

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

TIG INSURANCE COMPANY,

Petitioner,

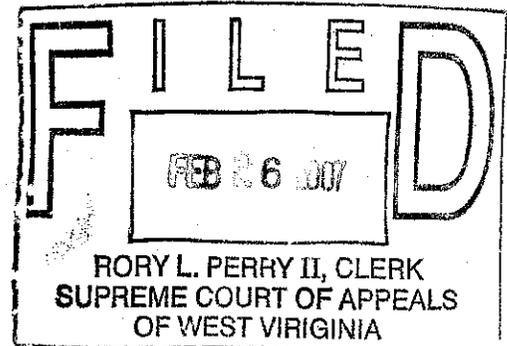
Vs.

Upon original jurisdiction in
prohibition,

THE HONORABLE ARTHUR M. RECHT; WILLIAM
E. GALLOWAY; GALLOWAY LAW OFFICES;
CAMBRIDGE PROFESSIONAL LIABILITY
SERVICES and JOHN DOES UNKNOWN; JEFFREY
A. HORKULIC; REBECCA A. HORKULIC, his wife,
and JEFFREY HORKULIC, as parent and natural
guardian of STEPHANIE HORKULIC and BENJAMIN
HORKULIC, minors,

No. 070384

Respondents.



**RESPONSE TO PETITION TO WRIT OF PROHIBITION AND
MEMORANDUM IN OPPOSITION OF WRIT OF PROHIBITION
FILED ON BEHALF OF WILLIAM GALLOWAY AND GALLOWAY LAW OFFICES**

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TABLE OF CONTENTS

Table of Authorities	ii.
Statement of Jurisdiction	1
Parties	1
Factual and Procedural Background	2
Issues	2
Prayer for Relief	2
Memorandum in Opposition	3
Kind of Proceeding and Nature of Ruling Below	3
Statement of Facts	4
Standard for Granting of Writ of Prohibition	7
Issues	7
Argument	7
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Glover vs. Narrick, 184 W.Va. 381, 400 S.E. 2d 816 (1990) 7

Barefield vs. DPIC, 600 S.E. 2d, 25 8

Givens vs. Mullikin, 75 S.W. 3d, 383, 395 (Tn. 2002) 8

Rose vs. St. Paul Fire and Marine Insurance Company, 599 S.E. 2d 673, 685
(Sup. Ct. App. W.V. 2004) 8

Statutes:

West Virginia Code §53-1-1 (1923) (2006) 7

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AND NOW come the Respondents, William E. Galloway, Esquire and Galloway Law Offices ("Galloway"), by and through his counsel, Joseph W. Selep, Esquire and ZIMMER KUNZ, P.L.L.C., and respond to the TIG Insurance Company's ("TIG") Petition for Writ of Prohibition, as follows:

STATEMENT OF JURISDICTION

1-8. Paragraphs 1-8 of TIG's Writ of Prohibition constitute conclusions of law to which no response is required. To the extent that a response is deemed necessary, Galloway admits the Petitioner has set forth the appropriate standard for the issuance of a Writ of Prohibition, but denies a Writ of Prohibition is appropriate under the facts of this case.

PARTIES

9-14. Admitted.

FACTUAL AND PROCEDURAL BACKGROUND

15. A Statement of Facts as set forth in the Memorandum of Law in Opposition for the Writ of Prohibition, to which reference is hereby made.

ISSUES

16. A statement of Galloway's response to the issues is set forth in the Petition for Writ of Prohibition and is set forth in a Memorandum of Law in opposition to the Petition, to which reference is hereby made.

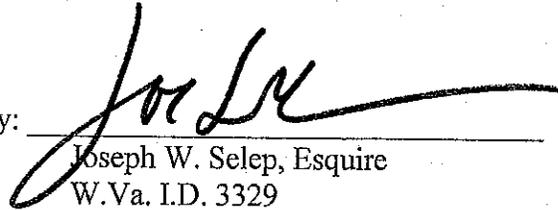
PRAYER FOR RELIEF

WHEREFORE, the Respondent, Galloway Law Office, denies that a Petition for Writ of Prohibition should issue under the facts and law of this case.

Respectfully submitted,

ZIMMER KUNZ
Professional Limited Liability Company

By: _____


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Counsel for Defendant, William E.
Galloway and Galloway Law Offices

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**MEMORANDUM IN OPPOSITION OF PETITION'
FOR WRIT OF PROHIBITION**

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is a Response to a Petition for Writ of Prohibition filed by the TIG Insurance Company against Respondents, including, Attorney William E. Galloway and the Galloway Law Offices, Defendants below. In a separate but related Petition for Allowance of Appeal, TIG objected to a trial court Order dated August 25, 2006 granting a Motion to Compel Enforcement of Compromised Settlement Agreement in a legal malpractice action filed against Attorney William E. Galloway and Galloway Law Offices. (See Case No. 070080 in the Supreme Court of Appeals of West Virginia) Presently, TIG objects to the assessment of attorneys' fees against it and the amount of the fees awarded to the Horkulics in prosecution of the Motion to Enforce Settlement. See Orders dated October 4, 2006 attached to TIG's Petition. Galloway asserts that the Orders were appropriately entered and deny that a Writ of Prohibition should issue.

