

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 33651

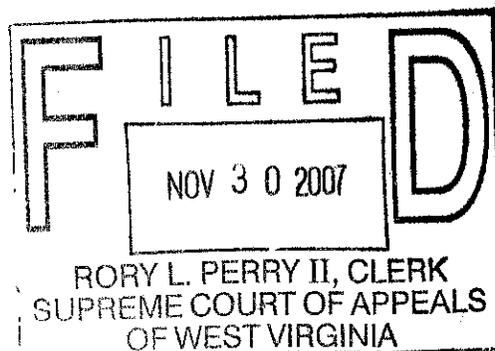
STATE OF WEST VIRGINIA ex rel.  
NATIONWIDE MUTUAL INSURANCE  
COMPANY,

Petitioner,

vs.

THE HONORABLE MARK A. KARL,  
Judge of the Circuit Court of Marshall  
County, West Virginia, and STACEY  
MEADOWS, Plaintiff below,

Respondents



**RESPONSE TO RULE**  
**TO SHOW CAUSE**

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## INTRODUCTION

For over three decades, this court has consistently recognized that a fair trial is impossible without a full, fair and meaningful voir dire. West Virginia Human Rights Com'n v. Tenpin Lounge, Inc., 158 W.Va. 349, 355, 211 S.E.2d 349 (1975)(“a fair trial requires a meaningful and effective voir dire examination”); Davis v. Wang, 184 W.Va. 222, 225, 400 S.E.2d 230 (1990)(“[w]ithout a meaningful and effective voir dire, a fair trial is not possible”). Neither party to this litigation disputes that a full, fair and meaningful voir dire includes questioning jurors concerning their relationship with the opposing lawyer and his/her law firm.<sup>1</sup> See, e.g., State v. Helmick, 169 W.Va. 94, 286 S.E.2d 245 (1982)(recognizing, in a criminal case, the right of counsel to “delve into the extent of the acquaintance of one juror” with the prosecuting attorney trying the case).

The question here is whether a “captive” law firm, which is owned and operated by a liability insurer, Nationwide, and is known throughout the community as “Nationwide Trial Division,” should be permitted to hide its name from the jury and prevent the plaintiff and the court from learning about connections between potential jurors and that law firm. This court should join others from across the country in requiring “captive” law firms to identify themselves by name in order to see that the guarantee of a full, fair and meaningful voir dire is fulfilled. See, e.g., Stone v. Stakes, 755 N.E.2d 220, 222 (Ind. App. 2001)(holding that it was proper to “requir[e] captive law firms to indicate their association with an insurance company as part of their name and allowing opposing counsel to identify the firm by name to prospective

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<sup>1</sup> For its part, Nationwide, on the defendant’s behalf, proposed a voir dire question identifying both the plaintiff’s attorney and his law firm. There was no objection to this question.

jurors”); Richter v. Kirkwood, 111 S.W.3d 504, 509 (Mo. App. 2003)(where Allstate was using a captive attorney, “[i]t was within the trial court’s discretion to allow plaintiff’s attorney to show that defendant’s attorney was an employee of Allstate to ascertain whether that circumstance would result in bias or prejudice on the part of prospective jurors”).

### STATEMENT OF FACTS

This petition arises out of a personal injury case involving the plaintiff, Stacey Meadows, who received serious and permanent injuries in a car wreck which occurred on February 28, 1997.

At the time of the wreck, the plaintiff was a 17 year old high school student in good health. The plaintiff was riding as a passenger in a car driven by a friend and fellow high school student, Brandi McLendon. McLendon was driving southbound on U.S. 250 in Moundsville, West Virginia near John Marshall High School. The defendant, Heather Loy, was driving a pickup truck behind McLendon. Classes at the high school were ending for the day and traffic was congested. When McLendon stopped for traffic, the defendant slammed into the rear of McLendon’s car and pushed it forward into a third car. McLendon’s car was a total loss and the plaintiff’s passenger seat was broken as a result of the impact.

