this Court must be mindful of the extraordinarily high burden Cincinnati must meet in order for such a writ to be issued (as cited in the Standard of Review section above), as well as the specific guidance that "relief in prohibition is inappropriate where jurisdiction turns on contested issues of fact." State ex rel. Ford Motor Co. v. McGraw, supra.

There is no better guidance for this Court than factually applicable precedent. In State ex rel. Owners Ins. Co. v. McGraw, 233 W. Va. 776, 760 S.E. 2d 590 (2014), this Court denied an Ohio-based insurance company's petition for a writ of prohibition under remarkably similar circumstances.

In Owners, an electrician, Mr. Messer, was injured in an accident while working as a lineman on a project. He filed a lawsuit in the Circuit Court of Wyoming County, West Virginia against (among others) Mr. Kerns, who served as a subcontractor for Morlan Enterprises, Inc. ("Morlan"), the contractor on the project, which was also a defendant in the matter. Mr. Kerns had purchased liability insurance from Owners Insurance Company ("Owners"), which was based in Ohio. Morlan alleged that Mr. Kerns had a contractual obligation to indemnify Morlan; moreover, Morlan alleged that it qualified as an additional insured under the liability insurance policy that Owners had issued to Mr. Kerns, and cited a certificate of liability insurance in support of its argument in that regard. Owners (which was eventually added as a party to the Wyoming County lawsuit) disputed Morlan's status as an additional insured. While Mr. Messer's lawsuit was eventually settled by Owners, the insurance coverage dispute between Owners and Morlan

remained unresolved, along with common law and statutory bad faith claims by Morlan against Owners.

Owners filed not one, but two separate declaratory judgment actions in Ohio state courts in order to address the insurance coverage dispute between itself and Morlan. The Ohio courts dismissed both actions, and upon Owners' appeal of one of the dismissals, it was affirmed. The Ohio courts addressing this issue all found that the insurance coverage dispute between Owners and Morlan should be resolved in West Virginia, not Ohio.

Unhappy with unfavorable rulings on choice of law and bad faith issues, Owners filed a petition for a writ of prohibition with this Court, seeking to prohibit the Circuit Court of Wyoming County from exercising personal jurisdiction over it. This Court denied the writ, finding that none of the Hoover v. Berger factors were in Owners' favor. This Court found that: Owners would have an opportunity to appeal the final decision of the Circuit Court; there were no interlocutory rulings by the Circuit Court that could not be repaired on appeal; the exercise of personal jurisdiction over Owners was not clearly erroneous; there was no indication of a blatant disregard for jurisprudence or procedure by the Circuit Court; and there were no new or important problems or issues of law of first impression to be resolved.

Of particular importance was this Court's analysis of the "clear error" arguments presented by Owners:

> Owners makes a number of arguments regarding the propriety of the lower court's rulings, including that the circuit court's decision was clearly wrong because West Virginia has no jurisdiction over an Ohio insurer, who issued a policy to cover an Ohio resident at the request and behest of an Ohio insurance agent. Owners further argues that Morlan is not a first-party claimant who is entitled to pursue a bad faith/UTPA argument against Owners. Morlan counters all of these arguments, relying upon the issuance of the certificate of insurance naming it an additional named insured to its West Virginia address [footnote omitted]. The issuance of the certificate of insurance naming a West Virginia company as an additional insured is also support for Morlan's argument that West Virginia law, not Ohio law, should

apply to this case. Finally, Morlan contends that the certificate of insurance establishes the basis of its bad faith/UTPA claim against Owners.

The circuit court's rulings were not clearly erroneous within our definition of the phrase. While there were arguments that supported both Owners' motion and Morlan's response, the circuit court's resolution of these issues does not leave this Court with a definite and firm conviction that the lower court made a mistake, such that this matter cannot proceed to a resolution before the circuit court and then be part of an appeal by one of the parties. These issues may be further developed in the circuit court and subsequently appealed.

Owners, id., 233 W. Va. at 781, 760 S.E. 2d at 595.

Knowing how this Court has ruled on similar "writ of prohibition" arguments made by an Ohio insurance company regarding personal jurisdiction, let us take a closer look at the law and relevant facts of this matter.

West Virginia Code § 56-3-33(a), also known as West Virginia's long-arm statute, governs actions by or against nonresident persons having certain contacts with West Virginia and provides, in pertinent part:

(a) **The engaging by a nonresident, or by his or her duly authorized agent, in any one or more of the acts specified in subdivisions (1) through (7)**, inclusive, of this subsection shall be considered equivalent to an appointment by a nonresident of the Secretary of State, or his or her successor in office, to be his or her true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him or her, in any circuit court in this state, **including an action or proceeding brought by a nonresident plaintiff or plaintiffs, for a cause of action arising from, or growing out of, such act or acts**, and the engaging in such act or acts shall be a signification of such nonresident's agreement that any such process against him or her, which is served in the manner hereinafter provided, shall be of the same legal force and validity as though such nonresident were personally served with a summons and complaint within this state:
(1) Transacting any business in this state;
(2) Contracting to supply services or things in this state;
(3) Causing tortious injury by an act or omission in this state;
(4) Causing tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might

> reasonably have expected the person to use, consume, or be affected by the goods in this state: *Provided,* That he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
> (6) Having an interest in, using, or possessing real property in this state; or
> (7) Contracting to insure any person, property, or risk located within this state at the time of contracting.