II. STATEMENT OF FACTS

The underlying action is a legal malpractice action filed by Plaintiffs against their former attorney William E. Galloway. At the relevant time, Galloway was insured under a liability policy issued by TIG with liability limits of \$500,000. TIG undertook the defense of Galloway in the underlying action and, at the time pertinent to the settlement issue, retained Attorney William D. Wilmoth to defend Mr. Galloway. Wilmoth negotiated a settlement with Plaintiffs with authority of TIG. TIG later objected to the settlement.

During a plenary hearing on Plaintiffs' Motion to Enforce Settlement on May 30, 2006, Attorney Wilmoth testified at length regarding the facts and circumstances surrounding the settlement. The following are excerpts of Wilmoth's sworn testimony:

Q. At some point in time were you given authority to attempt to resolve the malpractice case?

A. Yes.

(Transcript, p. 25, lines 2-4)

* * * *

A. I believe the first full settlement discussion was in your office (Fitzsimmons Law Office). You were present. Your son and law partner, Rocky Fitzsimmons, was also present, and of course, I was there, as the people who were personally present. Later we got Mr. Rapponotti from TIG on the telephone. Mr. Rapponotti is the claims manager and is also, by the way, an attorney himself.

(Transcript, p. 28, lines 20-24, p. 29, lines 1-3)

* * * *

Q. So was it your understanding that, when you left that—the office that day, that there was a general understanding of a settlement at that point.

A. Yes.

Q. Okay.

A. Because I recall the discussion between—perhaps I was the one who listed for Mr. Rapponotti the portions of the settlement that you and I had been discussing.

He said: okay. He used the words "okay," two words. Whatever that is, he used the words "okay" to the settlement. He said "the only thing I have a question on is the consent judgment."

And I believe you said: "well, then you can come in and object," to which Mr. Rapponotti again responded: "okay." So I believe at that point there was a settlement which protected Bill Galloway's personal assets and settled the malpractice portion of the case.

(Transcript, p. 30, line 24 through page 31, line 18)

* * * *

Q. Mr. Rapponotti, you understood, was representing TIG Insurance Company at that time?

A. Mr. Rapponotti was the claims manager who initially called me to take over the case from Mr. Gillenwater, and with whom I had been working from the beginning of my representation.

(Transcript, p. 30, line 1, p. 31, lines 1-24)

Between May and August, 2005, TIG began to "make noises" regarding the Consent Judgment and Covenant Not to Execute aspect of the settlement. Attorney Wilmoth testified that on August 18, 2005, he was a participant in a telephone conference, along with TIG's counsel, Tom Flaherty, and Beth Ann Berger Zerman and her partner Ed Rueberry, the Chicago counsel for TIG. During the telephone discussion, Mr. Flaherty, Mr. Rueberry and Ms. Berger Zerman were all representing the interest of TIG Insurance Company. Plaintiffs' counsel was then added to the conversation. See, transcript, pps. 57-59. During that discussion, Mr. Wilmoth confirmed that it was agreed by all parties to the phone conversation that a settlement was, in fact, reached. Mr. Wilmoth explained as follows:

Q. Was it your understanding that, at least so far as the cash aspect, there was an understanding that at that point that the cash payment of the settlement was to be \$500,000 at that time?

A. Yes.

Q. Alright, how about the consent feature of the settlement? What discussions were had and what was your understanding, Mr. Wilmoth, as to the consent features?

A. You will see that I have numbered two about two-thirds of the way down on that sheet. It was the understanding that Mr. Galloway will consent to the \$1,500,000 judgment as the potential value of the underlying malpractice claim.

And then I reflected that TIG will file its objection or otherwise evidence its non-consent.

Q. Is it your understanding that that was agreed to by all the participants on the conversation?

A. Yes.

Q. Did that include TIG representatives?

A. Yes.

Q. That was Mr. Flaherty, Mr. Rueberry and Beth Ann Berger Zerman?

A. Yes.

(Transcript, p. 61, lines 2 though p. 62, line 2)

* * * *

Q. Alright. Is it fair to say Mr. Wilmoth throughout your entire representation, including meetings at my office and also discussions with representatives of TIG, that you—your concern and your intent was to protect any personal liability or exposure that Mr. Galloway would have in this particular legal malpractice case?

A. Absolutely. I would not have gone forward otherwise.

(Transcript, p. 64, lines 4-12)

* * * *

Q. After during the August 18, 2005 telephone conversation with Mr. Fitzsimmons, Mr. Rueberry, Mr. Flaherty and Ms. Zerman, was it your position that everybody was on board, Plaintiff, Galloway, you, TIG, that if, in fact, there was a settlement, Mr. Galloway's personal assets were not exposed in any manner from attack from anyone?

A. From the August 18 telephone conversation, I believe that all parties you mentioned were on board with what you just said.