The plaintiff was taken by ambulance to Reynolds Hospital with complaints of head, neck and back pain. Thereafter, she followed up with her family physician, Dr. Wood. The plaintiff continued to have complaints of wide ranging pain, headache, fatigue and mood changes. Eventually, she began treating with a pain specialist who

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diagnosed a multi-regional pain syndrome, traumatic headache and other, related conditions. To help relieve the chronic pain, the plaintiff received pain relievers, massage therapy and injections into the affected muscle groups. As the defendant concedes, the plaintiff's medical bills at the time of trial in April, 2007 exceeded \$20,000.

The defendant, Loy, was insured by Motorists Mutual Insurance Company. In January, 2004, Motorists tendered the full limits of its liability coverage in the amount of \$50,000. Following this settlement, Nationwide, which provided underinsured coverage in the amount of \$50,000 under McLendon's policy and \$25,000 under the plaintiff's parents' policy, assumed the defense. Even though liability was admitted and the plaintiff's damages clearly exceeded Nationwide's limits of coverage, Nationwide has never offered more than \$5,000 to settle the plaintiff's underinsured claim.

Trial was scheduled to begin on Monday, April 23, 2007. On the morning of the trial, the court held a conference in chambers at which it considered a multitude of issues, including voir dire. One of the plaintiff's proposed voir dire questions asked if any of the jurors knew the defendant's attorney, Amy Pigg Shafer, or any other attorneys or paralegals affiliated with her law firm. The firm was identified as the Law Offices of W. Stephen Flesher, Nationwide Trial Division. The defendant objected, arguing this improperly injected the issue of insurance. During the course of argument the following facts were elicited:

- Nationwide Trial Division is, in fact, a captive law firm for Nationwide Insurance Company.

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- The principal trial attorney in the firm has changed multiple times in the recent past. Thus, at various times it has been known as the Law Offices of W. Stephen Flesher, Duane Tinsley and Dana Eddy.
- The firm is identified as Nationwide Trial Division on its own letterhead.
- When contacted by telephone, the firm identifies itself as Nationwide Trial Division.
- The firm is commonly known in the Marshall County community as Nationwide Trial Division.

Considering these facts, Judge Karl overruled the defendant's objection to the question. Attorney Shafer then consulted with Nationwide and was instructed to seek a writ of prohibition. In an effort to salvage the April 23rd trial date, the plaintiff volunteered to withdraw the question. However, Judge Karl indicated that regardless of whether, or not, the plaintiff withdrew the question it was important to know which jurors were insured by Nationwide or otherwise had dealings with Nationwide Trial Division. Accordingly, Judge Karl advised that he was prepared to ask the question on his own initiative. Noting that the issue was not only an important one, but also a recurring one, Judge Karl continued the trial in order to permit Nationwide to file its petition.<sup>2</sup>

Through this petition, Nationwide alleges that Judge Karl abused his discretion in two respects: first, in overruling Nationwide's objection to the voir dire question relating to Nationwide Trial Division and, second, in advising the parties that he was prepared to ask the question sua sponte. Neither of these rulings constitutes an

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<sup>2</sup> Judge Karl remarked: "This issue is going to come up again--if not today, it's going to come up time and time again. I want it resolved. If I don't have it today, it's going to come up a month from now or two months from now. So I want it resolved. If the Supreme Court's willing to take a look at it fine, so be it. If not, we'll proceed and I intend to ask that question." TR., AT 31.

abuse of discretion or otherwise entitles Nationwide to a writ. Accordingly, a writ of prohibition should be REFUSED.

### STANDARDS FOR ISSUING A WRIT OF PROHIBITION

Nationwide cites State ex rel. Hoover vs. Burger, 199 W.Va. 12, 483 S.E.2d 12 (1996) and the five factor test for issuing a writ of prohibition. The plaintiff acknowledges that Hoover provides the applicable standard.