W. Va. Code § 56-3-33(a)(1)-(7) (emphasis added).

As the Circuit Court correctly acknowledged, Cincinnati endorsed and issued a Certificate of Liability Insurance, and the Certificate clearly identifies the OCDA project in Triadelphia, West Virginia as a risk insured under the Cincinnati policy issued to Mohawk Construction and Supply Co., Inc. ("Mohawk"). APX 000712. While Cincinnati takes issue with the timing of the issuance of the policy (June 8, 2010) versus the formation of the contract between Mohawk and Grae-Con (September 20, 2011), and argues that this means subsection (7) of the long-arm statute cannot be satisfied, this focus is myopic. The focus of the long-arm statute is on the conduct of the person or entity over which a court seeks to exercise jurisdiction. The misconduct by Cincinnati that is primarily at issue in the instant matter is its refusal, in bad faith, to treat Grae-Con as an additional insured under the insurance policy that Cincinnati issued to Mohawk. The Circuit Court acknowledged this in the remainder of its discussion of personal jurisdiction. APX 000712-713.

Grae-Con is subject to liability to the OCDA in an arbitration proceeding being conducted in West Virginia. As to that claim by the OCDA, Grae-Con needs the benefits that liability insurance provides: a legal defense to the arbitration proceeding in West Virginia, and indemnification against liability that Grae-Con faces in West Virginia. Grae-Con has asked Cincinnati for those benefits to be provided in West Virginia. Cincinnati has refused to provide those benefits where they are needed by Grae-Con: In West Virginia, where Grae-Con faces liability to the OCDA.

Since Cincinnati has refused to provide those benefits to Grae-Con in West Virginia, Grae-Con has sued Cincinnati here in West Virginia, including in its causes of action both common law and statutory bad faith claims. Under West Virginia law, both varieties of bad faith claims sound in tort. See Syllabus Point 4 of Noland v. Virginia Insurance Reciprocal, 224 W. Va. 372, 686 S.E. 2d 23 (2009) (common law bad faith) and Syllabus Point 1 of Wilt v. State Auto. Mut. Ins., 203 W. Va. 165, 506 S.E. 2d 608 (1998) (statutory bad faith).

Where does the tort of insurance bad faith occur? Cincinnati seems to think it can only occur at the insurance company's home office, where it makes decisions about claims. But under West Virginia law, the tort of bad faith occurs where the harm is felt. In Kenney v. Independent Order of Foresters, 744 F. 3d 901 (2014), the United States Court of Appeals for the Fourth Circuit, applying West Virginia substantive law, addressed a situation where an insured couple lived in Virginia at the time they purchased a life insurance policy, but by the time the husband had died, they had lived in West Virginia for a number of years. The wife, Ms. Kenney, sued the insurance company for bad faith in its handling of her insurance claim surrounding her husband's death. The District Court found that Virginia law applied to Ms. Kenney's bad faith claim because that was the state where the insurance policy had been issued. However, the Fourth Circuit reversed. It found that, under West Virginia law, insurance bad faith claims are tort claims, not contract claims. Id. at 907. It further found that West Virginia traditionally applies the doctrine of *lex loci delicti* to tort actions. Id. The Fourth Circuit went on to find:

> Under the *lex loci delicti* choice-of-law approach, courts apply the "law of the place of the wrong." Although conduct that causes harm can occur in one state and the resulting injury to a plaintiff can occur in another state, "the substantive rights between the parties are determined by the law of the place of the injury." *West Virginia ex rel. Chemtall Inc. v. Madden*, 216 W. Va. 443, 607 S.E. 2d 772, 779-80 (2004).

As a result of this analysis, the Fourth Circuit found that Ms. Kenney's insurance bad faith claims against her insurance company were governed by the law of West Virginia, because that is where she felt the harm of the insurance company's bad faith activities.

In like manner, Grae-Con feels the harm of Cincinnati's bad faith activities here in West Virginia, where Grae-Con faces substantial potential liability to OCDA in the arbitration proceeding. These allegations clearly fall within either section (3) or section (4) of the long-arm statute. Either Cincinnati has caused tortious injury by an act or omission in this state, or it has caused tortious injury in this state by an act or omission outside this state. If it is the former, subsection (3) is clearly satisfied. If it is the latter, subsection (4) is likewise clearly satisfied, because Grae-Con has demonstrated that Cincinnati is an active insurance company operating here in West Virginia. Cincinnati is recognized by the West Virginia Insurance Commissioner as an admitted insurance carrier in this state. It is therefore subject to regulation by the West Virginia Insurance Commissioner, and is bound to abide by the Commissioner's rulings. It is also licensed with the West Virginia Secretary of State to do business in West Virginia. Grae-Con has clearly made a *prima facie* showing that the courts of West Virginia may properly exercise personal jurisdiction over Cincinnati. Cincinnati's petition for an extraordinary writ should be denied.

Cincinnati spends a great deal of time in its Petitioner's Brief disputing specific personal jurisdiction. It is therefore necessary to take a deeper dive into those waters.

