NO. 19-0955

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel. NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY, KENNETH R. CONAWAY, BETSY ROSS and LISA McGAHAN,

Petitioners,

v.

THE HONORABLE TOD J. KAUFMAN, Judge of the Circuit Court of Kanawha County, West Virginia, and CALEB BANKS,

Respondents.

FROM THE CIRCUIT COURT OF
KANAWHA COUNTY, WEST VIRGINIA
Civil Action No. 17-C-1737

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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1. Whether Petitioner is entitled to a writ of prohibition reversing the Circuit Court's finding that Respondent Caleb Banks "substantially prevailed" in his claim for insurance benefits following a fire loss at his home when Petitioner Nationwide Property & Casualty Insurance Company delayed the payment of his claims for months, but finally agreed to pay his claims even though the Respondent continued to refuse to withdraw his breach of contract and bad faith claims.

2. Whether the Petitioner is entitled to a writ of prohibition reversing the Circuit Court's Order granting Respondent Caleb Bank's request for an adverse inference instruction when Petitioner Nationwide Property & Casualty Insurance Company willfully refused to comply with the Circuit Court's discovery order and was unwilling or unable to provide highly relevant information concerning its general business practices.

STATEMENT OF THE CASE

Factual Background

This litigation arose from an October 22, 2017 fire which occurred at the home of Respondent Caleb Banks, located at 1593 Whitman Creek Road, in Whitman, West Virginia. At the time of the fire, Petitioner, Nationwide Property & Casualty Insurance Company ("Nationwide") insured Banks' home under Nationwide Policy No. 9247HP626416 ("the Policy"). (See Petitioners' Appendix, hereinafter "Pet. Appx.," 380-424, the Nationwide Policy, at 382.) Mr. Banks has alleged that, as a result of the fire, his home and personal property sustained severe damage. (See, Pet. Appx. at 032-033.)

Mr. Banks timely submitted a claim for insurance benefits under his homeowners policy and expected that his insurer would help him to repair his home and replace his lost property. It is

undisputed that Mr. Banks signed all of the forms Nationwide requested sign, answered all of the questions Nationwide asked, provided all of the financial records Nationwide requested and submitted to an examination under oath at Nationwide's request. Unfortunately, Mr. Banks experienced months of delay and had to participate in vexatious litigation, necessary to receive payment for his claims.

At Pg. 1 of their *Brief*, the Petitioners refer to the fire as being "highly suspicious," and imply that their investigation revealed overwhelming evidence that Mr. Banks intentionally set the fire at his home in order to collect the insurance proceeds. In fact, the evidence in this case clearly establishes that Nationwide never had any actual evidence to show that Mr. Banks intentionally caused the fire. For example, in his July 9, 2018 deposition, Nationwide adjuster Kenneth Conaway, who was principally responsible for the claim, indicated that Nationwide's fire investigator had given him his verbal report as early as five days after the fire. (See, Pet. Appx. 438, excerpts from the deposition of Kenneth Conaway, at Pgs. 277-278). Moreover, Mr. Conaway also acknowledged that there was never any evidence to suggest that either Mr. Banks or his girlfriend intentionally set the fire. He was asked about whether the investigator had indicated that he found any involvement by Mr. Banks and answered as follows:

> Q. All right. Well, did Bob Stuart (sic) tell you whether he thought that Mr. Banks had some -- or his girlfriend had some role or involvement in starting this fire?
> A. No, he did not indicate anything. He just said he wrote it as an incendiary fire due to multiple points of origin.

(See, Pet. Appx. 430, at Pgs. 198-199.) Similarly, Conaway was asked about whether various neighbors who gave statements to Nationwide's investigators on October 31 and November 1, 2017 had provided any information to suggest that Mr. Banks was involved, and he indicated that they had

not. (See, Pet. Appx. 431, at Pgs. 207-208, and 211-212.) Mr. Conaway also testified that there was no evidence whatsoever that Mr. Banks provided any false information to Nationwide in either his October 26, 2017 recorded statement or during his examination under oath (See, Pet. Appx. 431, at Pgs. 205-206), and that Mr. Banks had complied with all of his requests and provided everything that was asked of him. He was asked:

> Q. Okay. Despite the fact that there's not any specific contractual authority for these required forms or any requirement that Mr. Banks execute, he complied -- we're going to mark these as Exhibit 37. He complied and provided you with authorizations and non-waivers and everything else that you asked for, right?
> A. Correct.

(See, Pet. Appx. 433, at Pgs. 221-222.) Moreover, Mr. Conaway acknowledged that the mortgage on Mr. Banks' home had been paid off (See, Pet. Appx. 434-435, at Pgs. 228-229), and that Mr. Banks' credit report did not reflect any collections or other evidence to suggest any financial or other motive to burn his home. (See, Pet. Appx. 435, at Pg. 232.) Nationwide adjuster Lisa McGahan, who handled the contents claim, also acknowledged in her July 10, 2017 deposition that she knew of no evidence that Mr. Banks caused the loss. She was asked:

> Q. All right. Now, when you talked to Ken Conaway, did Ken Conaway tell you that he believed that Mr. Banks burned this house?
> A. No.
> Q. Did he ever suggest to you that Mr. Banks was involved in any way in causing or arranging others to cause the fire to this house?
> A. No.
> Q. Have you heard from any other representative at Nationwide, or any other individual or entity, that Mr. Banks was involved in any way in causing this fire loss?
> A. No.

(See, Pet. Appx. 441, excerpts from the deposition of Lisa McGahan, at Pgs. 41-42.) Likewise, McGahan acknowledged that Mr. Banks fully cooperated with her and complied with all of her

requests. (See, Pet. Appx. 442, at Pgs 51-52.) McGahan also agreed that fire was a covered cause of loss and a trigger for coverage under the Nationwide policy. (See, Pet. Appx.440, at Pg. 40.) Based on all of this evidence, it is clear that there was never any reason or basis for Nationwide and its adjusters to delay or deny the payment of Mr. Banks' claims. Instead, the evidence clearly establishes that they unreasonably delayed the payment of the claims for many months.

During his deposition, Mr. Conaway acknowledged that Nationwide's claim file indicated that, as of October 26, 2017, Nationwide's contents adjuster, Lisa McGahan, had determined, "There is nothing salvageable in this home contents wise. Heavy soot, smoke and water damage." (See, Pet. Appx. 427, at Pg. 99.) Likewise, Nationwide adjuster Betsy Ross acknowledged in her deposition that, when she inspected the property on October 24, 2017, the entire structure appeared to be heavily damaged and the contents appeared to have been destroyed. (See, Pet. Appx. 448, excerpts from deposition of Betsy Ross, at Pgs. 30-31.) Conaway also acknowledged that, by December 5, 2017, he had completed an estimate of the damages to Banks' home in the amount of One Hundred and Twenty-Six Thousand, Four Hundred and Forty-One Dollars ($126,441). (See, Pet. Appx. 426, at Pgs. 62-64.) Therefore, it is clear that, by early December of 2017, Nationwide knew that a covered cause of loss had damaged or destroyed Mr. Banks' property, knew that there was no evidence that Mr. Banks had caused the loss, and had determined what it believed to be the damages resulting from the fire. Unfortunately, Nationwide did not make any attempt to pay Mr. Banks' claims at that time. Instead, Nationwide's third-party administrator handling the additional living expense claim, Klein & Company, advised Mr. Banks that his Additional Living Expense benefits would be terminated as of December 22, 2017. In that regard, Mr. Banks testified in his deposition:

Q. Now, you indicated to Mr. Boone that you had a phone conversation.

You got called --

A. Yes.

Q. -- from Colorado by Klein & Company; is that right?

A. Yes.

Q. And you told him already in this record what they indicated to you, which was that Nationwide was terminating your additional living expense as of December 22, the two-month period, right?

A. That's correct.

* * *

Q. Had Nationwide given you any money to repair the house at that point?

A. No.

Q. But Klein & Company was telling you Nationwide was terminating the additional living expense effective December 22; is that right?