However, Nationwide overlooks cases stressing the extreme nature of the prohibition remedy. Prohibition will not be issued in cases involving "a simple abuse of discretion." Rather, to justify the issuance of a writ, there must be a demonstration of clear-cut legal error. See, e.g., State ex rel. Peacher vs. Sencindiver, 160 W.Va. 314, 233 S.E.2d 425 (1977)("[a] writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court"). Considering all of the facts in light of the legal standard which must be applied, it is obvious that Nationwide is not entitled to the writ it seeks.

### ARGUMENT

JUDGE KARL'S RULINGS WITH RESPECT TO NATIONWIDE TRIAL  
DIVISION WERE NOT AN ABUSE OF DISCRETION AND, THUS,  
WILL NOT SUPPORT THE ISSUANCE OF A WRIT OF PROHIBITION

Nationwide's argument proceeds from two false assumptions. As an initial matter, Nationwide argues that it was somehow compelled to identify the affiliation between Nationwide and its captive law firm. Furthermore, without citing a single insurance case, Nationwide argues that identifying Nationwide Trial Division in a voir

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dire question--without more--"inappropriately inject[ed] the issue of insurance coverage into the case." PETITION, AT 13. However, neither of these assumptions is true.

Nationwide advocates the view that any mention of insurance is impermissible. It cites no law for this proposition. It simply invites the court to accept that the mere mention of insurance, any time, and in any context, must be error. This is not the law!

The admissibility of evidence regarding a defendant's insured status was thoroughly canvassed in Reed vs. Wimmer, 195 W.Va. 199, 465 S.E.2d 199 (1995). Contrary to Nationwide's assertions, there is no per se rule prohibiting evidence of insurance. Rule 411 of the Rules of Evidence, which governs this topic, provides only that such evidence is inadmissible "upon the issue whether the person acted negligently or otherwise wrongfully." In other words, the existence of insurance cannot be used to support an inference of negligence. However, as Reed emphasized, "if evidence of insurance coverage is introduced for purposes other than negligence and wrongful conduct, Rule 411 does not bar its admission." 195 W.Va. at 205, 465 S.E.2d at 205 (emphasis added). West Virginia is firmly committed to this evidentiary principle.

The facts of Reed provide a helpful example. The defendant cross examined the plaintiff in a personal injury case by asking exactly when he retained an attorney. The plaintiff explained that it was only a few days after the wreck "cause the insurance company wouldn't fix my car." The defendant promptly moved for a mistrial. Under the circumstances, this court held that the mention of insurance was

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an appropriate, invited response to the defendant's questioning and, thus, fell outside of Rule 411 prohibition.

Even more on point is Butcher vs. Stull, 140 W.Va. 31, 82 S.E.2d 278 (1954), another personal injury case. The defendant offered a witness who testified concerning the conditions existing at the scene shortly after the wreck. On cross examination, the witness was asked by whom he was employed and why he was present at the scene. It was disclosed that he was, in fact, an insurance adjuster who was investigating the wreck on the defendant's behalf. The defendant objected to this testimony, arguing that the mere mention of insurance was error. This court disagreed, and, in a new syllabus point, emphasized the overriding importance of demonstrating a witness' bias or interest: "Examination of a witness to show interest or bias is not rendered improper because it may show the interest of an insurance company in the case."

Of course, in the instant case evidence of insurance is not being sought to be introduced at all. Voir dire is not an evidentiary part of the trial. Therefore, the same logic applies here--but even more compellingly. The overriding purpose of the voir dire process is to select jurors who are free from bias or prejudice. See, e.g., Davis vs. Wang, 184 W.Va. 222, 234 400 S.E.2d 230 (1990)("[i]n West Virginia, the test of the qualified juror is whether a juror can render a verdict based on the evidence, without bias or prejudice according to the instructions of the court"). To accomplish this, the parties must be given the freedom to "ascertain the possibility of bias through probing questions on voir dire." Pleasants vs. Alliance Corp. 209 W.Va. 39, 46, 543 S.E.2d 320 (2000). The jurors in Pleasants, for example, were specifically

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asked if they had ever worked for an "insurance company as an agent, adjuster [or] claims person." Therefore, insurance was properly placed before the jury as a part of voir dire. See also Torrence v. Kusminsky, 185 W.Va. 734, 408 S.E.2d 648 (1991)(jurors asked "whether any of them was a claims adjustor, an accident investigator, or was related to one").

