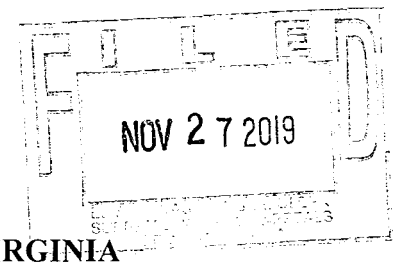

No. 19-0978

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA *ex rel.* NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., *et al.*,

Petitioners,

vs.

THE HONORABLE DAVID W. HUMMEL, JR., JUDGE OF THE SECOND JUDICIAL CIRCUIT; AND AXIALL CORPORATION; AND WESTLAKE CHEMICAL CORPORATION,

Respondents.

From the Circuit Court of Marshall County, West Virginia
No. 19-C-59, The Honorable Judge David W. Hummel, Jr.

RESPONDENTS' AXIALL CORPORATION'S AND WESTLAKE CHEMICAL CORPORATION'S RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Respondents, Axiall Corporation ("Axiall") and Westlake Chemical Corporation ("Westlake") (collectively, "Westlake"), agree with Petitioner Insurers (the "Insurers") that this Court should issue a Writ of Prohibition vacating that portion of the Circuit Court of Marshall County's (the "Circuit Court") October 22, 2019 Order Following September 5, 2019 Hearing (the "Order") that addresses Westlake's bad-faith claims. Indeed, neither the Insurers nor Westlake made any motion to the Circuit Court regarding bad-faith claim issues, nor did they brief, argue or present an evidentiary record pertaining to the bad-faith claims at issue in this case. Rather, the bad-faith aspects of the Order were issued by the Circuit Court *sua sponte*, with no advance notice to the parties, as an add-on to the Court's ruling on the most-convenient-forum and venue issues that had been briefed and argued by the Parties – namely, the Insurers' Motion to Dismiss or Stay in Favor of First-Filed Foreign Action (the "Motion to Dismiss"). Accordingly, the Circuit Court's rulings on Westlake's bad-faith claims should be vacated and remanded to the Business Court[1] to be addressed, at the appropriate time, after relevant discovery, briefing and argument.

I. QUESTION PRESENTED

Westlake agrees with the Insurers that the Circuit Court erroneously made rulings related to Westlake's bad-faith claims after deciding the Insurers' Motion to Dismiss, which motion was solely concerned with forum and venue issues. However, the Insurers' request for relief from this Court goes beyond the permissible scope of a Writ of Prohibition – a rare and limited remedy meant to correct clear errors of law in the absence of factual disputes – and invites this Court to make a ruling as to which particular state's law applies to those bad-faith claims. This improper invitation is reflected in the Insurers' Question Presented: "Whether the extra-

[1] This case was referred to the Business Court Division by order of the Supreme Court of Appeals, dated October 11, 2019 [APP001644-45].

contractual bad-faith claims brought against Insurers in the underlying matter are governed by Georgia law, as agreed in the subject insurance contract."

As explained in greater detail below, Westlake agrees with the Insurers that this Court should vacate those portions of the Order dealing with bad faith and remand the bad-faith issues to the Business Court for decision after development of a full record. The Court should not, however, go beyond that limited ruling, given the purpose of a Writ of Prohibition and given the procedural posture of this case – specifically, this case has barely advanced past the pleadings stage, and practically no factual record has been developed as yet.

In Westlake's view, the proper Question Presented by the Petition is:

> **Whether the Circuit Court erred in making a *sua sponte* ruling regarding Westlake's bad-faith claims at issue in this action in the absence of any motion, briefing, argument, hearing, or factual record, and in the context of an unrelated motion of the Insurers regarding the proper forum and venue in which this case should proceed.**

Westlake submits that the answer to this question is: **YES.**

Consequently, those portions of the Circuit Court's Order unrelated to the Insurers' Motion to Dismiss should be vacated, and Westlake's Georgia bad-faith claim (Count III) should be reinstated, with direction to the Business Court to consider and address any bad-faith issues at the appropriate time. To the extent the Insurers desire a ruling on the applicable choice of law for Westlake's bad-faith claims, the Insurers should present their motion to the Business Court after the parties have completed relevant discovery and have had an opportunity, in light of that discovery, to fully brief and argue the matter.

II. STATEMENT OF THE CASE

In accordance with Rule 16(g) of the West Virginia Rules of Appellate Procedure, Westlake states only facts deemed necessary to correct inaccuracies and omissions in the Petition.