A. Correct.

(See. Respondent's Appendix, hereinafter "Resp. Appx." at 000027, the Deposition of Caleb Banks, at Pgs. 121-122.) Accordingly, by late December of 2017, it had became apparent to Mr. Banks that Nationwide was not going to pay him the insurance benefits for which he had been paying premiums.

Procedural History Of The Litigation

Because Mr. Banks had complied with all of Nationwide's requests and Nationwide had still not accepted and issued payment for his claim, but had instead communicated that Mr. Banks' additional living expenses benefits were being terminated effective December 22, 2017, Mr. Banks filed this action on December 29, 2017, naming Nationwide and its adjusters as Defendants. (See, Pet. Appx. 031-055, the *Complaint*.)

On or about February 5, 2018, the Petitioners collectively filed a *Notice of Removal*, which removed this action to the United States District Court for the Southern District of West Virginia alleging that there was diversity jurisdiction because Kenneth Conaway was a resident of Ohio and Lisa McGahan was a resident of Pennsylvania, and alleging that Betsy Ross, a West Virginia

resident, was fraudulently joined to defeat diversity jurisdiction. (See, Pet. Appx. 896-918, the Docket Sheet for S.D. W.Va. Case No. 2:18-CV-00259) While the Petitioners later filed a Supplemental Brief admitting that Petitioner Lisa McGahan was actually also a West Virginia resident, the Petitioners continued to assert that Ross and McGahan were fraudulently joined to defeat diversity jurisdiction and this case proceeded in federal court for over a year before it was finally remanded to the Circuit Court of Kanawha County on February 20, 2019. (See, Pet. Appx. 890, the Kanawha County Docket Sheet.) As revealed by the Docket Sheet in Case No. 2:18-CV-00259, the Petitioners' removal of the action forced Caleb Banks to engage in extensive and ultimately unnecessary motion practice over a period of many months before the case was remanded. (See, Pet. Appx. 896-918.)

Throughout their Brief, the Petitioner's assert that litigation was not actually necessary because they would have paid Mr. Banks' claim anyway if he had simply waited a few weeks before suing them. However, the evidence reveals that Nationwide determined that Mr. Banks' claims were valid and payment was proper. For example, during a deposition in July of 2018 Lisa McGahan was asked:

> Q. You had determined that his contents were destroyed in this fire loss.
> A. Yes.
> Q. You have agreed with me that fire is a covered cause of loss.
> A. Yes.
> Q. Barring the application of an exclusion in the policy, Mr. Banks, who purchased this insurance, is entitled to payment for his lost personal property, isn't he?
> A. Yes.

(See, Pet. Appx. 441, at Pg. 44.) Similarly, Kenneth Conaway was asked about why the amount of the estimate he had prepared had not been paid to Mr. Banks and testified:

> Q. Now, if this estimate was completed on November 22, 2017, do you have any explanation or information as to why Nationwide has failed

to pay at least the amount of its own estimate for the UPP claim of Mr. Banks as of July 9, 2018?

A. Not that I know of. I know that they were still -- during the time frame that this was indeed completed on November 22nd, of course we were still waiting on the expert report from FEC and their findings.

Q. All right. All that's come and gone. We've gone through all that. Nationwide received that information months and months ago, right? Correct?

A. It was sent -- to my understanding, it was sent to our outside counsel.

(See, Pet. Appx. 436, at Pg. 240). Remarkably, Nationwide's own counsel in this action acknowledged that Nationwide had completed its investigation and decided to pay Mr. Banks' claims months earlier in a letter dated March 9, 2018, stating:

> Please accept this letter as an update on Nationwide's determination of coverage for Caleb Bank's claim for a loss at his residence located at 1593 Whitman Creek Road, Whitman, West Virginia ("Residence"). Nationwide has completed its investigation and accepts Mr. Bank's claim.

(See, Pet. Appx. 512-514.) The letter went on to discuss alleged contradictions in Mr. Banks' testimony, but noted "Nationwide believes that after its full investigation, payment of this claim is proper." (See, Pet. Appx. 512-514.) Importantly, in addition to requesting that Mr. Banks indicate whether he would accept Nationwide's estimate for his claim, or if he had any other documentation of damages, the March 9, 2018, letter also asserted Nationwide's position that ". . .once Nationwide issues its check for Mr. Banks' claim. . .the payment moots any breach of contract action" and any *Hayseeds* claim. (See, Pet. Appx. 514.) Thus, it was apparent from the March 9, 2018 letter that Nationwide wished to condition payment of its estimate regarding the repairs upon Mr. Banks' indicating his willingness to forego his breach of contract and bad faith claims.

It should also be noted that in the March 9, 2018 letter, Nationwide's counsel acknowledged that Mr. Banks' residence had suffered additional damage because the home had not been properly winterized by Nationwide. (See, Pet. Appx. 513.) This information had been communicated by Caleb

Banks' counsel to Nationwide's counsel during a March 1, 2018, phone call, as acknowledged in footnote two of the March 9, 2018 letter. (See, Pet. Appx. 513.) In response to Nationwide's demand that Mr. Banks indicate whether he would accept Nationwide's estimate or whether he had other documentation of damages, Mr. Banks' counsel sent a letter to Nationwide's counsel on March 15, 2018, attaching the water invoice for the property, in the amount of almost $3,000.00, reflecting charges for water over the period of December 22, 2017 to January 19, 2018, for usage of 335,800 gallons. (See, Pet. Appx. 516.) The communication noted that Nationwide had prohibited Mr. Banks from entering the property due to Nationwide's investigation, and had affirmatively assumed the duty to have the property winterized to protect it from further loss. This communication also clearly identified and provided documentation of additional damage to the Plaintiff's property. (See, Pet. App. 516.)

The March 9, 2018 letter is also significant because it contains a number of self-serving assertions regarding whether the services of Mr. Banks' counsel were necessary to obtain the payment that was not actually forthcoming. In that regard, it attempts to place all blame for the delay on the fact that Nationwide was waiting for a final report from its fire expert, even though each of Nationwide's adjusters acknowledged that Nationwide never had any evidence to suggest that Mr. Banks caused the fire. (See, Pet. Appx. 513, the March 9, 2018 letter at Pg. 2, and Pet. Appx. 441, at Pgs. 41-42.)

Despite the fact that Nationwide's counsel indicated it had decided to pay Mr. Banks' claims in March of 2018, it is undisputed that Nationwide had not paid them by July of 2018. For example, when Kenneth Conaway was asked about the March 9, 2018 letter, he testified as follows:

Q. Nationwide completed its investigation, decided that payment of the claim was proper, right?
A. Correct.
Q. You see that in the letter.

A. See that in the letter.
Q. And why between those things and now Mr. Banks has not been paid, you don't know.
A. Don't know.
Q. That's certainly not acceptable, is it?
A. That I'm not sure of.
Q. It might be acceptable?
A. I mean, I'm not sure why the check wasn't issued.

(See Pet. Appx. 437, at Pg. 248.) In fact, Nationwide did not issue payment to Mr. Banks for the undisputed amounts it acknowledged he was owed until July 16, 2018, when it sent checks totaling One Hundred Forty-Nine Thousand, Seven Hundred Fifteen Dollars and Sixty-Three Cents ($149,715.63) to his counsel. (See, Pet. Appx. 451-452 , counsel's July 16, 2018 letter forwarding the checks). Thus, Nationwide's payment was completed just a week after Mr. Banks' counsel completed the depositions of Nationwide's adjusters, during which its adjusters agreed that the payments were due under the Nationwide Policy, but had not been paid. Significantly, Nationwide made the payment even though Mr. Banks remained unwilling to agree that his breach of contract and *Hayseeds* claims would be "rendered moot" by Nationwide's issuance of the checks. Therefore, the evidence in this case clearly establishes that Nationwide and its adjusters delayed the payment of Mr. Banks' claims for over eight months until his counsel forced the issue through litigation, and Nationwide then conceded its duty to pay without Mr. Banks agreeing to give up his remaining claims.