Frankly, it is impossible to draw a distinction between questions like these, which clearly go to bias, and the question which will be asked in the instant case. In both instances, the mention of insurance is not being made to support the impermissible inference of negligence but, instead, to determine the qualifications of the jurors.

The precise issue raised here was considered by the Court of Appeals of Indiana in Stone vs. Stakes, 755 N.E.2d 220 (Ind. App. 2001). Like West Virginia, Indiana required captive law firms to disclose their affiliation with the insurer. The law firm representing the defendant objected to voir dire which identified it as the "Litigation Section" of Warrior Insurance Group. The trial court overruled the objection and the appellate court affirmed, noting:

Requiring captive law firms to indicate their association with an insurance company as part of their name and allowing opposing counsel to identify the firm by name to prospective jurors does not impinge upon Rule 411's decree that liability insurance is not admissible "upon the issue whether the person acted negligently or otherwise wrongfully" where, as here, the reference is brief, occurs during voir dire, and is not demonstratively calculated to unduly prejudice the jury.

755 N.E.2d at 222.

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The same result was reached by the Missouri Court of Appeals in Richter v. Kirkwood, 111 S.W.3d 504 (Mo. App. 2003). The defendant was insured by Allstate, and her defense was provided by a captive law firm owned and operated by Allstate. The plaintiff identified the law firm during voir dire and stated that the lawyer representing the defendant was "an employee of Allstate." The defendant's objection to this voir dire questioning was overruled and, thereafter, the trial court's ruling was affirmed:

Allstate, as defendant's insurer, chose to use employed in-house counsel to meet its contractual obligation to provide defendant's defense. The inquiry plaintiff's attorney made on voir dire was tailored to ascertain whether defendant's attorney's status as an employee of Allstate would result in an interest or bias of panel members that would be adverse to plaintiffs.

111 S.W.3d at 508.

Richter cited Missouri case law which, like West Virginia's, recognized that evidence of insurance was admissible for purposes of attacking the credibility of a witness. From this, Richter readily concluded that the same rationale applied to the conduct of voir dire:

The same rationale is apropos with respect to voir dire inquiry of prospective jurors. It was within the trial court's discretion to allow plaintiff's attorney to show that defendant's attorney was an employee of Allstate to ascertain whether that circumstance would result in bias or prejudice on the part of prospective jurors.

111 SW.W.3d at 509.

This is perfectly consistent with West Virginia law. Even Nationwide concedes that its captive law firm identifies itself and is known in the relevant community as Nationwide Trial Division. How can a proper voir dire be conducted if it is not

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identified using the name by which it does business and holds itself out? Asking this question clearly falls outside of the prohibitory language in Rule 411. It is a proper question to gauge bias or prejudice. Accordingly, Judge Karl did not abuse his discretion by permitting the question to be asked.

Nationwide cites L.E.I. 99-01, an opinion by the Lawyer Disciplinary Board (n/k/a the Office of Disciplinary Counsel) addressing the subject of captive law firms. According to the board's opinion, "[t]he lawyers in...captive law firms are full time, salaried employees of the insurance company, which also pays the office rental and all business expenses. The lawyers only work on defense or subrogation cases involving their employer." It is undisputed that Nationwide Trial Division is a captive firm meeting this definition.

Throughout its opinion, the board expressed "serious concerns" that attorneys working for captive law firms will confront situations that "materially limit the lawyer's ability to represent the interests of the insured." Nevertheless, the board refused to adopt a per se rule prohibiting captive law firms. It noted, however, that using a firm name under these circumstances had the effect of "concealing the nature of the lawyer's relationship with the insurance company." Accordingly, whenever an insurer utilizes its own, captive law firm to represent an insured, the firm must disclose its affiliation with the insurer.