Building the foundation for jurisdictional due process analysis, in Pries v. Watt, 186 W. Va. 49, 410 S.E.2d 285 (1991), this Court cited with favor the following federal authorities:

> The United States Supreme Court has held that "[t]he Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of state courts to enter judgments affecting rights or interests of nonresident defendants.... [A] valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by the court having jurisdiction over the person of the defendant." *Kulko v. Superior Court,* 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56

L.Ed.2d 132, 140 (1978). The Court cited two prerequisites for personal jurisdiction: First, the defendant must be afforded reasonable and adequate notice of the suit, and second, the defendant must have certain minimum contacts with the forum state such that the maintenance of the suit would not offend traditional concepts of fair play and substantial justice. *See International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945). The Court in *Kulko* recognized that an essential element of the minimum contacts question is whether the defendant's activities are such that it is reasonable and fair to subject him to suit in the forum state, a determination that must be made on the particular facts of each case. The majority in *Kulko* also quoted with approval this line from *Hanson v. Denckla,* 357 U.S. 235, 253, 78 S.Ct. 1228, 1240, 2 L.Ed.2d 1283, 1298 (1958): " '[I]t is essential in each case that there be some act by which the defendant purposefully avails [him]self of the privilege of conducting activities within the forum State.' " 436 U.S. at 94, 98 S.Ct. at 1698, 56 L.Ed.2d at 142.

In *World–Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980), and, more recently, in *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), the Supreme Court had occasion to elaborate on some of the factors that would be used to determine whether the exercise of jurisdiction was reasonable in view of the defendant's minimal contacts. [internal footnote omitted]

> "A court must consider the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.' *World–Wide Volkswagen,* 444 U.S., at 292 [100 S.Ct. at 564, 62 L.Ed.2d at 498] (citations omitted)." 480 U.S. at 113, 107 S.Ct. at 1033, 94 L.Ed.2d at 105.

Pries, 186 W. Va. at 51, 410 S.E.2d at 287. This Court explained that it has "followed the substance of these principles in our jurisdiction without reviewing them in detail." Id. (citing Carr v. Carr, 180 W.Va. 12, 375 S.E.2d 190 (1988); Hinerman v. Levin, 172 W.Va. 777, 310 S.E.2d 843 (1983); S.R. v. City of Fairmont, 167 W.Va. 880, 280 S.E.2d 712 (1981); State ex rel. Coral Pools, Inc. v. Knapp, 147 W.Va. 704, 131 S.E.2d 81 (1963)).

In West Virginia, "'[t]he standard of jurisdictional due process is that a foreign corporation must have such minimum contacts with the state of the forum that the maintenance of an action in

the forum does not offend traditional notions of fair play and substantial justice.' Syllabus Point 1, Hodge v. Sands Manufacturing Company, 151 W. Va. 133, 150 S.E.2d 793 (1966)." Id. at 51-52, 287-88 (citing Syl., S.R. v. City of Fairmont, 167 W. Va. 880, 280 S.E.2d 712 (1981)).

Relying upon the foregoing, this Court explained in Pries that "a more detailed test is appropriate to determine whether a state court has personal jurisdiction" and held that:

> The Due Process Clause of the Fourteenth Amendment to the United States Constitution operates to limit jurisdiction of a state court to enter a judgment affecting the rights or interests of a nonresident defendant. This due process limitation requires a state court to have personal jurisdiction over the nonresident defendant. In order to obtain such personal jurisdiction, reasonable notice of the suit must be given the defendant. There also **must be a sufficient connection or minimum contacts between the defendant and the forum state so that it will be fair and just to require a defense to be mounted in the forum state.**
>
> To what extent the defendant has minimum contacts depends upon the facts of the individual case. **One essential inquiry is whether the defendant has purposefully acted to obtain benefits or privileges in the forum state.** In determining whether the exercise of personal jurisdiction is reasonable, a court should consider the **burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief.** Finally, consideration should be given to the **interstate judicial system's interest in obtaining the most efficient resolution of controversies and the shared interest of the several states in furthering fundamental substantive social policies.**

Id. at Syl. Pts. 1-3 and 52, 288 (emphasis added).[1]

[1] In Pries, a couple had been divorced in New Jersey after 36 years of marriage. Id. at 50, 286. Thereafter, the former husband moved to Putnam County, West Virginia and stopped making the alimony payments provided for in the New Jersey divorce decree. Id. The former husband filed a petition in the Circuit Court of Putnam County, West Virginia seeking modification of a New Jersey alimony award, and the former wife filed a writ of prohibition after the Putnam County Circuit Court denied her motion to dismiss for lack of personal jurisdiction, claiming that further proceedings against her in West Virginia violated due process. Id. at 51, 287. The Pries Court agreed, reasoning that the former wife's contacts with West Virginia were non-existent—"there is no evidence that the relator had any contact with West Virginia until this suit was filed." Id. at. 53, 289. The Court also implied what level of contact would be sufficient to satisfy due process, when it compared its holding (in Pries) to the outcome in Carr v. Carr, 180 W. Va. 12, 375 S.E.2d 190 (1988), stating that, there, "we found the defendant nonresident father subject to our jurisdiction because he had been personally served in Cabell County while visiting relatives. His ex-wife and child had resided in Cabell County for several years before filing suit to modify a foreign support decree." Id. at fn. 2.

This Court later provided additional guidance regarding the specific jurisdiction due process analysis, and characterized it as being "multi-pronged," in State ex rel. Ford Motor Co. v. McGraw, supra, 237 W. Va. at 589, 788 S.E.2d at 335:

> The **specific jurisdiction analysis** for determining whether a forum's exercise of jurisdiction over a nonresident defendant meets due process standards is multi-pronged. **The first prong requires a determination that the nonresident defendant has minimum contacts with the forum.** Establishing minimum contacts involves an examination of whether the 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. **To meet the second prong, it must be determined that the plaintiff's claims arise out of or relate to the defendant's contacts with the forum. Under the third prong, it must be constitutionally reasonable to assert the jurisdiction so as to comport with fair play and justice.** The reasonableness factors were identified in *Asahi Metal Industry Co. v. Superior Court of California,* 480 U.S. 102, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), and include considering "the burden on the defendant," "the interests of the forum State," "the plaintiff's interest in obtaining relief," "the interstate judicial system's interest in obtaining the most efficient resolution of controversies," and "the shared interest of the several States in furthering fundamental substantive social policies." *Id.* at 113, 107 S.Ct. at 1033, 94 L.Ed.2d 92 (internal quotations and citation omitted).