The only facts pertinent to the Petition are found in Section II.C of the Petition. In Section II.C, the Insurers correctly point this Court to the forum dispute between the parties, the final resolution of that dispute via the Circuit Court's denial of the Insurers' Motion to Dismiss, and the Circuit Court's subsequent *sua sponte* rulings regarding Westlake's bad-faith claims made in the absence of a motion, briefing, argument, or a factual record. These facts are not in dispute, and they are evidenced by the transcript of the September 5, 2019 hearing [APP001623-28] (*sua sponte* dismissing Westlake's Georgia bad-faith cause of action) and the Order itself [APP001647] (confirming the September 5 ruling and stating "[t]he Court acknowledges that this issue has not been briefed or argued before the Court").[2]

In addition to these undisputed relevant facts, however, the Insurers also include other "facts" in their Statement of the Case that are irrelevant to the resolution of the Petition and which are not supported by any evidence in the record. In fact, other than the pleadings, the Motion to Dismiss, and attachments thereto, there is as yet no record in this case.

For example, the Insurers allege the following "facts":

- Axiall's broker was "sophisticated";
- The broker "actively participated in procuring the Policy and involved wording";
- Axiall, and not the Insurers, selected Georgia law should govern the policies at issue;
- Axiall selected Georgia law because it was headquartered in Georgia.

The Insurers do not cite any evidence in support of these and other alleged "facts" made in their Statement of the Case. For example, the entirety of Section A of their Statement of the Case is devoid of a single citation to the record.

[2] All references to "[APP_____]" are to the Appendix filed by the Insurers with their Petition for Writ of Prohibition.

Because they are irrelevant to the proper Question Presented as noted above, and to the extent they are unsupported by any citation to the record, all of the factual allegations in the Insurers' Statement of the Case other than those in Section II.C should be disregarded.

III. SUMMARY OF ARGUMENT

Westlake agrees with the Insurers that this Court should vacate the portion of the Circuit Court's Order that deals with Westlake's bad-faith claims and remand those matters to the Business Court for consideration at the appropriate time.

However, to the extent that the Insurers are inviting this Court to go further by asking this Court to make an affirmative finding regarding what law applies to those bad-faith claims, Westlake contends that a Writ of Prohibition is an inappropriate vehicle for such a request, especially given the procedural posture of the case. This Court should refuse the invitation to address this unripe issue, and instead should simply vacate the portions of the Circuit Court's Order pertaining to bad faith, reinstate Westlake's Georgia bad-faith claim, and remand the case to the Business Court for further proceedings.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument, especially since Westlake and the Insurers agree that those portions of the Court's Order dealing with issues other than those presented by the Insurers' Motion to Dismiss should be vacated. Westlake is of course prepared to present oral argument if the Court so desires, or if it would expedite the resolution of this matter.

V. ARGUMENT

A. Westlake Agrees That the Portions of the Circuit Court's Order Unrelated to the Forum and Venue Issues Should Be Vacated.

The only issue before the Circuit Court during the September 5, 2019 hearing from which the Order arose was the Insurers' Motion to Dismiss on grounds of *forum non conveniens* and venue. [APP001569-1631] After denying the Insurers' Motion to Dismiss (a denial that the Insurers are not challenging), the Circuit Court took it upon itself to *sua sponte* dismiss – without the benefit of any motion, briefing, argument or indeed any factual record – one of the counts in Westlake's Complaint – Count III (Bad Faith violation of Georgia Code § 33-4-6). [APP001623; 1647] The Circuit Court then justified this action by finding – again, without the benefit of any motion, briefing, or argument or factual record – that Westlake's bad-faith claims against the Insurers were governed solely by West Virginia law. [APP001624-28; 1647]

The Insurers are correct to note that, in the course of making its *sua sponte* decision, the Circuit Court both misconstrued Georgia law (Petition, at 9, n.7), and made a ruling in the absence of any record on an issue that neither party either had requested to be decided at that time, or had briefed (Petition, at 9-10). They are also correct that this Court should "vacate the portion of the Circuit Court's Order finding that [Westlake's] bad faith claims are governed by West Virginia law." (Petition at 23). Although they do not say so expressly in their Petition, the Insurers must surely also intend for this Court to vacate the entirety of the Order that deals with any matters other than the forum and venue issues presented by the Insurers' Motion to Dismiss – including the Court's dismissal of Westlake's Georgia bad-faith claim – because the Circuit Court's "finding" that Westlake's bad-faith claims are governed by West Virginia law was only made in the context of that dismissal (and surely the Insurers are not arguing that Westlake's Georgia bad-faith claim should remain dismissed even as they contend that Georgia law should govern Westlake's bad-faith claim).