From this, Nationwide argues that it was compelled by law to use the phrase "Nationwide Trial Division" and should not be penalized for doing so. However, Nationwide overlooks this critical fact: Nationwide itself made a fully informed

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decision to provide representation for its insureds by establishing a captive law firm rather than retaining private attorneys in the marketplace.

If, like most insurers, Nationwide would simply hire a private law firm to represent its insureds, this whole issue would be moot. But Nationwide has made a knowing, deliberate choice to provide representation through a captive law firm. It did so with its eyes wide open. Nationwide was fully aware of the ethical requirements which must be complied with. Nationwide was free to choose how its insureds would be represented. Having chosen to establish a captive firm, Nationwide must live with the consequences of its choice--including, of course, the requirement to disclose that firm's affiliation with Nationwide.

Almost as a throwaway, Nationwide also argues that Judge Karl erred by indicating that he would ask the question sua sponte. Even though it is common place for the attorneys involved to ask voir dire questions, the fact remains that the trial court oversees and is ultimately responsible for the voir dire process. The trial court must approve all voir dire questions and, of course, possesses the power to ask questions in its own right. See, e.g., Rule 47(a) of the Rules of Civil Procedure (“[t]he court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination”); State v. Miller, 197 W.Va. 588, 476 S.E.2d 535 (1996)(“West Virginia trial judges are accorded ample discretion in determining how best to conduct voir dire”).

That said, it also should be noted that Judge Karl made his ruling only after having “a chance to reflect on this.” TR., 31. Mindful of his role in seating an unbiased jury, Judge Karl believed the question had to be asked. Nationwide quotes

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from a hearing in an unrelated case before Judge Mazzone in which he reached the same conclusion. This is a further indication that judges in the Northern Panhandle of West Virginia recognize that Nationwide's captive law firm is commonly known in the community as Nationwide Trial Division and that it is important to the trial process to determine whether potential jurors have had any dealings with the firm that is referred to by that name.

We are left with this question: How can asking a pertinent, important voir dire question relating specifically to juror bias or prejudice be an abuse of discretion? The simple answer is that it cannot. Judge Karl acted appropriately and within his discretion by determining that the question would be asked sua sponte even if it was withdrawn by the plaintiff.

### CONCLUSION

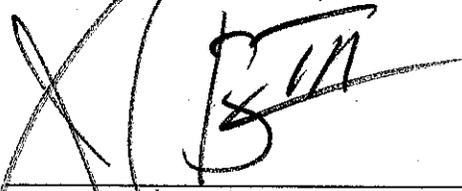
For all the reasons stated herein, Nationwide has not established that Judge Karl committed a clear-cut legal error warranting the issuance of a writ of prohibition. Accordingly, Nationwide's petition should be REFUSED.

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Respectfully submitted,

STACEY MEADOWS, Plaintiff/Respondent



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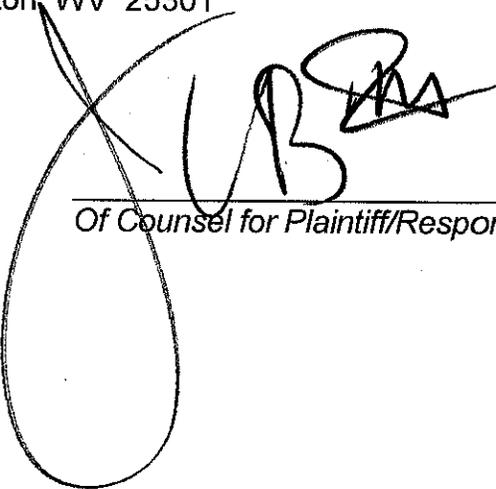
**CERTIFICATE OF SERVICE**

Service of the foregoing ***RESPONSE TO RULE TO SHOW CAUSE*** was had upon the parties herein by mailing a copy thereof, by United States Mail, on this 29<sup>th</sup> day of November, 2007, as follows:

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