The Request For An Adverse Inference Instruction

In his *Amended Complaint*, (Pet. Appx. 039-055) Mr. Banks asserts claims against Nationwide for breach of contract, bad faith and violations of West Virginia's Unfair Trade Practices Act [*W.Va. Code §33-11-4(9)*] in connection with Nationwide's handling of his insurance claims. In particular, Mr. Banks alleges that Nationwide and its adjusters failed to perform an adequate investigation and improperly delayed the payment of his claims even though Nationwide's liability

was reasonably clear. He further alleges that all of the Petitioners had a "general business practice" of violating the Unfair Trade Practices Act, as is required in order to sustain a private cause of action for such violations pursuant to *Jenkins v. J. C. Penney Casualty Insurance Company*, 167 W. Va. 597, 280 S.E.2d 252 (1981).

In order to obtain evidence in support of his claims, Mr. Banks served written interrogatories and requests for production of documents upon Nationwide which sought information regarding other grievances and complaints, whether formal or informal, asserted by other claimants and policyholders against Nationwide for the past five years. Nationwide is required by law to maintain such information in a "complaint register," pursuant to *W. Va. Code §33-11-4(10)* and Mr. Banks specifically requested that said "complaint register be produced. (See, Pet. Appx.094, Request For Production No. 5, Plaintiff's First Set of Requests For Production.) He also specifically sought the identification of:

> all claims or suits asserted or filed against Defendant Nationwide at any time within the last five (5) years in West Virginia which contain or raise allegations of "bad faith," unfair claims practices, statutory violations in the handling of any claim, fraud or misrepresentation in the handling of any claim, or any other kind of wrongdoing, whatsoever, . . .

(See, Pet. Appx. 089-090, Interrogatory No. 12, Plaintiff's First Set of Interrogatories.)

Because Nationwide objected to providing the requested information regarding other complaints and claims against it, Mr. Banks was forced to file a *Motion To Compel* on March 20, 2019. (See, Pet. Appx. 059-181.) Such information is highly relevant to the discovery of evidence related to the "general business practice" issue and Nationwide provided no legitimate excuse for its refusal to produce it, the Circuit Court granted the *Motion* through its *Order Granting Plaintiff's Motion To Compel Discovery,* entered on May 14, 2019. (See, Pet. Appx. 241-245.) Pursuant to

the *Order*, Nationwide was required to provide the requested information and claim files regarding other complaints and lawsuits against it and was also required to designate corporate representatives to testify regarding both the complaint register and the other lawsuits. In that regard, Mr. Banks had also served a *Notice of Rule 30(b)(7) Deposition,* which requested that Nationwide designate a witness to testify regarding the other lawsuits against Nationwide alleging bad faith. (See, Pet. Appx. 148-151, at Topic 10 on 149.) Specifically, Topic 10 of the *Notice* sought testimony regarding:

> 10. The other lawsuits filed against Nationwide in West Virginia raising allegations of "bad faith," unfair trade practices, and/or breach of contract for claims relating to policies issued in West Virginia in the last five (5) years.

(See, Pet. Appx. 149) Mr. Banks' *Notice* also requested that Nationwide designate a witness to testify regarding the complaint register and log kept by Nationwide pursuant to *W. Va. Code §33-11-4(10).* (See, Pet. Appx. 148-151, at Topic 11 on 149.) Because the testimony would explain how Nationwide keeps a record of other complaints about Nationwide's claims handling, it would also be highly relevant to Mr. Banks' pursuant to discovery to prove a "general business practice," as required by *W. Va. Code §33-11-4(9),* and *Jenkins v. J.C. Penney* supra....

While a deposition regarding other written complaints identified on Nationwide's complaint register was eventually completed on June 10, 2019 (See, Pet. Appx. 356-359.), Nationwide refused to comply with the Circuit Court's May 14, 2019 *Order* to produce a corporate representative regarding the other lawsuits covered under Topic 10. Instead, Nationwide's counsel indicated in an email dated June 7, 2019:

> Nationwide will not be producing a witness for Topic 10. How Nationwide prepared its list of bad faith cases and confirmed it to be complete is not relevant. It is also confidential and proprietary to Nationwide.

(See, Resp. Appx. at 000064 , the June 7, 2019 e-mail.) This refusal is remarkable in light of the fact that the Circuit Court's May 14, 2019 *Order* expressly provided, at Pg. 3:

> Defendant Nationwide shall designate its representatives to testify regarding those topics included in Plaintiff's Notice of Rule 30(b)(7) Deposition, with the designation to be completed by May 28;

(See, Pet. Appx. 241-245, the Court's May 14, 2019 *Order*.) Rather than seek reconsideration of the Circuit Court's decision or seek appellate review of the issue, Nationwide simply ignored the Circuit Court's May 14, 2019 *Order* based on nothing more than Nationwide's counsel's unilateral determination that Topic 10 was "not relevant."

During the June 10, 2019 deposition of Nationwide's corporate representative, Susan Hatfield, Mr. Banks also learned that the list of complaints which Nationwide produced after being expressly ordered to do so was not complete and also learned that Nationwide claims adjusters may not have turned in or reported complaints they received to be included in the complaint log. Ms. Hatfield was asked about the absence of any auto policy complaints, for example, on the produced list even though Nationwide writes auto coverage and testified as follows:

Q. Okay. And this all says "Homeowners." In fact, they all say "Major Homeowners" except for a few of them that say "Other Homeowners - Condos, Tenants, Other," right?
A. Yes.
Q. You know what I don't see here?
A. What?
Q. I don't see anything that says "Auto" or any other line of business. Do you?
A. That must have been part of the request and what was asked.
Q. And you know what's unfortunate about that? It's that that's not what the Court ordered. The Court ordered a complete listing of the complaints. That's not what this is, is it?
A. What I see here is Major Homeowner or Tenant auto -- or Tenant Condos, is what's listed.

* * *

Q. Now, Nationwide Property & Casualty Insurance Company writes auto policies, doesn't it?

A. Yes.

Q. And you're not here to suggest to me, are you, Susan, that over the period of March -- excuse me, May 1 of '13 to June 15 of '18, that Nationwide didn't get a single complaint as defined by West Virginia Code 33-11-4(10), related to an auto policy. You're not here to tell me that, are you?

A. My guess is we probably had one in that time period at least, but I don't know -- I don't have any of the details to know that. I can only show you what's in front of me here.

(See, Pet. Appx. 357, excerpts from the deposition of Susan Hatfield, at Pgs. 46-48.) In the same fashion, Ms. Hatfield also testified that she could not confirm that the list included the third-party complaints (Pet. Appx. 358, at Pg. 59), and that she was unaware of any auditing process whereby Nationwide ensured that its adjusters sent all written communications primarily expressing a grievance to her department to be included on the list. (Pet. Appx. 359, at Pgs. 71-72.) Thus, Ms. Hatfield's deposition reflects that Nationwide did not comply with the Court's May 14, 2019 *Order* or the statutory requirement to keep a complete list of all written communications primarily expressing a grievance as set forth in *W. Va. Code §33-11-4(10).* While Mr. Banks was not asserting that he had some cause of action for violation of the record keeping requirement, he was entitled to receive the information that such records were supposed to contain pursuant to the Circuit Court's May 14, 2019 *Order,* as the same was relevant to his pursuit of discovery related to Nationwide's business practice. Therefore, Mr. Banks filed his *Motion For Adverse Inference Instruction* (Pet. Appx. 334-361), and asked the Circuit Court to instruct the jury that it may presume that the complete discovery which Mr. Banks had requested and which Nationwide refused to provide would have provided access to information that would have disclosed that Nationwide had a "general

business practice" of conduct, which violated *W. Va. Code §33-11-4(9).*

The Request For Partial Summary Judgment

On July 29, 2019, Mr. Banks served his *Motion For Partial Summary Judgment* (Pet. Appx. 362-454) pursuant to *Rule 56* of the *West Virginia Rules Of Civil Procedure,* which asked the Circuit Court to award him partial summary judgment because there was no genuine question of fact regarding whether he had "substantially prevailed" in connection with his insurance claims and was, therefore, entitled to recover the damages permitted under *Hayseeds v. State Farm Fire and Casualty Company*, 177 W.Va. 323, 352 S.E.2d 73 (W.Va. 1986). On August 29, 2019, the Petitioners served their *Response,* asserting that the Plaintiff filed suit before their investigation was complete, that the services of Mr. Banks' attorneys were not "necessary" and that Nationwide would have paid his claims, eventually, even if counsel had not gotten involved in the case. (See, Pet. Appx. 595-718.)