McGraw, 237 W. Va. at 589, 788 S.E.2d at 335 (emphasis added); see also Syl. Pts. 5-7, State ex rel. Third-Party Defendant Health Plans v. Nines, 244 W. Va. 184, 852 S.E.2d 251 (2020). As further discussed below, the three prongs are satisfied.

In this case, the record is replete with Cincinnati's contact with West Virginia—indeed, far greater contact with West Virginia than the minimal contact that satisfied jurisdiction over a foreign defendant in Carr v. Carr, supra. The essential inquiry of "whether the defendant has purposefully acted to obtain benefits or privileges in the forum state" is unquestionably satisfied. See Pries, at Syl. Pts. 1-3 and 52, 288. Cincinnati is in the business of insuring risk and adjusting claims all over the country, routinely including in West Virginia. It is permitted to do business in West Virginia by the West Virginia Insurance Commissioner (see APX 5-6) and is registered with

the West Virginia Secretary of State (see APX 598). It cannot be disputed that Cincinnati has purposefully availed itself of the privilege of conducting activities within West Virginia. Further, as Cincinnati is a regular participant for profit in our economy and stream of commerce, it would be disingenuous and patently unfair to simultaneously claim it is a disadvantaged stranger to our courts. Indeed, Cincinnati has petitioned those very courts for redress, presumably, when doing so suited Cincinnati's purposes. See Cincinnati Ins. Co. v. Mills, 208 W. Va. 723, 542 S.E.2d 886 (2000) (Cincinnati filed a declaratory judgment action against its insured in the Circuit Court of Kanawha County, West Virginia seeking a declaratory judgment that the policy excluded coverage).

What is more, Cincinnati has, on at least one other occasion, been called into a West Virginia court as a non-resident defendant under similar circumstances and, significantly, did not raise personal jurisdiction or due process challenges to the Complaint. See Third Party Complaint and Answer from G&G Builders, Inc. v. Lawson, et al., APX 647 and 682, respectively. In G&G Builders, Inc. v. Lawson, et al., pending in the Circuit Court of Cabell County, West Virginia and bearing Civil Action No. 14-C-250, Cincinnati insured a third-party defendant, Stone by Lynch, LLC, a North Carolina contractor that was contracted by a homeowner in West Virginia (the Lawsons) to perform work on their home in West Virginia. G&G Builders, Inc. ("G&G"), a West Virginia corporation, alleged that Stone by Lynch agreed to defend and indemnify G&G and to obtain a certificate of insurance naming G&G as an additional insured for the West Virginia project. They further alleged that Stone by Lynch obtained the required certificate of insurance that named G&G as an additional insured with respect to the general liability policy that Cincinnati had issued to Stone by Lynch and that, despite being placed on notice of the claims, Cincinnati failed and refused to afford a defense and indemnification to G&G. (APX 657-659)

Notably, under similar facts, Cincinnati did not seek dismissal of the Third-Party Complaint in G&G Builders based upon lack of personal jurisdiction or due process. (APX 688-689).

Thus, in both the instant matter and in the G&G Builders case, despite the fact that some or all of its insureds were not West Virginia residents, Cincinnati: (1) specifically insured risk on a West Virginia project, as evidenced by a certificate of insurance; (2) denied a defense and indemnity to its additional insured as listed on the certificate; (3) in a West Virginia lawsuit; and (4) was then sued in West Virginia pertaining to its denial. The fact that Cincinnati did not seek to dismiss the Third-Party Complaint against it in G&G Builders for lack of personal jurisdiction or due process (and, rather, filed an Answer to the Third-Party Complaint and participated in the litigation), but has done so here, is significantly inconsistent. Furthermore, Cincinnati's previous activity in our courts demonstrates that it is fair and just to require Cincinnati to mount a defense in a West Virginia court, particularly where it has wrongfully denied a defense to its additional insured in an underlying West Virginia legal proceeding, but it is providing a defense to its named insured in the same West Virginia legal proceeding.

As discussed above, Grae-Con's coverage and bad faith claims as set forth in the Amended Complaint stem directly from Cincinnati's conduct in West Virginia. Cincinnati insured Mohawk and Grae-Con specifically for the Project in West Virginia, as evidenced by the Certificate of Insurance[2] (APX 74). The Project resulted in an alleged loss in West Virginia, such that the OCDA

