

**IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

**MAPLE LAKE CLUB, INC.,
a West Virginia corporation,**

Plaintiff,

vs.

**Civil Action No.: 23-C-44
Presiding: Judge Nines
Resolution: Judge Hammer**

**BENEDUM AIRPORT AUTHORITY,
a West Virginia corporation,
WOLFE'S EXCAVATING, LLC,
a West Virginia corporation, and
THE THRASHER GROUP, INC.,
a West Virginia corporation,**

Defendants.

**ORDER GRANTING WESTFIELD NATIONAL INSURANCE COMPANY'S
MOTION TO INTERVENE**

On this 3rd day of ~~February~~ ^{March} 2024, this matter came before the Court upon a Motion to Intervene by Westfield National Insurance Company. The Defendant, Wolfe's Excavating, LLC, by counsel Hunter B. Mullens, Esq. and Intervenor, Westfield National Insurance Company, by counsel Brent K. Kesner, Esq., have fully briefed and argued the issues. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

FINDINGS OF FACT

1. This case arises from an airport construction project known as "Move the Mountain" which involved moving approximately 3 million cubic feet of earth to produce flat land for a new terminal and facilities for the North Central West Virginia Airport operated by Defendant Benedum Airport Authority (hereinafter "Benedum"). As part of the project,

Benedum entered into a contract with Defendant Wolfe's Excavating, LLC (hereinafter "Defendant" or "Wolfe") for completion of certain excavation work on the project. The contract also included agreements whereby Wolfe agreed to indemnify Benedum and obtain certain insurance. *See* Int. Mem., p. 2-3. Wolfe was insured by Intervenor Westfield. *Id.* at 9.

2. On or about November 13, 2023, Intervenor Westfield National Insurance Company (hereinafter "Intervenor" or "Westfield") filed the instant Westfield's Motion to Intervene, urging the Court to permit it to intervene as a party defendant in this civil action and permit it to file a complaint for declaratory relief. *See* Int's Mem., p. 32.
3. A briefing schedule was entered. No party except Defendant Wolfe's Excavating filed a Response.
4. On or about February 9, 2024, Defendant Wolfe's Excavating filed its Response to Westfield's Motion to Intervene, stating that it does not object to Westfield's motion to intervene, but requests this Court limit the participation of Westfield so the issue of insurance is not unfairly injected into any trial or hearing in a way that would cause prejudice to Wolfe. *See* Def's Resp., p. 1-2.
5. On or about February 20, 2024, Intervenor filed its Reply to its Motion to Intervene, agreeing that insurance should not be brought before the jury, and contending that it would not be involved or a party participant at trial conducting opening statements or cross-examining witnesses. *See* Reply, p. 2. Instead, it argued it seeks to intervene so that it can "participate in discovery in the present case by monitoring written discovery and depositions, and potentially (although unlikely) engaging in written discovery or deposition related to the insurance coverage issues, if necessary". *Id.*

6. The Court now finds the issue ripe for adjudication.

CONCLUSIONS OF LAW

The Court will analyze the instant Motion to Intervene pursuant to Rule 24(a) and Rule 24(b) of the West Virginia Rules of Civil Procedure. Motions to intervene are governed by Rule 24 of the West Virginia Rules of Civil Procedure. Rule 24 provides, in pertinent part:

- (a) Intervention of Right.** Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this State confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.
- (b) Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of this State confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or State governmental officer or agency or upon any regulation, order, requirement, or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

W. Va. R. Civ. P. 24.

I. Rule 24(a) Analysis

Regarding the interventions of right under Rule 24(a), the West Virginia Supreme Court of Appeals has enumerated four requirements: (1) the application must be timely; (2) the applicant must claim an interest relating to the property or transaction which is the subject of the action; (3) disposition of the action may, as a practical matter, impair or impede the applicant's

ability to protect that interest; and (4) the applicant must show that the interest will not be adequately represented by existing parties. Rules Civ. Proc., Rule 24(a)(2). *Syl. Pt. 5, State ex rel. Ball v. Cummings*, 208 W. Va. 393, 540 S.E.2d 917 (1999). Given that the proposed intervention is not objected to, the Court will briefly address the factors.