At the hearing held on both the *Motion For Adverse Inference* and the *Motion For Partial Summary Judgment*, the Circuit Court heard the arguments of counsel and indicated that it would grant both *Motions*. (See, Pet. Appx. 789.) Then, on October 16, 2019, the Court entered its *Order Granting Plaintiff's Motion For Partial Summary Judgment (Plaintiff Has Substantially Prevailed)* (Pet. Appx. 15-30) and its *Order Granting Plaintiff's Motion for Adverse Inference Instruction* (Pet. Appx. 1-14) The trial on Plaintiffs remaining claims against the Petitioners was then set to begin on November 4, 2019. (See Pet. Appx. 838.) Apparently unwilling to proceed to trial, the Petitioners sought a Writ of Prohibition from this Court on October 21, 2019. The Respondent/Plaintiff, Caleb Banks, now submits his *Response* and asks that the *Petition* be denied.

SUMMARY OF THE ARGUMENT

In this case, the Circuit Court properly found that Mr. Banks had "substantially prevailed" because Nationwide refused to pay his claims for insurance benefits until after he had filed suit and engaged in months of litigation. In particular, the evidence establishes that Nationwide recognized that it was liable to pay for Mr. Banks' home and contents by December of 2017, but did not complete payment. Instead, Nationwide's agent advised Mr. Banks that his additional living expense benefits were going to be cut off after December 22, 2017. After Mr. Banks filed suit, Nationwide acknowledged in writing, in March of 2018, that it would accept his claims, but did not then pay even the amounts it had determined were owed. Instead, Nationwide delayed payment until July of 2018, in the hope that Mr. Banks would forego his extra-contractual claims, as suggested in Nationwide's counsel's letter of March 9, 2018. It was only after Mr. Banks' counsel forced the issue by deposing Nationwide's adjusters and their admissions that Nationwide owed payment to Mr. Banks for his dwelling and contents. Because it made the payments even though Mr. Banks remained unwilling to give up his extra-contractual claims, the Circuit Court properly found that his attorneys' services were necessary and that he had substantially prevailed.

The Circuit Court also properly sanctioned Nationwide for its unwillingness to produce information concerning other complaints made against it despite being expressly ordered to do so. In that regard, information regarding other complaints made against Nationwide were directly relevant to Mr. Banks' pursuit of discovery related to the "general business practice" requirement of Mr. Banks' cause of action for the Petitioners' violations of the West Virginia Unfair Trade Practices Act. Mr. Banks requested discovery regarding those other complaints and Nationwide refused to provide it. Mr. Banks was forced to file a *Motion To Compel,* which the Circuit Court

granted. Unfortunately, Nationwide still refused to provide the requested information, despite being ordered to do so. Mr. Banks then properly requested that the Court give the Jury an adverse inference instruction that it could take it that the requested information would have provided access to evidence that Nationwide has a general business practice of violating the Act.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioners suggest that oral argument is unnecessary because the issues raised herein concern alleged error in the application of settled law. While the Respondent/Plaintiff Caleb Banks agrees that the *Petition* concerns only settled law, he would note that the *Petition* is simply an unsupported attempt to appeal an interlocutory order. Therefore, the Respondent agrees oral argument is not necessary.

ARGUMENT

I. Standard Of Review.

"[A] writ of prohibition is an extraordinary remedy to be utilized in extremely limited instances." *State ex rel. Vanderra Res., LLC v. Hummel*, 242 W.Va. 35, 45, 829 S.E.2d 35, 45 (W. Va. 2019). Moreover, "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." *Id.* at 40, 40. Likewise, this Court has noted that "writs of prohibition provide a drastic remedy, and should be invoked only in extraordinary situations. . . As a consequence, the prohibition remedy is tightly circumscribed." *Health Mgrnt., Inc. v. Lindell*, 207 W. Va. 68, 72, 528 S.E.2d 762, 766 (1999) (citations omitted). In addition, the Court has held that "[t]he right to prohibition must clearly appear ... before the petitioner is entitled to such remedy" and explained that "prohibition cannot be substituted for a writ of error or appeal unless a writ of

error or appeal would be an inadequate remedy." *State ex rel. Maynard v. Bronson*, 167 W. Va. 35, 41, 277 S.E.2d 718, 722 (1981) To that end, the Court has also explained that:

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

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

The standard for ruling upon writs that allege that the Circuit Court exceeded its legitimate powers is set forth in Syl. Pt. 4 of *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996), wherein the Court explained:

> 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.

Id. Furthermore, the Court has noted that "[i]n determining the third factor, the existence of clear error as a matter of law, [the Court] will employ a *de novo* standard of review, as in matters in which purely legal issues are at issue." *State ex. rel. Nelson v. Frye*, 221 W. Va. 391, 395, 655 S.E.2d 137, 141 (quoting *State ex rel. Gessler v. Mazzone*, 212 W.Va. 368, 372, 572 S.E.2d 891, 895 (2002)). The Court in *Frye* went on to indicate:

> In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance."

Frye, at 395, 141. Thus, the Petitioners face a substantial burden in meeting the stringent standards established by the Court for issuance of Writs of Prohibition.

While the Petitioners cite the five-part test set applicable to requests for a writ of prohibition forth in *State ex rel. Hoover v. Berger*, supra., they fail to explain why the Circuit Court's interlocutory Orders entered shortly before trial was scheduled to commence meet each element of the *Hoover* test and why an appeal following that trial would not be an adequate remedy. Instead, they merely offer the conclusory statement that the Circuit Court's Orders would somehow "prohibit" Nationwide from defending against Mr. Banks' remaining claims and suggest that "[f]orcing Nationwide to go through an expensive, complex trial" is not an adequate remedy. Given the circumstances of this case, the Nationwide *Petition* is nothing more than an improper attempt to appeal the Circuit Court's interlocutory orders.

II. The Circuit Court properly found that Caleb Banks "substantially prevailed" in his claim for insurance benefits when Nationwide refused to pay his claims for months, but ultimately agreed to pay even though Mr. Banks was unwilling to concede his extra-contractual claims.

As discussed above, the evidence in this case establishes that Nationwide refused to pay Caleb Banks' claim for the damages to his home and personal property until after he had spent months litigating his right to recover. While Nationwide and its adjusters now assert that he "never

made a demand," they fail to acknowledge that, under West Virginia law, he is not required to. Instead, *§114-14-6.3* of the Insurance Rules expressly requires Nationwide to make an offer within ten working days of completing its investigation regardless of whether the claimant has made a demand. It provides:

> Within ten (10) working days of completing its investigation, the insurer shall deny the claim in writing or make a written offer, subject to policy limits and, with respect to medical professional liability claims, subject to applicable statutory requirements set forth in the Medical Professional Liability Act, W.Va. Code §55-7B-1 to 11.

Here, Nationwide's counsel expressly indicated that Nationwide had completed its investigation of the fire on March 9, 2018, but suggested that Mr. Banks would then have to forego his breach of contract and bad faith claims. (See, Pet. Appx. at 513-514.) Such a linkage of payment of the dwelling coverage to a willingness to withdraw other claims violates *§114-14-6.11* of the Insurance Rules, which required payment of the undisputed amounts due under the Nationwide Policy within 15 working days, as well as *§114-14-6.10,* which provides:

> In any case where there is no dispute as to one (1) or more elements of a claim, payment for such element(s) shall be made notwithstanding the existence of disputes as to other elements of the claim where such payment can be made without prejudice to either party.