[2] "**A certificate of insurance is evidence of insurance coverage,** and is not a separate and distinct contract for insurance. However, because **a certificate of insurance is an insurance company's written representation that a policyholder has certain insurance coverage in effect at the time the certificate is issued,** the insurance company may be **estopped from later denying the existence of that coverage** when the policyholder or the recipient of a certificate has reasonably relied to their detriment upon a misrepresentation in the certificate." Syl. Pt. 9, Marlin v. Wetzel Cnty. Bd. of Educ., 212 W. Va. 215, 217, 569 S.E.2d 462, 464 (2002) (emphasis added). Cincinnati argues that its agent, rather than Cincinnati itself, produced the Certificate of Insurance. However, pursuant to Marlin, the

has brought claims in a West Virginia arbitration against Grae-Con arising from the Project. Grae-Con tendered a request to Cincinnati for defense and indemnification as to the claims asserted against Grae-Con arising from the Project. Cincinnati is defending its named insured, Mohawk, as it relates to the claims, but has refused a defense to its additional insured, Grae-Con, in a West Virginia arbitration. As a result, Grae-Con has filed its Amended Complaint raising coverage and bad faith claims directly related to Cincinnati's refusal to defend and indemnify Grae-Con for the exact risk it insured in West Virginia. Cincinnati continues to assert that Grae-Con's claims and alleged damages do not stem from any conduct by Cincinnati within the state of West Virginia. But this is nonsense. Grae-Con faces liability to the OCDA in a West Virginia arbitration. Grae-Con therefore needs a legal defense and indemnification in West Virginia. Cincinnati is refusing to provide Grae-Con those things that it needs regarding potential liability in West Virginia. As a liability insurance company, Cincinnati should understand that. But apparently, it does not.

It is constitutionally reasonable to assert jurisdiction over Cincinnati to comport with fair play and justice. As noted above, considerations for personal jurisdiction fairness and reasonableness "include, but [are] not limited to, considering the burden on the defendant, the interests of the state, the interest of the plaintiff in obtaining relief, the interstate judicial system's interest in obtaining efficient resolution of controversies, and the shared interests of states in furthering fundamental substantive social policies. The analysis is case specific, **and all factors need not be present in all cases**." Syl. Pt. 7, State ex rel. Third-Party Defendant Health Plans v. Nines, supra, (citing Syl. Pt. 10, McGraw, supra) (emphasis added).

Certificate of Insurance is Cincinnati's **written representation** of the insurance coverage reflected therein. Furthermore, Cincinnati itself, not its agent, issued the policy that afforded coverage for the West Virginia Project.

There is no significant burden on the defendant, Cincinnati, by maintaining this action in Ohio County, West Virginia, despite Cincinnati's claims to the contrary. Cincinnati has not identified or disclosed any witnesses that would be traveling from Butler County, Ohio to Ohio County, West Virginia, nor has it provided real details regarding any particular burdens that would, in fact, be experienced by those individuals in traveling 4-5 hours to Wheeling, West Virginia. Presumably, the Cincinnati claims professional who denied Grae-Con's tender of defense would be a witness, but Cincinnati has not demonstrated that this individual is even located in Butler County, Ohio. Moreover, the transportation of documents/evidence to Ohio County, West Virginia for trial likely would be no more inconvenient for Cincinnati than it would be to transport those same documents/evidence from its office (or attorney's office) to the courthouse in Butler County, Ohio, or anywhere else Cincinnati engages in insurance coverage and bad faith litigation.

West Virginia has a well-defined interest in resolving this claim as it involves a project located in West Virginia and impacts the OCDA, a West Virginia Public Corporation. The Project was undertaken in furtherance of the OCDA's mission—to promote, develop, and advance the business prosperity, economic stability, and infrastructure of Ohio County, West Virginia. (APX 6-7). The Certificate of Insurance evidences that Cincinnati specifically insured risk for a construction project located in Ohio County, West Virginia. APX 74. Further, Grae-Con has alleged specific violations of the West Virginia Uniform Trade Practices Act, W. Va. Code 33-11-1, et seq. and common law bad faith by Cincinnati in the handling and denial of Grae-Con's request for defense and indemnification—causes of action which this state has a keen interest in addressing. West Virginia also has an interest in resolving disputes involving insurance coverage for alleged damages arising from construction of a building in West Virginia for a West Virginia Public Corporation. Additionally, for efficiency reasons alone, Grae-Con has an interest in

obtaining relief related to Cincinnati's denial of defense and indemnity in the same state as the Underlying Arbitration, which is pending in Ohio County, West Virginia.

The interstate judicial system's interest in obtaining efficient resolution of controversies also weighs in favor of litigating this coverage action in West Virginia, particularly where Grae-Con's Amended Complaint pending in the Circuit Court of Ohio County is more inclusive of all claims and all interested parties, and where the OCDA cannot be made a party to the Butler County, Ohio action.

As demonstrated herein and in Grae-Con's Response, it is constitutionally reasonable to assert jurisdiction over Cincinnati so as to comport with fair play and justice.

III. A WRIT OF PROHIBITION IS NOT WARRANTED REGARDING THE CIRCUIT COURT'S DENIAL OF CINCINNATI'S MOTION TO DISMISS FOR IMPROPER VENUE

While the Standard of Review (cited above) for extraordinary writs places an extremely heavy burden of proof on Cincinnati, this Court has recognized that issues of venue are appropriately addressed in prohibition. See State ex rel. Thornhill Group, Inc. v. King, supra, 233 W. Va. at 567, 759 S.E. 2d at 798. However, this should be of small comfort to Cincinnati, because "[t]his Court's review of a trial court's decision on a motion to dismiss for improper venue is for abuse of discretion." Syllabus Point 1, United Bank, Inc. v. Blosser, 218 W. Va. 378, 624 S.E. 2d 815 (2005). And, as cited above in the Standard of Review, "[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, supra.