A. Timeliness

First, the Court addresses the timeliness requirement enumerated by West Virginia Supreme Court of Appeals in *Cummings*. While Rule 24 of the West Virginia Rules of Civil Procedure provides for the intervention of parties upon a timely application, the timeliness of any intervention is a matter of discretion with the trial court. *Syl. Pt. 10, Pioneer Co. v. Hutchinson*, 159 W.Va. 276, 220 S.E.2d 894 (1975), *overruled on other grounds, State ex rel. E.D.S. Fed. Corp. v. Ginsberg*, 163 W.Va. 647, 259 S.E.2d 618 (1979). The West Virginia Supreme Court of Appeals has directed that trial “courts must approach the issue of timeliness with flexibility and a view toward considering all the circumstances”. *SWN Prod. Co., LLC v. Conley*, 243 W. Va. 696, 704, 850 S.E.2d 695, 703 (2020). Further, the Supreme Court of Appeals cautioned circuit courts not to look solely to the age of the case in addressing the question of timeliness, and instead to consider the status of the proceedings and the circumstances of the parties. *Id.*

Here, the Court notes that in the instant matter, Intervenor filed the instant motion as soon as the case was referred to the Business Court Division and assigned to the undersigned and attended the case management conference and alerted the Court that this issue would be raised. Further, after the referral of this civil action to the Business Court Division, several related cases were referred into the Business Court Division, and scheduling was not contemplated to occur until after all the related cases were referred into the Division. No other party has raised

objections on the issue of timeliness. The Court finds this request timely and weighs this factor in favor of Intervenor.

B. Interest

Next, the Court addresses the requirement that the intervenor have an interest in the property at issue. *See* Rules Civ.Proc., Rule 24(a)(2); *Cummings*, 208 W. Va. 393, 540 S.E.2d 917. To warrant intervention of right, an applicant's interest in the property or transaction which is the subject of the action must be direct and substantial or legally protectable. *Id.* To justify intervention of right, the interest claimed by the proposed intervenor must be direct and substantial; for these purposes, a "direct interest" is one of such immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment to be rendered between the original parties, and a "substantial interest" is one that is capable of definition, protectable under some law, and specific to the intervenor. *Id.* As one commentator cited and relied upon by the West Virginia Supreme Court of Appeals has stated: "[I]t has been declared that the interest in the subject matter of the litigation must be a substantial interest, a legal interest, or an interest known and protected by the law. 'Interest' means a concern which is more than mere curiosity, or academic or sentimental desire. One interested in an action is one who is interested in the outcome or result thereof because he or she has a legal right which will be directly affected thereby or a legal liability which will be directly enlarged or diminished by the judgment or decree therein." 59 Am.Jur.2d Parties § 134, p. 591 (1987) (footnotes omitted). *See also* Eunice A. Eichelberger, *What Is "Interest" Relating To Property Or Transaction Which Is Subject Of Action Sufficient To Satisfy That Requirement For Intervention As Matter Of Right Under Rule 24(a) (2) Of Federal Rules Of Civil Procedure*, 73 A.L.R. Fed. 448 (1985); *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir.1994); *U.S. v. W.R. Grace & Co.-Conn.*, 185 F.R.D. 184

(D.N.J.1999); and *U.S. v. ABC Industries*, 153 F.R.D. 603 (W.D.Mich.1993). *Cummings*, at 399–400, and 923–24.

Here, Intervenor is the insurer of Defendant, and wishes to intervene in this action for the “purpose of confirming its duties and responsibilities, if any, to Wolfe and [Benedum] and, further, to determine the limits of insurance, if any, that may be available to [Benedum] under the Westfield Policy in connection with the Maple Lake claims and other claims arising from the ‘Move the Mountain’ Project.” *See* Int.’s Mem., p. 31. Further, Intervenor seeks to file a complaint for declaratory judgment to confirm Westfield’s duties and obligations under the Policy. *Id.*

The Court finds that here, Intervenor, as insurer, possesses the type of substantial interest in the property or transaction which is the subject of this action. *See Cummings*, 208 W. Va. 393, 540 S.E.2d 917. Under Rule 24, a “direct interest” relating to property or transaction which is subject of the action, as required for intervention of right, is of such immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment to be rendered between the original parties. *See SWN Prod. Co., LLC v. Conley*, 243 W. Va. 696, 850 S.E.2d 695 (2020). Westfield, as insurer, will be affected by the outcome of this case, and that outcome would be of such immediate character that Westfield would either gain or lose by the direct legal operation and effect of the judgment between the current parties. The Court notes no party has raised an objection, claiming Westfield does not possess the requisite interest.