Likewise, *§114-14-4.5* indicates:

> No person may ask a first-party claimant to sign a release that extends beyond the subject matter which gave rise to the claim payment.

While Nationwide eventually paid the undisputed portions of the Plaintiff's claims on July 16, 2018, without requiring the Plaintiff to withdraw his remaining claims, Nationwide did so only after the Plaintiff's counsel completed the depositions of Nationwide's claim adjusters, and the claim adjusters indicated their agreement that there was no basis for Nationwide to have withheld payment

of the undisputed amounts owed once Nationwide had completed its investigation and had determined that payment of the Plaintiff's claim was proper. In its October 16, 2019 *Order Granting Plaintiff's Motion For Partial Summary Judgment (Plaintiff Has Substantially Prevailed)* (Pet. Appx. 15-30.), the Circuit Court recognized these facts and found that Caleb Banks had "substantially prevailed" in his claim for insurance benefits. In particular, the Circuit Court noted:

> Nationwide was either unwilling to complete payment, or had failed to complete payment from the date of its acknowledgment that payment of the claim was proper on March 9, 2018, until months of additional litigation and discovery were completed, including the depositions of Nationwide's claims adjusters which showed that the claim payments were required.

(Pet. Appx. 25.) The Circuit Court further noted that Nationwide finally made that payment "without requiring the Plaintiff to withdraw his breach of contract and *Hayseeds* claims." (Pet. Appx. 27.) While the Petitioners dispute these findings and suggest that even if Mr. Banks had not retained counsel and filed suit, they would have paid his claims at some unspecified time in the future, that argument is totally without merit.

In the case of *Hayseeds v. State Farm Fire and Casualty Company*, supra., this Court held that the common-law rule requiring each party to a lawsuit to pay their own attorneys' fees worked a hardship upon persons who were forced to engage in litigation to recover benefits under insurance policies which provide them first party benefits. The Court stated:

> To impose upon the insured the cost of compelling his insurer to honor its contractual obligations is effectively to deny him the benefit of his bargain.

Hayseeds at 80. The Court reasoned that "when an insured purchases a contract of insurance, he buys insurance - - not a lot of vexatious, time-consuming, expensive litigation with his insurer." *Id.* at 79. In accordance with this reasoning, the Court held:

> whenever a policyholder must sue his own insurance company over any property damage claim, **and the policyholder substantially prevails in the action**, the company is liable for the payment of the policyholder's reasonable attorneys' fees.

Id. (Emphasis supplied.) Accordingly, *Hayseeds* damages are extra-contractual damages which an insured may recover in addition to the proceeds of his or her policy if the insured substantially prevails in litigation to recover those proceeds. These damages are recoverable regardless of whether the insurance company acted in "good faith" when it delayed or denied payment. *Id.* Therefore, under *Hayseeds*, even if Nationwide disputes that it acted in "bad faith," Nationwide is still liable where Mr. Banks substantially prevailed on his claims.

In the years since *Hayseeds* was decided, the Court has clarified the law with regard to whether prevailing at trial is necessary before an insured can be said to have "substantially prevailed." In the case of *Jordan v. National Grange Ins. Co.*, 183 W.Va. 9, 393 S.E.2d 647 (W.Va. 1990), the Court found that an insured who "substantially prevails" can recover *Hayseeds* damages even if the case is settled before trial. The Court stated:

> The rationale . . . for allowing the recovery of reasonable attorney's fees from one's own insurer is applicable whether the insured substantially prevails in the litigation as a result of a settlement or as the result of a jury verdict. In either case, "the insured is out his [or her] consequential damages and attorney's fees.

Jordan, at 650 (Citations omitted.) Likewise, the Court noted:

> It is also important to remember that Hayseeds . . .announced a "bright line standard" for the insured's recovery of reasonable attorney's fees and other compensatory damages from his insurer, so that the insurer's "good faith" or other "justification" for the undue delay in payment is not relevant and does not bar the recovery of such fees.

Id., at 652 (Citations omitted.) Thus, the fact that Nationwide voluntarily agreed to pay policy benefits in July of 2018, after months of litigation, does not bar an action for *Hayseeds* damages by

first-party claimants, such as Mr. Banks

There is also no requirement that a claim for *Hayseeds* damages arise out of a property damage claim. In the case of *Miller v. Fluharty*, 201 W.Va. 685, 500 S.E.2d 310 (W.Va. 1997), the West Virginia State Supreme Court dealt with a claim for *Hayseeds* damages arising out of a claim for underinsured motorist coverage. There, the Court stated:

> [w]hen an insurance carrier refuses to pay any type of first-party claim (including a claim for underinsurance benefits), the policyholder may be compelled to participate in lengthy, costly litigation to recover the insurance policy proceeds.

Miller, at 693, 318. Earlier, the Court had defined a "first-party" claim as follows:

> [f]irst-party insurance means that the insurance carrier has directly contracted with the insured to provide coverage and to reimburse the insured for his or her damages up to the policy limits.

Id. Accordingly, it is clear that *Hayseeds* applies to all of Caleb Banks' first-party claims for items such as additional living expenses in addition to his claims for damages to the dwelling.

Just as there is no requirement that there be a jury verdict or even a trial, West Virginia law does not require that a lawsuit actually be filed before an insured can "substantially prevail." For example, in *Smithson v. U.S.F.&G.*, 186 W.Va. 195, 411 S.E.2d 850 (W.Va. 1991), the Court found that an insured had "substantially prevailed" in an appraisal proceeding which was resolved in arbitration rather than through the filing of suit. The Court noted:

> "[t]he question of whether an insured has substantially prevailed against his insurance company on a property damage claim is determined by the status of the negotiations between the insured and the insurer prior to the institution of the lawsuit. Where the insurance company has offered an amount materially below the damage estimates submitted by the insured, and the jury awards the insured an amount approximating the insured's damage estimates, the insured has substantially prevailed."
>
> Consequently, under the foregoing principles, we conclude that a first-party suit based on *Hayseeds* will not be barred by the settlement of the loss in an appraisal

> proceeding under the fire insurance policy if the insured substantially prevailed in the appraisal proceeding over the amount of the loss.

Smithson at 203, 858. quoting *Syllabus Pt. 2* of *Thomas v. State Farm Mut. Auto. Ins. Co.* 383 S.E.2d 786 (W.Va. 1989). Therefore, it is clear that Caleb Banks, who was offered nothing for the damage to his home until after he retained counsel and was further forced to wait months until his counsel deposed the Nationwide adjusters before obtaining policy benefits, is entitled to recover *Hayseeds* damages with respect to his claims.

While the Petitioners assert that the services of counsel were not "necessary" and that it would have paid Mr. Banks eventually, even if his counsel had not gotten involved in the case, that argument is simply inconsistent with the facts and West Virginia law. For example, in the case of *Paxton v. Municipal Mutual Ins. Co.,* 202 W.Va. 224, 503 S.E.2d 537 (W.Va. 1998), the Court found that an insured had "substantially prevailed" when the insured did not pay his claim until after he had filed a complaint with the Insurance Commissioner's Office and retained an attorney who threatened litigation. The Court rejected the trial court's determination that attorney fees were not appropriate "simply because counsel got involved" and stated:

> The court's basis for rejecting the Hayseeds formula is incorrect. Counsel for the Paxtons did not just "get involved." MMI tendered to the Paxtons an offer of settlement based upon MMI's own estimate. The offer was $17,157.32. The Paxton's minimum structural repair estimate was $25,200.00. MMI rejected the Paxtons' estimate. Instead, MMI contended until the Paxtons secured counsel, that the Paxtons information was incomplete. As a defense, this argument makes little sense. MMI was eager to have the Paxtons settle their claim for an amount MMI now argues was based upon unsound information. In contrast to MMI's position, it is clear that without counsel's intervention MMI would not have increased its payment from $17,157.32 to the policy limit of $38,825.00.