Therefore, to the extent that the Insurers are requesting that this Court vacate those portions of the Order unrelated to their Motion to Dismiss on forum and venue issues, Westlake agrees.

B. The Issue of What Law Governs Westlake's Bad-Faith Claims Is Not Ripe, and Not Properly Before This Court.

The Insurers' contention that the Circuit Court's *sua sponte* ruling that West Virginia law applies to Westlake's bad-faith claims without the benefit of briefing, argument or a factual record was a clear error of law – and that therefore this Court should vacate that part of the Order containing that ruling (which of course entails the entirety of the bad-faith rulings in the Order, which are all inter-related). However, Insurers then attempt to go further with their Writ and seek a ruling from this Court regarding what law applies to those bad-faith claims. This Court should deny any invitation to make such a ruling, because the issue is not properly before this Court.

As this Court has itself very recently pointed out:

> [T]his Court will use prohibition 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.

State ex rel. Vanderra Res., LLC v. Hummel, 242 W. Va. 35, 40, 829 S.E.2d 35, 40 (2019) (emphasis added).

The *Vanderra* standard, as applied to this case, supports the vacating of the Circuit Court's bad-faith rulings. There is no dispute between the Insurers and Westlake that the Circuit Court's *sua sponte* choice-of-law ruling, made in the context of deciding a motion on forum and venue and without the benefit of a motion, briefing, or a factual record, was a clear-cut legal error. This error was in contravention of clear statutory and common law mandates because, in

making its choice-of-law ruling, the Circuit Court did not perform the thorough analysis that West Virginia law requires for such rulings. Therefore, a Writ of Prohibition correcting this clear error is appropriate under *Vanderra*. *See, e.g., Atl. Credit & Fin. Special Fin. Unit, LLC v. Stacy*, No. 17-0615, at pp. 13-14 (W. Va. Oct. 26, 2018) (memorandum decision) (remanding case where court issued choice-of-law ruling without the benefit of a thorough analysis by the parties).

At the same time, the *Vanderra* standard is entirely inconsistent with this Court using the very limited and rare vehicle of a Writ of Prohibition to decide a substantive legal issue which the Insurers acknowledge was never even presented to the Circuit Court and which they correctly fault the Circuit Court for deciding without sufficient legal basis. *See, e.g., State ex rel. Owners Ins. Co. v. McGraw*, 233 W. Va. 776, 781, 760 S.E.2d 590, 595 (2014) (denying insurer's petition for writ of prohibition on, *inter alia*, choice-of-law issue as premature, and finding that "the matters raised by [the insurer] . . . should be resolved in the lower court" and that an "appeal may be taken from a final order" in the normal course).

Moreover, in asking this Court to make a choice-of-law ruling while the case remains barely out of the pleadings stage, with zero discovery having been conducted as of this writing, the Insurers are asking for a Writ in circumstances where not only are there factual disputes, but a dearth of facts in the record by which the Court can resolve those disputes. To determine choice-of-law applicable to Westlake's bad-faith and unfair trade practices causes of action contracts require analysis that may encompass, among other case-specific considerations: (i) assessment of the enforceability the choice-of-law provision in the insurers' policies based on factors including whether the policies bear a "substantial relationship with the jurisdiction whose laws the parties have chosen to govern the agreement" and whether "the application of that law would offend the public policy" of West Virginia; (ii) the intent of the parties with respect to the

scope of that choice-of-law provision; and (iii) inquiry into the place of contracting, the intentions of the parties, and each candidate state's public policy interests. *See, e.g.*, *Gen. Elec. Co. v. Keyser*, 166 W. Va. 456, 275 S.E.2d 289 (1981) (application of contractual choice-of-law provision requires analysis of whether the contract bears a "substantial relationship with the jurisdiction whose laws the parties have chosen to govern the agreement" and whether "the application of that law would offend the public policy of this state."); *Howe v. Howe*, 218 W. Va. 638, 643-47, 625 S.E.2d 716, 721-25 (2005) (discussing West Virginia choice-of-law principles in the context of insurance coverage disputes).

To be sure, Westlake does not dispute, and has never disputed, that there is a Georgia choice-of-law provision in the relevant contracts of insurance that potentially governs a claim by Westlake for bad-faith claims handling. This is precisely why Westlake included a Georgia bad-faith claim in is Complaint. However, West Virginia common law and West Virginia's Unfair Trade Practices Act may also apply here in addition to Georgia bad-faith law, or they may supersede Georgia bad-faith law.