Cincinnati's arguments regarding venue, as with its arguments regarding personal jurisdiction, suffer from the mistaken view that the bulk of its relevant activities occurred at the

time it issued the insurance policy in question. But that is simply not true. As discussed above, the misconduct by Cincinnati that is primarily at issue in the instant matter is its refusal, in bad faith, to treat Grae-Con as an additional insured under the insurance policy that Cincinnati issued to Mohawk. Grae-Con is subject to liability to the OCDA in an arbitration proceeding being conducted in West Virginia. As to that claim by the OCDA, Grae-Con needs the benefits that liability insurance provides: a legal defense to the arbitration proceeding in West Virginia, and indemnification against liability that Grae-Con faces in West Virginia. Grae-Con has asked Cincinnati for those benefits to be provided in West Virginia. Cincinnati has refused to provide those benefits where they are needed by Grae-Con: In West Virginia, where Grae-Con faces liability to the OCDA.

Since Cincinnati has refused to provide those benefits to Grae-Con in West Virginia, Grae-Con has sued Cincinnati here in West Virginia, including in its causes of action both common law and statutory bad faith claims. Under West Virginia law, both varieties of bad faith claims sound in tort. See Syllabus Point 4 of Noland v. Virginia Insurance Reciprocal, supra (common law bad faith), and Syllabus Point 1 of Wilt v. State Auto. Mut. Ins., supra (statutory bad faith). Under West Virginia law, the tort of bad faith occurs where the harm is felt. See Kenney v. Independent Order of Foresters, supra, and West Virginia ex rel. Chemtall Inc. v. Madden, supra.

Cincinnati moved to dismiss Grae-Con's lawsuit based on improper venue. According to Syllabus Point 1 of United Bank, Inc. v. Blosser, supra, such a motion is reviewed for an abuse of discretion. But "[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court." Syl. pt. 2, State ex rel. Peacher v. Sencindiver, supra. In order to issue the writ, this Court must find that the Circuit Court's decision regarding venue constituted clear error. But that

cannot be the case on these facts. As shown in Syllabus Point 1 of In the Interest of Tiffany Marie S., supra, "clearly erroneous" means the following:

> 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 entirety.

The Circuit Court's focus on Cincinnati's bad faith denial of liability insurance benefits to Grae-Con here in West Virginia, where Grae-Con faces the very liability that should be covered under the Cincinnati policy, was appropriate and just. It is certainly not "clearly erroneous." Cincinnati's petition for an extraordinary writ should be denied.

IV. A WRIT OF PROHIBITION IS NOT WARRANTED REGARDING THE CIRCUIT COURT'S DENIAL OF CINCINNATI'S MOTION TO DISMISS UNDER THE DOCTRINE OF *FORUM NON CONVENIENS*

"A circuit court's decision to invoke the doctrine of forum non conveniens will not be reversed unless it is found that the circuit court abused its discretion." Syllabus Point 5, State ex rel. Almond v. Rudolph, supra, citing Syllabus Point 3, Cannelton Indust. v. Aetna Cas. & Sur. Co. of America, 194 W. Va. 186, 187, 460 S.E. 2d 1, 2 (1994). And, as noted above, "[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, supra. Once again, Cincinnati has an incredibly high burden. Cincinnati only has hope of convincing this Court to issue an extraordinary writ if proves that the Circuit Court's decision regarding the doctrine of *forum non conveniens* was clear error. And as shown in Syllabus Point 1 of In the Interest of Tiffany Marie S., supra, "clearly erroneous" means the following:

> 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 entirety.

Moreover, the statute that addresses the doctrine of *forum non conveniens* in West Virginia, W. Va. Code § 56-1-1a, explicitly states that "the plaintiff's choice of forum is ***entitled to great deference.***" W. Va. Code § 56-1-1a. (emphasis added).

Cincinnati's arguments regarding the various factors outlined in W. Va. Code § 56-1-1a are without merit. Grae-Con will take each in turn:

Regarding the question of whether an alternate forum exists, Cincinnati seems to assume that its competing declaratory judgment action that it filed in its home county of Butler County, Ohio (filed the same day as the instant matter, only approximately six hours earlier) will survive the motion to dismiss that Grae-Con has filed in that court. The Court of Common Pleas of Butler County, Ohio is still considering Grae-Con's motion to dismiss. That court may dismiss for lack of jurisdiction. Even if it finds that it properly has jurisdiction over the dispute, the fact that the instant matter exists presents three options to the Ohio court, according to Ohio law binding on that court:

1. Grant a stay in the Ohio action, pending the resolution of the action pending in West Virginia;

2. Move forward with the action in Ohio; or

3. Dismiss the Ohio action under the doctrine of *forum non conveniens*.

See In re Estate of Rush, 12th Dist. Warren No. CA2013-10-103, 2014-Ohio-3293, ¶ 34; Calvary Industries, Inc. v. Coral Chemical Company, 12th Dist. Butler No. CA2016-12-233, 2017-Ohio-7279, ¶ 17; Calvary Industries, Inc. v. Coral Chemical Company, 12th Dist. Butler No.

CA2018-07-134, 2019-Ohio-1288, ¶ 19; and Walp v. Walp, 3rd Dist. Auglaize No. 2-05-10, 2005-Ohio-4181, ¶¶ 8-11.

As the Circuit Court correctly found, there might not be an alternative forum, because the Court of Common Pleas of Butler County, Ohio may very well dismiss that action, in favor of the instant matter moving forward with the insurance coverage dispute. That was certainly the decision made by the Ohio courts that dealt with the companion matters at issue in State ex rel. Owners Ins. Co. v. McGraw, supra.