Paxton at 540, 227. Here, it is obvious that counsel's involvement was necessary since Nationwide

had not paid Mr. Banks' claim before he filed suit,[1] and then still refused to pay for many months even after its own attorney had indicated that Nationwide's investigation was complete in March of 2018. (See, Pet. Appx. at 513-514.) In that regard, *W. Va. Code § 33-11-4(9)(e)* requires insurers to "affirm or deny coverage within a reasonable time after proof of loss forms have been completed. In this case, Kenneth Conaway acknowledged that Mr. Banks sent him a completed proof of loss. (See, Pet. Appx. 429, at pgs 178-179, and the completed proof of loss at 695-697.) Conaway also acknowledged that Nationwide never rejected that proof of loss (See Pet. Appx. 429, at pg. 180.), but had also never paid Mr. Banks' claims as of July 9, 2018. (Pet. Appx. 429, at pg. 180.) Under such circumstances, an unsupported assertion that Nationwide would have paid Mr. Banks' claims anyway at some unspecified time in the future is simply insufficient to overcome the undisputed evidence that Nationwide paid nothing until Caleb Banks' counsel became involved, filed suit, and completed extensive discovery to establish Nationwide's obligation to complete payment.

The necessity of counsel's involvement in this case can also be illustrated by example, examining one small component of Mr. Banks' damages, which Nationwide had simply ignored until his counsel pointed out the mistake during the depositions of Nationwide's claims adjusters. Specifically, both Ms. McGahan and Mr. Conaway acknowledged that Ms. McGahan had received a communication from Mr. Banks on November 28, 2017, regarding a bill for cable equipment which Mr. Banks had received from Suddenlink for its equipment destroyed in the fire. (See, Pet. Appx. 428, at Pgs. 141-142, and Pet. Appx. 445-446, at Pgs. 92-94). While Ms. McGahan agreed that the

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[1] Instead, Nationwide's third-party administrator had indicated to Mr. Banks that his additional living expense benefits were being terminated as of December 22, 2017. (See Resp. Appx. at 000064.)

equipment was covered, she acknowledged that she did not include the Suddenlink equipment in her contents estimate until the evening of July 9, 2018, following Banks' deposition of Kenneth Conaway, during which the invoice was addressed. (See, Pet. Appx. 443-444, at Pgs. 76-78.)[2] Had Mr. Banks'counsel not taken the deposition and explored the issue in a deposition, it is obvious that Nationwide would never have addressed it.

The Court in *Miller*, *supra.* set forth the criteria for determining when a claimant has, in fact, "substantially prevailed," stating:

> [W]hen examining whether a policyholder has substantially prevailed against an insurance carrier, a court should look at the negotiations as a whole from the time of the insured event to the final payment of the insurance proceeds.

Miller, at 696. In this case, Nationwide delayed the payment of Caleb Banks''s claims for many months, even after he filed this action, and continued its refusal to pay anything until July of 2018, when Nationwide finally paid, even though Mr. Banks remained unwilling to forego his extra-contractual claims against it. While Nationwide points to its need to investigate a "suspicious" claim as a justification for the delays and argues that it never actually denied the claim or forced Mr. Banks to file suit, that argument simply ignores the months of delay was imposed upon Mr. Banks. In that regard, the Court in *Miller* stated:

> There is no doubt that an insurance carrier is allowed a certain amount of time to investigate and process a claim, at its own expense, but once it becomes clear that the benefits are due, delaying payment is often the same as not paying at all.

Miller at 699, 324. Moreover, the Court defined a "prompt" investigation as follows:

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[2] Interestingly, Ms. McGahan also acknowledged that the Suddenlink invoice had been turned over to collections while the Plaintiff was waiting for Nationwide's response. (See Pet. Appx. 444, at Pg. 80.)

> [a] "prompt" investigation is one 'performed readily or immediately," or involves "responding instantly.

Miller at 694, 319 at *Footnote 12.* Here, a simple review of the deposition testimony of Kenneth Conaway and Lisa McGahan and the letter sent on March 9, 2018 reveals that Nationwide delayed payment for many months even after it acknowledged that payments were due. Moreover, a delay of several months while waiting on the paper copy of a report from the fire investigator, who had already communicated his opinions, can hardly be considered "prompt." Accordingly, Mr. Banks, who had to retain an attorney and undergo months of litigation before Nationwide would pay even any part of his claims, is clearly entitled to recover *Hayseeds* damages and the Circuit Court properly found that there was no genuine issue of fact to be decided with regard to that issue.

III. The Circuit Court properly granted Caleb Banks' request for an adverse inference instruction in light of Nationwide's unwillingness and/or inability to provide relevant discovery with respect to Nationwide's general business practices.

As discussed above, Mr. Banks served written interrogatories and requests for production of documents upon Defendant Nationwide in order to obtain evidence to support his claim that the Petitioners have a "general business practice" of violating West Virginia's Unfair Trade Practices Act (*W. Va. Code §33-11-4(9)*). A private cause of action for such violations was recognized by the Court in *Jenkins v. J.C. Penney Casualty Insurance Company*, supra., where the Court stated:

> [I]t does seem clear that **more than a single isolated violation of W.Va. Code 33-11-4(9), must be shown in order to meet the statutory requirement of an indication of "a general business practice,"** which requirement must be shown in order to maintain the statutory implied cause of action.

Jenkins, at 260. (Emphasis supplied.) The Court in *Jenkins* described two different means by which a claimant could meet the statute's "general business practice" requirement. The first method of meeting the "general business practice" requirement discussed in *Jenkins* was by showing that more

than one violation occurred in a single claim. *Jenkins* at 260. The second is through testimony regarding unrelated claims by others. In that regard, the Court noted:

> Proof of other violations by the same insurance company to establish the frequency issue can be obtained from other claimants and attorneys who have dealt with such company and its claim agents, or from any person who is familiar with the company's general business practice in regard to claim settlement.

Jenkins at 260. Therefore, claimants who are seeking such evidence often request that an insurer produce the list of complaints that all insurance companies doing business in West Virginia are required to keep pursuant to *W. Va. Code §33-11-4(10),* which provides:

> No insurer shall fail to maintain a complete record of all the complaints which it has received since the date of its last examination under section nine [§33-2-9], article two of this chapter. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints and the time it took to process each complaint. **For purposes of this subsection, "complaint" shall mean any written communication primarily expressing a grievance.**

(Emphasis supplied.) Here, Mr. Banks sought information regarding other grievances and complaints, whether formal or informal, asserted by other claimants and policyholders against Nationwide over the past five years. (See, Pet. Appx. 089-090 and 94.) Unfortunately, because Nationwide refused to provide the requested information, the Plaintiff was forced to file a *Motion To Compel*, which the Circuit Court granted on May 14, 2019. (See, Pet. Appx. 241-245, the Court's May 14, 2019 *Order*.) Nevertheless, Nationwide continued its refusal to provide complete information and to produce a witness to testify regarding topics related to those issues despite being expressly ordered to do so. (See, Resp. Appx. at 000064, the June 7, 2019 e-mail.) Nationwide further produced an incomplete complaint register and its corporate representative was not even able to verify that a procedure was in place to confirm that all such complaints were included. (See Pet.

Appx. 357, excerpts from the deposition of Susan Hatfield, at Pgs. 46-48.)