Accordingly, the Court concludes Westfield possesses the substantial and direct interest contemplated by the Rules of Civil Procedure in governing intervention by right and weighs this factor in favor of Intervenor.

C. Ability to Protect Interest

Third, the Court addresses the requirement that absent intervening, the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest. Rules Civ. Proc., Rule 24(a)(2); *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 540 S.E.2d 917 (1999). In determining whether a proposed intervenor of right is so situated that the disposition of the action may impair or impede his or her ability to protect his interest, courts must first determine whether the proposed intervenor may be practically disadvantaged by the disposition of the action; courts then must weigh the degree of practical disadvantage against the interests of the plaintiff and defendant in conducting and concluding their action without undue complication and delay, and the general interest of the public in the efficient resolution of legal actions. *Id.* The Court in *Cummings* considered and cited the opinion of legal commentators regarding the ability of a proposed intervenor's ability to protect his or her interest, including one commentator which said that "[t]he issue of practical impairment is necessarily one of degree and requires a consideration of the competing interests of the plaintiff and defendant in conducting and concluding their lawsuit without undue complication, and of the public in the speedy and economical resolution of legal controversies." 59 Am.Jur.2d Parties § 138, p. 603 (footnote omitted). *cited by Cummings*, at 401, 925.

The Court is tasked with considering the issue of practical impairment and the interests of the plaintiff and defendant in conducting and concluding their lawsuit without undue complication, and of the public in the speedy and economical resolution of legal controversies." 59 Am.Jur.2d Parties § 138, p. 603 (footnote omitted). *cited by Cummings*, at 401, 925. This is especially emphasized in Business Court Division cases, and the undersigned values judicial economy in the conducting and resolution of all matters related to the Maple Lake civil actions.

This also is reflected by counsels' actions in referring the related actions to the Business Court Division, and consolidating at least some of the actions for discovery purposes.

The Court recognizes that without the presence of Westfield, it may, in the future, have coverage issues unresolved if it does not get the opportunity to participate in this civil action. The Court also considers that allowing Westfield to intervene would not cause undue complication or interfere with the speedy and efficient resolution of this controversy, and no party objects to Westfield's participation. This proposed intervention would in no way impede the orderly progression of this litigation. Other parties will not be prejudiced by the addition of Westfield as a party counterclaim defendant at this stage, and will have ample opportunity to meet the issues.

For these reasons, the Court finds the protection of interest requirement for intervention of right has been met.

D. Adequate Representation

Finally, the Court addresses the requirement that the applicant must show that the interest will not be adequately represented by existing parties. Rules Civ.Proc., Rule 24(a)(2); *State ex rel. Ball v. Cummings*, 208 W. Va. 393, 540 S.E.2d 917 (1999). If the proposed intervenor's interest is not represented by the existing party, or the existing party's interests are adverse to those of the proposed intervenor, intervention should be granted, provided that all other requirements are satisfied. *Id.* It is also to be remembered that a proposed intervenor need only show that his claimed interest *may* not be adequately represented; no showing of actual inadequacy is required. See West Virginia Rule of Civil Procedure 24(a)(2) and 59 Am.Jur.2d Parties § 140. *cited by Id.* at 403, 927.

The West Virginia Supreme Court of Appeals has held it is sufficient to recognize that generally courts compare the interests asserted by the proposed intervenor with the interests of the existing party. *See* 59 Am.Jur.2d Parties § 141. *Id.* If the interests of the proposed intervenor and the existing party are similar, “a discriminating judgment is required on the circumstances of the particular case, but [the proposed intervenor] ordinarily should be allowed to intervene unless it is clear that the [existing] party will provide adequate representation for the absentee.” 7C Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1909, p. 319 (footnote omitted). *See also* 26 Fed.Proc. L.Ed. Parties § 59:303. *Id.*

Here, no other party can adequately protect Westfield’s unique interests with respect to coverage issues under the relevant policy. Westfield’s interests are adverse to both the claimants and Benedum and Wolfe, and neither can/will advance Westfield’s position. Accordingly, Westfield’s interests are not adequately represented by any of the existing parties. *See* Int.’s Mem., p. 32. The Court weighs this factor in favor of Intervenor.