Regarding the question of whether maintenance of the instant action will cause a substantial injustice to Cincinnati, the Circuit Court correctly found that Cincinnati has failed to prove that litigating the instant dispute here in West Virginia will cause it to suffer substantial injustice. Cincinnati accuses the Circuit Court of focusing too much on the underlying arbitration when it ought to have focused on the insurance coverage dispute. But such a shift in focus does Cincinnati no favors. Cincinnati is both licensed to do business in West Virginia and an admitted insurance carrier, subject to regulation by the West Virginia Insurance Commissioner. Moreover, its headquarters is a 4-5 hour drive from Wheeling, West Virginia, where the Circuit Court of Ohio County is located. The insurance policy at issue here was issued by Cincinnati to Mohawk at its headquarters in McMurray, Pennsylvania, approximately 44.1 miles from Wheeling. In fact, Wheeling is geographically closer to Cincinnati's headquarters than where its named insured is located. The idea that having to litigate an insurance coverage and bad faith case in Wheeling, West Virginia constitutes a "substantial injustice" to Cincinnati is a notion with no valid basis.

Regarding the question of whether the alternate forum can exercise jurisdiction over all the defendants properly joined to Grae-Con's lawsuit here in West Virginia, the simple fact is that, in the instant action, Grae-Con chose to include in its action both the named insured (Mohawk) and

the third party claimant (OCDA). Both entities have standing to litigate the insurance coverage questions at issue in both the West Virginia and the Ohio lawsuits. However, in the Ohio lawsuit, Cincinnati chose to only sue Grae-Con and Mohawk. There are serious questions as to whether the Ohio court could ever property exercise jurisdiction over either the OCDA, the third party claimant. Why? Because it does not do any business anywhere near the Court of Common Pleas of Butler County, Ohio. In contrast, the instant matter already has jurisdiction over the OCDA. All parties should want the OCDA, the third party claimant, to be bound by the outcome of this matter, because if it is not so bound, it will have the right to file its own action to determine whether Cincinnati must provide liability insurance coverage to Grae-Con. See Syllabus Point 3, Christian v. Sizemore, 181 W. Va. 628, 383 S.E. 2d 810 (1989).

Regarding the question of where Grae-Con's cause of action accrued, Cincinnati continues to assert that the only relevant activity by Cincinnati was the issuance of the insurance policy to Mohawk in the first place. But that is simply not true. To Grae-Con, the most relevant activity by Cincinnati has been Cincinnati's refusal to provide liability insurance benefits to Grae-Con here in West Virginia, where Grae-Con faces liability to the OCDA, where Grae-Con needs a legal defense to the OCDA's arbitration proceeding, and where Grae-Con may someday need to be indemnified against liability to the ODCA.

Regarding the question of the balance of private interests and public interest, Cincinnati's focus is entirely mistaken. The insurance coverage and bad faith dispute between Cincinnati and Grae-Con concerns a construction project in Triadelphia, West Virginia, which is in Ohio County, West Virginia. Grae-Con faces liability to the OCDA (a reminder: the acronym stands for the "Ohio County Development Authority") regarding the construction project in Triadelphia, West Virginia. There is no public interest in this dispute in Butler County, Ohio. There is ample public

interest in this dispute in Ohio County, West Virginia. Regarding the private interests, it should be remembered that the named insured under the insurance policy in question, Mohawk, is located in McMurray, Pennsylvania. Grae-Con is located in Steubenville, Ohio. Both locations are within an hours' drive of Wheeling, West Virginia, where the Circuit Court of Ohio County, West Virginia is located. But both companies' headquarters are approximately 4-5 hours away from Hamilton, Ohio, where the Ohio court in question (the alternative forum) is located. Since the reasonable expectations of the named insured (Mohawk) will likely be at issue in this matter, the witnesses in this matter are likely going to be witnesses from Grae-Con, Mohawk, and Cincinnati. Which is more reasonable: Expecting Cincinnati's witnesses to drive 4-5 hours to Wheeling West Virginia, or expecting both Grae-Con's witnesses and Mohawk's witnesses to drive 4-5 hours to Hamilton, Ohio? The balance of public and private interests make it clear that this dispute is better heard in Wheeling, West Virginia.

Regarding the question of whether not granting a stay or dismissal of the instant action would result in unreasonable duplication or proliferation of litigation, Cincinnati's argument is, to be kind, fanciful. Cincinnati argues that allowing the instant lawsuit to proceed will encourage and embolden litigants to sue insurance companies here in West Virginia, thereby opening the floodgates. This is utter nonsense. The two competing fora at issue here can be fairly described in the following way: Wheeling, West Virginia (location of the Circuit Court of Ohio County) is where the underlying facts of the insurance coverage and bad faith action are centered, and it is where the insured in question, Grae-Con, faces potential liability and needs a legal defense. In contrast, Hamilton, Ohio (location of the Court of Common Pleas of Butler County, Ohio) has the sole relevant characteristic of being the county seat of Cincinnati's home county. The contrast—

where everything relevant really happened, versus where the insurance company likes to file lawsuits—is stark.

Regarding the question of whether the alternate forum provides a remedy, the simple answer is: It might not. As stated above, the Court of Common Pleas of Butler County, Ohio is still considering Grae-Con's motion to dismiss. That court may dismiss for lack of jurisdiction. Even if it finds that it properly has jurisdiction over the dispute, the fact that the instant matter exists presents three options to the Ohio court. That court might stay its case, pending the outcome of the instant matter. It might move forward, regardless of the existence of the instant matter. Or, it might be dismissed, either because of a lack of jurisdiction or in order to defer to the instant matter under the doctrine of *forum non conveniens*. That decision has not been made yet by the Ohio court.