Rule 37 of the *West Virginia Rules of Civil Procedure* provides guidelines to address a party's improper refusal to cooperate in discovery. *Rule 37(b)(2)* states:

> *Sanctions by Court in Which Action is Pending.* -- **If a party** or an officer, director, or managing agent of a party or a person designated under Rules 30(b)(6) or 31(a) to testify on behalf of a party **fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule** or Rule 35, or if a party fails to supplement as provided for under Rule 26(e), or if a party fails to obey an order entered under Rule 26(f), **the court in which the action is pending may make such orders in regard to the failure as are just and among others are the following:**
>
> **(A) An order that matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;**
>
> (B) An order refusing to allow the disobedient party to support or oppose designed claims or defenses, or prohibiting that party from introducing designated matters into evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment by default against the disobedient party;
>
> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;
>
> In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(Emphasis supplied.) In this case, Mr. Banks sought the information regarding other complaints made about Nationwide's claims handling in order to establish that Nationwide has a general business practice which violates West Virginia's Unfair Trade Practices Act. Pursuant to *Rule 37*,

when Nationwide intentionally refused to provide that information in violation of the Court's discovery Order and, by its conduct, rendered the information unavailable, it became subject to sanctions in the form of an adverse inference instruction to the Jury on that issue.

The Court has recognized the use of an adverse inference in cases involving the concealment of evidence by a party litigant. For example, in the case of *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003) at Syl. Pt. 3, the Court stated:

> "'Before a trial court may give an adverse inference jury instruction or impose other sanctions against a party for spoliation of evidence, the following factors must be considered: (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonableness of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence. The party requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four-factor spoliation test. If, however, the trial court finds that the party charged with spoliation of evidence did not control, own, possess, or have authority over the destroyed evidence, the requisite analysis ends, and no adverse inference instruction may be given or other sanction imposed.'"

Syl. Pt. 3, *Hannah v. Heeter*, 213 W.Va. 704, 584 S.E.2d 560 (2003) [quoting Syl. Pt. 2, *Tracy v. Cottrell,* 206 W.Va. 363, 524 S.E.2d 879 (1999)].

"[F]or an adverse inference to arise 'against a party, it must appear that ***he is able to produce, and has some control,*** by reason of his situation or relation, over the witness whose testimony would clear up the situation.'" *Tracy*, 206 W.Va. at 372, 524 S.E.2d at 888 (quoting *Bartlett v. Baltimore & Ohio Railroad Co.,* 84 W.Va. 120, 128, 99 S. E. 322, 322 (1919), emphasis in *Tracy*). When a party mishandles, alters, damages, or destroys relevant evidence, "the solution ... is to instruct the jury regarding the spoliation of evidence[]" and "give an 'adverse inference' instruction to the jury,

such that the jury may infer that the altered or missing evidence, if it had been available, would have been unfavorable to the offending party's case." *Brady v. Deals on Wheels, Inc.*, 208 W.Va. 636, 645, 542 S.E.2d 457, 466 (2000) (Starcher, J., dissenting from affirmance of dismissal based on plaintiff's inadequate affidavits [citing *Tracy*, 206 W.Va. at 371-74, 524 S.E.2d at 887-90)].

In this case, Nationwide clearly had exclusive control over its complaint register and had a legal obligation to make the list complete. Nationwide also controls and is responsible for the actions of its adjusters when they receive written communications primarily expressing a grievance about Nationwide's claims handling. In the absence of some rule or procedure that all such communications be reported and entered into the list Nationwide is required to keep pursuant to *W. Va. Code §33-11-4(10)*, it is obvious that some or even most of those "communications' will not end up on the list. Here, Nationwide's corporate representative on the topic of how Nationwide maintains its complaint register, Susan Hatfield testified that she could not confirm that the list she was producing included third-party complaints (Pet. Appx. 358, at Pg. 59), and she was unaware of any auditing process whereby Nationwide ensured that its adjusters actually sent all written communications primarily expressing a grievance to her department to be included on the list in the first place. (Pet. Appx. 359, at Pgs. 71-72.)

The degree of prejudice suffered by Mr. Banks due to Nationwide's unwillingness to produce either a complete complaint register or a complete list of complaints was great because, as noted above, information regarding other complaints about how an insurer handles claims is directly relevant to the "general business practice" issue pursuant to *Jenkins*, and to Banks' claim for punitive damages. Moreover, Nationwide could hardly argue that it should not have anticipated the need to maintain such a record when it is required to do so under the plain language of *W. Va. Code §33-11-*

4(10), and it was clearly at fault for failing to produce the statutorily-required records when it was specifically ordered to do so.

In an effort to escape the consequences of their failure to properly respond to discovery, the Petitioners assert a number of excuses and explanations which must be addressed. First, the Petitioners assert that Mr. Banks "undeniably received a complete copy of all complaints maintained by Nationwide about first-party homeowners insurance claims." (See, the Petitioners' *Brief,* at Pg. 9.) This assertion ignores the fact that Mr. Banks had not limited his request to complaints about "first-party homeowners claims." (See Pet. Appx. 089-090, Interrogatory No. 12, Plaintiff's First Set of Interrogatories.) In addition, it ignores the fact that all such complaints are subject to discovery as all are relevant to Banks' pursuit of discovery related to Nationwide's business practices. For example, in Syl. Pt. 4 of *Dodrill v. Nationwide Mut. Ins. Co.*, 201, W.Va. 1, 491 S.E.2d 1 (W.Va. 1996), the Court focused upon the nature of the conduct rather than the nature of the underlying claim, and stated:

> [T]he evidence should establish that the conduct in question constitutes more than a single violation of W.Va. Code § 33-11-4(9), that the violations arise from separate, discrete acts or omissions in the claim settlement, and that they arise from a habit, custom, usage, or business policy of the insurer, so that, viewing the conduct as a whole, the finder of fact is able to conclude that the practice or practices are sufficiently pervasive or sufficiently sanctioned by the insurance company that the conduct can be considered a "general business practice" and can be distinguished by fair minds from an isolated event.

The focus on the type of conduct rather than the type of policy or coverage involved is also reflected in *W. Va. Code §33-11-3* itself, which provides:

> No person shall engage in this state **in any trade practice which is defined in this article** or determined pursuant to section seven [§33-11-7] of this article to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

1.1(a) expressly states:

> The purpose of this rule is **to define certain practices in this State which constitute unfair methods of competition or unfair or deceptive acts or practices** and to establish certain minimum standards and methods of settlements of both first party and third party claims.

(Emphasis supplied.) For this reason, evidence that Nationwide has engaged in any prohibited practice would relevant to whether it has a "general business practice" of violating the Statute regardless of the type of policy involved or the fact that pattern gave rise to the claim. For example, *§114-14-5.3* of the Insurance Rules requires insurers to respond to pertinent communications "within fifteen (15) working days." It does not distinguish between communications regarding claims under auto policies and communications regarding claims under homeowners policies. The failure to respond to a pertinent communication within fifteen working days is a violation, regardless of the type of coverage or policy involved. Similarly, *W. Va. Code §33-11-4(9)(a)* prohibits an insurer from "[m]isrepresenting pertinent facts or insurance policy provisions relating to coverages at issue." Such misrepresentations are a violation, regardless of whether they concern coverage under a commercial liability policy, an auto policy or a homeowners policy. Nationwide's desire to limit discovery related to Banks' Unfair Trade Practices Act claim to complaints involving identical policies and fact patterns ignores the nature of the general business practice requirement. It also ignores the decisions of this Court which expressly recognize that information regarding all bad faith claims over a period of time is subject to discovery in a *Jenkins* action. For example, in *State ex rel. Allstate Ins. Co. v. Gaughan*, 220 W. Va. 113, 640 S.E.2d 176 (W.Va. 2006), the Court noted:

> We held in *Stephens* that the plaintiff insureds' discovery requests, which sought information as to "**every claim filed against [State Farm,] Nationwide, [for a 10-year-period] since 1980 which involved allegations of bad faith, unfair trade practice violations, excess verdict liability, or inquiries from insurance industry**

regulators concerning State Farm's handling of claims," 188 W.Va. at 625, 425 S.E.2d at 580, were relevant to the issues involved in the insureds' Unfair Trade Practices Act lawsuit against State Farm. As we said further in *Stephens:*

> In the present case, the information requested by the plaintiffs was relevant to the issues involved in the civil action below. In *Jenkins v. J.C. Penney Casualty Insurance Co.*, 167 W.Va. 597, 280 S.E.2d 252 (1981), we recognized that to prove a violation of the Unfair Trade Practices Act, W. Va. Code, 33-11-1, *et seq.*, the plaintiff must show more than one violation of the statute. Thus, the plaintiffs' request for information of other unfair trade practices claims against State Farm was relevant to prove their own allegations in that regard. Likewise, the plaintiffs' interrogatories sought information relevant to their bad faith claim which carried with it the potential for punitive damages. Other courts have recognized that in a bad faith claim against an insurance carrier, previous similar acts can be shown to demonstrate that the conduct was intentional.

State ex rel. Allstate Ins. Co. v. Gaughan, at 121-22, 184-85. (Emphasis supplied.) Federal courts in West Virginia have also rejected the Petitioners' arguments regarding limiting such discovery to similar types of claims. For example, in *Paull Assocs. Realty, LLC v. Lexington Ins. Co.*, No. 5:13-CV-80, 2014 WL 12596397 (N.D. W. Va. Jan. 9, 2014), the Court considered an identical argument and noted:

> Thus, **contrary to Defendant's contentions, case law clearly holds that information about *all* prior complaints is relevant to show a general business practice in WVUTPA actions because prior complaints bear directly on an insurance company's claims handling procedures regardless of whether the complaint arises out of the same type of policy**. Where other Courts have limited the scope of discovery into prior complaints, it is because the responding party was able to show that responding would create an undue burden. However, here, Defendant presents no specific information about why responding to this request as framed would present a hardship. Moreover, Defendant has not argued that the handling of occurrence policy claims is different than the handling of claims-made-and-reported claims. Nor has Defendant explained why Plaintiff's request must be limited to *miscellaneous* professional liability policies *real estate operations*. Defendant merely asserts that coverage is triggered differently under different types of policies. As noted above, Plaintiff is not merely seeking prior complaints in order to show that Defendant breached the insurance contract at issue, so the fact that

> coverage is triggered differently has no bearing on whether complaints are relevant. **Because prior complaints are relevant to show a general business practice of mishandling claims, prior complaints arising under all similarly handled policies are relevant to Plaintiff's WVUTPA claims**. Additionally, here, Plaintiff limited its requests both temporally, by requesting prior complaints from 2008, and geographically, by requesting prior complaints from the State of West Virginia. Accordingly, the Court finds that Plaintiff is entitled to information about prior complaints stemming from *all* professional liability insurance policies in West Virginia from 2008 to the date of filing the complaint.

Paull Assocs. Realty, LLC v. Lexington Ins. Co., at 9 (Emphasis supplied.) Therefore, the Petitioners' suggestion that Nationwide's refusal to identify "all" complaints is warranted because all such complaints are not relevant is simply incorrect.

Next, the Petitioners seek to excuse their failure to comply with the Circuit Court's *Order* by suggesting that the complaint register itself is not admissible as evidence and that there is no cause of action for failing to maintain it properly. Both arguments ignore the very purpose for why claimants such as Mr. Banks routinely request production of the complaint register. It is the information the complaint register contains, not the register itself, which is needed for discovery. By identifying other individuals who have made complaints about how Nationwide handled their claims, Mr. Banks can identify potential witnesses who can provide evidence about Nationwide's business practices. Moreover, by obtaining the type of information contained on the complaint register, Mr. Banks could weed out complaints which might not be particularly helpful and identify which witnesses to contact. Put simply, Mr. Banks did not want or need the complaint register as an exhibit to be offered into evidence. He needed it as discovery to identify "other claimants and attorneys who have dealt with such company," as discussed in *Jenkins,* as a source of general business practice evidence related to Nationwide. See *Jenkins* at 260.

In a related argument, the Petitioners assert that there was no grounds for the Court to

sanction Nationwide for its failure to produce the requested information because Mr. Banks' counsel had indicated that he did not intend to take discovery regarding any of the individual complaints identified on the complaint register. This argument misses the point of the requested discovery. While Mr. Banks' counsel did not seek to depose a corporate representative regarding the details of the specific complaints identified on the complaint register, he did wish to obtain information regarding how the complaints were recorded and whether the listing was complete. As discussed above, having the opportunity to review a complete list would allow counsel to identify relevant complaints for which additional information could be sought. Because Nationwide refused to provide complete discovery information in the first place, Mr. Banks was denied the opportunity to identify all such complaints.

Next, the Petitioners raise the nonsensical argument that *W. Va. Code §33-11-4(10)* applies only to complaints an insurer receives and not complaints received by its adjusters since adjusters are "persons" and not "insurers." Such an argument is ridiculous on its face since an insurance company is a legal entity which can only act through the conduct of its human employees and officers. Clearly, all complaints are received by Nationwide's representatives, rather than the corporation itself.

In the same fashion, the Petitioners make the circular argument that if Nationwide was not maintaining a proper complaint register, the Insurance Commissioner would have taken action against it in a market conduct survey. This argument ignores the fact that one of the primary sources of information about an insurer's conduct available to the West Virginia Insurance Commissioner when performing such a market conduct survey is the insurer's complaint register. Obviously, the Insurance Commissioner is already aware of complaints received by the Commissioner's office. It

depends upon the insurer to keep a record of all written complaints primarily expressing a grievance to identify other complaints which were not sent to the Commissioner, but which may be relevant to the insurer's market conduct. What the Petitioners' argument on this issue fails to recognize is the simple fact that if the insurer does not include information about many of the written complaints it receives from its complaint register in the first place, the Commissioner's Office would have no reason to know that a complete record was not being maintained.

Next, the Petitioners suggest that the only way the Circuit Court could properly give the jury an adverse inference instruction would be upon a finding that Nationwide was guilty of spoliation or had somehow destroyed evidence. This argument ignores *Rule 37* and the provision that, when a Circuit Court determines that a party has refused to comply with its discovery orders, the Court may enter:

> [a]n order that matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order.

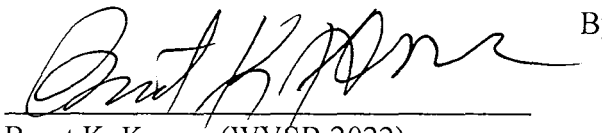
Here, Nationwide refused to produce information concerning its general business practices, despite being ordered to do so. Therefore, under the plain language of *Rule 37*, the Circuit Court could properly order the Jury to take it as established that Nationwide had such a general business practice. Put simply, Mr. Banks requested information regarding other complaints against Nationwide to help him prove that Nationwide has a general business practice of violating the Unfair Trade Practices Act. Nationwide refused to provide the requested discovery, even after being ordered to do so and the Circuit Court properly sanctioned Nationwide by determining that the jury should be instructed that the records, if they had been produced, would have provided access to evidence that Nationwide had such a general business practice. The fact that Nationwide later supplemented its responses

long after discovery had closed to provide at least some of the requested information is irrelevant. Here, Nationwide chose to willfully disobey the Circuit Court's *Order* and reaped the normal consequences of such a decision.

CONCLUSION

Respondent Caleb Banks asks the Court to deny the *Petition for Writ of Prohibition*, and remand this action for proceedings on the merits.

Respectfully submitted,
CALEB BANKS,
By counsel,



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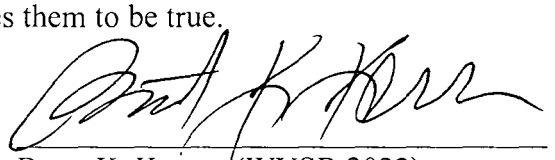
VERIFICATION

BRENT K. KESNER, being first duly sworn, on his oath, deposes and says that he is counsel for the Respondent/Plaintiff, Caleb Banks, in the foregoing verified RESPONSE TO PETITION FOR WRIT OF PROHIBITION; that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief; and that insofar as they are therein stated to be upon information and belief, he believes them to be true.



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