The Insurers regularly conduct business in West Virginia, and they have taken advantage of West Virginia's insurance licensure provisions to become licensed West Virginia insurers subject to West Virginia regulations. [APP000740; APP000745; APP001488] Furthermore, while presenting themselves as licensed West Virginia insurers, the Insurers undertook to insure Westlake's property located in Marshall County, West Virginia. [APP001284; APP001292] When that property was damaged, the Insurers' claims-handling activities – which Westlake contends included bad-faith conduct – took place in significant part in West Virginia. [APP000012-000014] The Insurers apparently contend that the Georgia choice-of-law provision in the relevant insurance contracts[3] absolves them of all of their responsibilities as West Virginia

[3] The relevant choice-of-law provision reads: "Any dispute concerning or related to this insurance will be determined in accordance with the laws of the State of Georgia." While providing that any dispute

licensed insurers under West Virginia insurance law and regulations. However, this question cannot be answered on the scant record currently before this Court, nor can it be decided via the vehicle of a Writ of Prohibition, the limited and rare purpose of which is to correct clear errors of law that are not subject to related factual disputes.

Finally, even if the Insurers' Petition was the appropriate vehicle for a choice-of-law determination (in the complete absence of a relevant factual record), the Insurers would still not be entitled to their preferred ruling because the Insurers' legal argument for the proposition that Georgia law must govern all of Westlake's bad-faith claims is incorrect. The Insurers' argument for this proposition rests largely on the premise that Westlake's bad-faith claims sound in contract, not in tort. (Petition, at 18-19). Their primary support for this argument is *Pen Coal Corp. v. William H. McGee & Co.*, 903 F. Supp. 980 (S.D.W. Va. 1995), in which the U.S. District Court for the Southern District of West Virginia found that "[f]or the purpose of choice-of-law analysis ... bad faith and unfair trade practices claims properly should be characterized as contract, not tort, claims." *Id.*, 903 F. Supp. at 983. The problem with the Insurers' reliance on this case is that the U.S. Court of Appeals for the Fourth Circuit, in a much more recent decision, came to the opposition conclusion. In *Kenny v. Independent Order of Foresters*, 744 F.3d 901 (4th Cir. 2014), the Fourth Circuit held that the policyholder's West Virginia Unfair Trade Practices Act ("WVUTPA") claim sounded in tort, not in contract, because:

> [the policyholder's] lawsuit is based on [the insurer's] allegedly unlawful conduct in connection with its handling of her claim. In other words, notwithstanding the repeated references to the policy

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"concerning or relating to this insurance will be determined in accordance with the laws of the State of Georgia," this provision does not specifically exclude the application of the laws of other states to, for example, bad-faith claims-handling issues involving coverage under the Policies. Indeed, application of Georgia's conflict-of-law rules may result in the application of West Virginia bad-faith law to Westlake's bad-faith claims. Aware of the sparseness of this provision and the potential for ambiguity in its wording, the Insurers assert – without any evidentiary support whatsoever – that it was Axiall who drafted this wording. The Insurers' reliance on this and other similar assertions in their Petition, coupled with the fact that there has not been any discovery in this case, is yet another reason why the Insurers' Petition is not the proper vehicle for determining choice-of-law issues.

> (a contract) in the complaint, the essential claim underlying [the policyholder's] lawsuit is [the insurer's] allegedly tortious conduct.

Kenny, 744 F.3d at 907 (internal punctuation omitted). In addition, the Fourth Circuit noted a further reason for its conclusion: the WVUTPA affords policyholders damages, such as punitive damages and attorneys' fees, that are not generally available in contracts cases. *Id.* In the course of its decision, the Fourth Circuit expressly cited and dismissed *Pen Coal*. *Id.* at 906. Here, as in *Kenny*, Westlake's common law bad-faith claim and its WVUTPA claims sound in tort. Moreover, like in *Kenny*, although Westlake's bad-faith allegations in the Complaint include repeated references to the at-issue contracts of insurance, they also allege tortious behavior on the part of the Insurers, including violation of specific provisions of the WVUTPA, and "willfully, maliciously, and intentionally utiliz[ing] unfair business practices...." [APP000018-19]

For all these reasons, the Court should refuse the Insurers' request to go beyond simply vacating the Circuit Court's erroneous bad-faith claim rulings and to decide a disputed choice-of-law matter based on an incomplete record. The rare vehicle of Prohibition, the purpose of which is correcting clear-cut errors, not deciding substantive issues, is inappropriate for making determinations on the disputed choice-of-law issue in the first instance.

VI. CONCLUSION

This Court should vacate paragraphs 3, 4 and 5 of the October 22, 2019 Order, and remand the matters addressed in those paragraphs to the Business Court for further proceedings. This Court should take no other action with respect to the Petition.

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Dated: November 26, 2019

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