When this Court considers how the Circuit Court addressed all of the above factors, it cannot logically draw the conclusion that the Circuit Court committed clear error. The Circuit Court enjoys great deference in its consideration of these various factors. Its analysis of the above factors was appropriate and just. It was certainly not "clearly erroneous." Cincinnati's petition for an extraordinary writ should be denied.

V. A WRIT OF PROHIBITION IS NOT WARRANTED REGARDING THE CIRCUIT COURT'S DENIAL OF CINCINNATI'S MOTION TO DISMISS DUE TO THE PENDENCY OF CINCINNATI'S LAWSUIT FILED IN BUTLER COUNTY, OHIO

In order to determine the true standard of review regarding the Circuit Court's decision on Cincinnati's theory regarding the pendency of a prior action (i.e., the Butler County, Ohio lawsuit filed by Cincinnati less than six hours prior to the filing of instant lawsuit), it is necessary to look a bit deeper than the case law cited by Cincinnati.

Cincinnati cites Berger v. Berger, 177 W. Va. 58, 350 S.E. 2d 685 (1986), and Morris v. Estate of Morris, 2016 WL 6678988 (W. Va. Nov. 14, 2016), for the proposition that, where there is litigation on the same subject between the same parties pending in another state, the West Virginia court should not consider the matter until the proceedings in the other state are resolved. However, Cincinnati fails to mention that both cases rely upon a specific West Virginia statute as their legal basis for that principle of law: W. Va. Code § 56-6-10, which states:

> Whenever it shall be made to appear to any court, or to the judge thereof in vacation, that a stay of proceedings in a case therein pending should be had until the decision of some other action, suit or proceeding in the same or another court, such court or judge shall make an order staying proceedings therein, upon such terms as may be prescribed in the order. But no application for such stay shall be entertained in vacation until reasonable notice thereof has been served upon the opposite party.

According to Syllabus Point 2 of State ex rel. Piper v. Sanders, 228 W. Va. 792, 724 S.E. 2d 763 (2012), which in turn cites Syllabus Point 4 of Dunfee v. Childs, 59 W. Va. 225, 53 S.E. 209 (1906):

> A stay of proceedings in a suit provided by [W. Va. Code § 56-6-10 (1923)], rests in the sound discretion of the court. To warrant the stay it must be essential to justice, and it must be that the judgment of decree by the other court will have legal operation and effect in the suit in which the stay is asked, and settle the matter of controversy in it.

So, as with many of the issues addressed above, the Circuit Court enjoys discretion in whether to dismiss (or stay) an action pursuant to the notion that there is a prior pending action in another state. "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, supra. Yet again, Cincinnati has an incredibly high burden. Cincinnati only has hope of convincing this Court to issue an extraordinary writ if proves that the Circuit Court's decision regarding the existence of a prior pending lawsuit in Ohio was clear error. And as shown in

Syllabus Point 1 of In the Interest of Tiffany Marie S., supra, "clearly erroneous" means the following:

> 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 entirety.

There are ample reasons for this Court to find that the Circuit Court did not clearly err in this regard. The Ohio action does not include the OCDA as a party, but the instant matter does. The Ohio action is currently just a declaratory judgment action, whereas the instant matter also addresses Grae-Con's common law and statutory bad faith claims against Cincinnati. There is no guarantee that the Ohio action will survive. As stated above, Grae-Con's motion to dismiss the Ohio action is currently pending. The Ohio court could choose to dismiss that action on either jurisdictional or *forum non conveniens* grounds. Or, it could choose to stay that matter in deference to the instant matter. And it should always be remembered that the Ohio action is not years, months, weeks, or even days older than the instant matter. It is less than six hours older than the instant matter. Against the backdrop of uncertainty about the Ohio action, and the limitations of the scope of that action (both in terms of causes of action and bound parties), it was entirely reasonable for the Circuit Court to refrain from issuing an order dismissing the instant matter due to the pendency of a prior action.

When this Court considers how the Circuit Court ruled on this issue, it cannot logically draw the conclusion that the Circuit Court committed clear error. Cincinnati's petition for an extraordinary writ should be denied.

CONCLUSION

For the reasons set forth above, Grae-Con asks this Court to deny the writ of prohibition sought by Cincinnati.

Respectfully submitted,

GRAE-CON CONSTRUCTION, INC.

BY: SPILMAN THOMAS & BATTLE, PLLC

/s/ Don C.A. Parker
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 23-67

STATE OF WEST VIRGINIA ex rel.
THE CINCINNATI INSURANCE COMPANY,
Defendant Below/Petitioner,

v.

THE HONORABLE JASON A. CUOMO, JUDGE OF THE CIRCUIT COURT OF OHIO COUNTY,
Respondent,

and

GRAE-CON CONSTRUCTION, INC.,
Plaintiff below/Respondent.

(On Original Jurisdiction re: Civil Action No. CC-35-2022-C-166, Circuit Court of Ohio County)

CERTIFICATE OF SERVICE

I, Don C.A. Parker, hereby certify that I served true and correct copies of the foregoing **"RESPONDENT'S BRIEF OF GRAE-CON CONSTRUCTION, INC."** upon counsel of record through the Supreme Court's E-Filing system, and also by placing true copies thereof in envelopes deposited in the regular course of the United States Mail, with postage prepaid, on this 6th day of March, 2023, addressed as follows:

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Respondent

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