Q. That Mr. Galloway would be fully protected, even against his own insurance carrier, TIG?

A. That was my understanding.

(Transcript, p. 104, lines 7-19)

Based upon the above, it is clear that a settlement was reached between Plaintiffs and Defendant Galloway as early as May, 2005 or during the telephone conversation of August 18, 2005, with the full knowledge and authority of Galloway's insurance carrier, TIG. The sole reason that a Petition to Enforce the Settlement had to be filed was the failure of TIG to complete the terms of the agreement in which it participated.

III. STANDARD FOR GRANTING OF WRIT OF PROHIBITION

A Writ of Prohibition will issue "in all cases in usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers." West Virginia Code §53-1-1 (1923) (2006); Glover vs. Narrick, 184 W.Va. 381 400 S.E. 2d 816 (1990).

IV. ISSUES

- A. WHETHER THE TRIAL COURT ABUSED ITS POWER, COMMITTED CLEAR ERROR OR EXCEEDED ITS LEGITIMATE AUTHORITY BY ORDERING TIG TO PAY ATTORNEYS' FEES.**
- B. IF IT IS DETERMINED THAT THE AWARD OF ATTORNEYS' FEES WAS APPROPRIATE, WAS THE AMOUNT OF FEES AWARDED OUTRAGEOUS AND EXCESSIVE.**

V. ARGUMENT

- A. THE TRIAL COURT DID NOT ABUSE ITS POWER, COMMIT CLEAR ERROR OR EXCEED ITS LEGITIMATE AUTHORITY BY ORDERING TIG TO PAY ATTORNEYS' FEES.**

The facts of this matter are simple. The Horkulics filed a legal malpractice claim against Galloway as a result of Galloway's failure to file a bodily injury claim within the applicable statute of limitations. Galloway's insurance carrier, TIG, retained counsel, William Wilmoth, to represent Galloway in the legal malpractice claim. Upon consultation and consent of TIG, Wilmoth settled

the malpractice claim on behalf of Galloway in a manner that served to protect Galloway from personal exposure or liability. TIG later disavowed the settlement that it authorized Wilmoth to enter into, thereby necessitating Plaintiff to file a Motion to Enforce Settlement.

Although attorneys hired by insurance companies to represent their clients are independent contractors (see Barefield vs. DPIC, 600 S.E. 2d, 25; citing Givens vs. Mullikin, 75 S.W. 3d, 383, 395 (Tn. 2002), an insurer can be held liable for the acts of the attorney hired to represent an insured when those acts were directed, commanded, or knowingly authorized by the insurer. Rose vs. St. Paul Fire and Marine Insurance Company, 599 S.E. 2d, 673, 685 (Sup. Ct. App. W.V. 2004).

As noted above, Wilmoth testified at length that he had the authority of TIG to enter into the subject settlement. He further testified that TIG participated and authorized the settlement. The sole reason of Horkulics counsel filed the Petition to Enforce Settlement was TIG's failure to abide by the terms of the settlement. Given the facts of this case, the trial court was within its power and authority to award counsel fees against TIG since it was TIG's conduct that necessitated the Motion to Enforce Settlement.

B. WHETHER THE AWARD OF ATTORNEYS' FEES WAS APPROPRIATE, OUTRAGEOUS OR EXCESSIVE

Defendant Galloway takes no issue with the amount of time submitted by Petitioner's counsel, Robert Fitzsimmons, to prosecute the Motion to Enforce Settlement. Defendant Galloway takes no position as to the appropriate hourly rate to be awarded to Claimant's counsel.

VI. CONCLUSION

The trial court was within its power to order TIG to pay attorneys' fees in connection with the settlement agreement to which it was a participant.

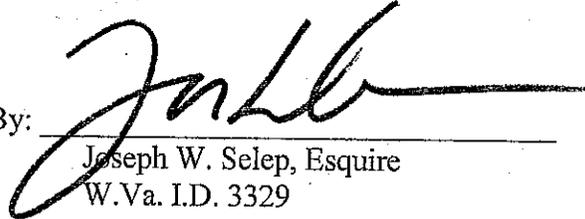
The amount of attorneys' fees is within the sound discretion of the trial court.

WHEREFORE, Respondent Galloway respectfully requests this Honorable Court to deny
TIG's Petition for Writ of Prohibition.

Respectfully submitted,

ZIMMER KUNZ
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By: _____



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CERTIFICATE OF SERVICE

I hereby certify that I have this 23 day of February, 2007, served a true and correct copy of the foregoing **Response to Petition for Writ of Prohibition** on the following counsel of record via U.S. first class mail:

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Charleston, WV 25338-3843
Counsel for TIG Insurance Company

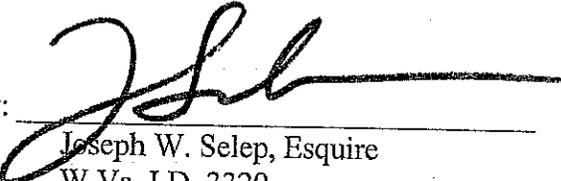
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