Accordingly, the Court finds all of the requirements of Rule 24(a) regarding intervention of right have been met and it is appropriate for Intervenor to be added as a party in this civil action via intervention by right.

II. Rule 24(b) Analysis

Because the Court finds Intervenor has met the requirements of Rule 24(a) for Intervention of Right, and because no party objects to the proposed intervention, this Court declines to analyze the elements of Rule 24(b)’s permissive intervention.

III. Scope of Intervenor’s Participation

The Court addresses the issue raised in Wolfe's Response regarding the scope of Westfield's involvement in this civil action. Wolfe's stated that it does not object to Westfield's motion to intervene, but requested this Court limit the participation of Westfield so the issue of insurance is not unfairly injected into any trial or hearing in a way that would cause prejudice to Wolfe. *See* Def's Resp., p. 1-2. In its Reply, Westfields urged that this "concern is unfounded". *See* Reply, p. 2. Westfield agrees that the jury should not be informed about existence of insurance. *Id.* Westfield contends that it would not be involved or a party participant at trial conducting opening statements or cross-examining witnesses. *Id.* Instead, Westfield stated it seeks to intervene so that it can "participate in discovery in the present case by monitoring written discovery and depositions, and potentially (although unlikely) engaging in written discovery or deposition related to the insurance coverage issues, if necessary". *Id.* With regard to Westfield's participation at trial, it contended that it would only seek to be involved in the process of the preparation and submission of a verdict form with special interrogatories to any jury impaneled to hear the claims at issue so that any factual issues that impact the determination of coverage under the Westfield policies could be addressed by the jury. *Id.* Importantly, Westfield stated that it contemplated that in addressing those interrogatories, the jury would not be informed of the existence of insurance coverage issues or dispute. *Id.* Instead, Westfield contends the jury would simply be asked to answer questions regarding its findings with respect to any material factual issues that may be relevant to and dispositive of the insurance coverage issues. *Id.*

The Court finds the type of participation described by Intervenor in the Reply adequately protects the parties, including Wolfe, from prejudice and unfairness stemming from a jury's knowledge of the existence of insurance. The Court finds the type of participation described by

Intervenor in the Reply comports with relevant West Virginia law, including Rule of Evidence 411, Syllabus Point 2 of *Graham v. Wriston*, 146, W. Va. 484, 120 S.E.2d 713 (1961)(overruled on other grounds), and *Reed v. Wimmer*, 195 W. Va. 199, 465 S.E.2d 199 (1995). Any issues that would come up regarding potential prejudice or unfairness can be addressed by motions practice, and specifically, related to the jury, motions *in limine*, at that stage of the litigation.

For these reasons, the Court does not place any limitations on Intervenor's participation at this time. The Court notes the parties' agreement as to the issue of injecting the issue of insurance coverage to a jury.

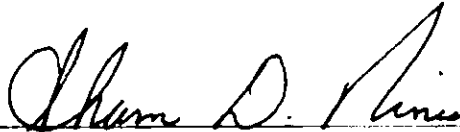
CONCLUSION

Accordingly it is hereby ADJUDGED and ORDERED that Westfield's Motion to Intervene is hereby GRANTED.

The Clerk of the Circuit Court is directed to add Westfield National Insurance Company as a party defendant in this civil action and to add Brent K. Kesner, Esq., Tanya M. Kesner, Esq., and Ernest G. Hentschel, II, Esq., and the law firm of Kesner & Kesner, PLLC, as counsel for Westfield National Insurance Company, as an attorney of record in this matter, and add them to the case on Courtsplus for purposes of electronic filing. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

03-04-2024

A handwritten signature in black ink, appearing to read "Shawn D. Nines", written over a horizontal line.

JUDGE SHAWN D. NINES
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION