

No. _____

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

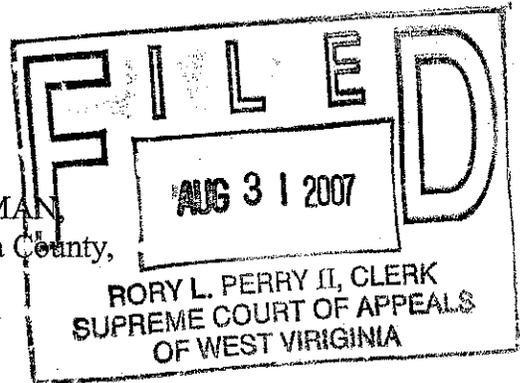
STATE EX REL. NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

v.

THE HONORABLE TOD KAUFMAN,
Judge of the Circuit Court of Kanawha County,
West Virginia,

Respondent.



From the Circuit Court of
Kanawha County, West Virginia
Civil Action No. 06-C-1543

PETITION FOR WRIT OF PROHIBITION

MARTIN & SEIBERT, L.C.
Michelle Roman Fox
BB&T Square, Suite 610
300 Summers Street
Charleston, WV 25301
(304) 380-0800

Counsel for Nationwide Mutual
Insurance Company

THE LAW OFFICE OF W. STEPHEN FLESHER
Asad U. Khan
300 Summers Street, Suite 740
Charleston, WV 25301
(304) 346-2272

Counsel for Stephen D. Clegg

TABLE OF CONTENTS

	<u>Page</u>
I. ISSUES PRESENTED	3
II. PROCEEDINGS AND RULINGS BELOW	3
III. ASSIGNMENT OF ERROR	7
IV. ARGUMENT	7
A. PROHIBITION IS THE ONLY REMEDY TO CORRECT A CLEAR LEGAL ERROR	7
B. THE RESPONDENT ABUSED HIS DISCRETION BY FAILING TO BIFURCATE AND STAY ALL DIRECT CLAIMS AND DISCOVERY AGAINST NATIONWIDE UNTIL THE UNDERLYING NEGLIGENCE ACTION AGAINST NATIONWIDE’S INSURED, STEPHEN CLEGG, IS FULLY AND FINALLY RESOLVED, AND BY ORDERING PRODUCTION OF THE CLAIMS FILE.	8
V. CONCLUSION	13

TABLE OF AUTHORITIES

<u>CASES</u>	<u>Page</u>
<i>Davis v. Robertson</i> , 175 W. Va. 364, 332 S.E.2d 819 (1985)	9
<i>Handley v. Cook</i> , 162 W. Va. 629, 252 S.E.2d 147 (1979)	7
<i>Jenkins v. J. C. Penney Cas. Ins. Co.</i> , 167 W. Va. 597, 280 S.E.2d 252 (1981)	9
<i>Robinson v. Continental Cas. Co.</i> , 185 W. Va. 244, 406 S.E.2d 470 (1991)	10
Rule 24.01, Trial Court Rules	3
<i>State ex rel. Allstate Ins. Co. v. Gaughan</i> , 203 W. Va. 358, 508 S.E.2d 75 (1998)	3
<i>State ex rel. Billups v. Clawges</i> (No. 32513, May 26, 2005)	7
<i>State ex rel. Kees v. Sanders</i> , 192 W. VA. 602, 453 S.E.2d 436 (1994)	7
<i>State ex rel. State Farm Fire & Cas. Co. v. Madden</i> , 192 W. Va. 155, 451 S.E.2d 721 (1994)	3, 8-13
<i>State ex rel. State Farm Mut. Ins. Co. v. Stephens</i> , 188 W. VA. 622, 425 S.E.2d 577 (1992)	8
<i>State ex rel. USF&G v. Canady</i> , 194 W. VA. 431, 460 S.E.2d 677 (1995)	7, 8
 <u>AUTHORITIES</u>	
W. Va. Code § 33-11-4a	5
W. Va. Code §53-1-1	7

I. ISSUES PRESENTED

The present Petition arises from an August 29, 2007 hearing and Order of the Circuit Court of Kanawha County¹ wherein the Respondent denied the Defendant, Nationwide Mutual Insurance Company's Motion to Bifurcate and Stay Discovery and Motion for Protective Order regarding discovery directed to Nationwide, as well as discovery directed to the tortfeasor regarding the production of the claim file relating to Nationwide's claims handling and adjustment of the pending tort claim. In so doing, the Respondent ignored the clear holding of this Court in *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994), which held all direct claims against an insurance company must be bifurcated from the underlying third-party tort action against the insured and all discovery related to such direct claims against the insurer stayed until resolution of the underlying tort action.

II. PROCEEDINGS AND RULINGS BELOW

The present civil action stems from a May 31, 2005 automobile accident which occurred in Kanawha County, West Virginia between the Plaintiff below, Donald E. Smith, II, and Stephen D. Clegg. Stephen D. Clegg was insured by Nationwide at the time of the accident.

¹After the hearing on August 29, 2007, in the late afternoon, Plaintiffs' counsel submitted an Order, attached hereto as Exhibit A, to the Court. This Order was submitted to the Court without first circulating it among counsel. On August 30, 2007, at 10:03 a.m., less than 24 hours later, the lower Court entered this Order without providing counsel an opportunity to object, within 5 days, as mandated by Rule 24.01, Trial Court Rules. In accordance with *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998), undersigned counsel submitted an Objection to the lower Court and a proposed Order setting forth Findings of Fact and Conclusions of Law. See Letter and Order attached hereto as Exhibit B. In addition, Defendant Clegg submitted a written objection to the proposed Order at 1:30 p.m. on August 30, 2007, by hand delivery, attached hereto as Exhibit C.

As a result of this accident, on or about August 4, 2006, the Plaintiffs, Donald E. Smith, II, and Sherri L. Smith, filed the instant tort action against Stephen D. Clegg, alleging that Mr. Clegg was negligent in the operation of his motor vehicle thereby causing the accident in question and the Plaintiffs' injuries.

At the time this lawsuit was initially filed against Mr. Clegg, the Plaintiffs were aware that Nationwide Mutual Insurance Company, Stephen Clegg's automobile insurer, had denied its insured was legally liable for causing the motor vehicle accident in question. Moreover, at the time the lawsuit was initially filed, the Plaintiffs and their counsel were aware that Nationwide previously had paid the Plaintiffs' property damage claim and sold his motorcycle for salvage, based upon the authority given to it by virtue of documents executed by the Plaintiff which transferred the title to Nationwide.

Nonetheless, more than nine months after filing the initial underlying tort action against Stephen Clegg, the Plaintiffs sought to amend their Complaint and add various claims directly against Nationwide Mutual Insurance Company alleging spoliation of evidence, waiver and estoppel. The lower Court entered the Order allowing the amendment, without a hearing, on May 29, 2007. Nationwide filed an Answer to the Amended Complaint denying that it was liable for any of the claims asserted against it.

In their Amended Complaint, the Plaintiffs allege, in a blanket fashion, that Nationwide, the Defendant's insurer, negligently or intentionally destroyed the Plaintiffs' motorcycle in an attempt to negatively affect the Plaintiffs' ability to prove their liability claims against the Defendant, Stephen Clegg, as a result of the May 31, 2005 motor vehicle accident. The Plaintiffs have not

asserted how the sale of the motorcycle damaged their ability to pursue the liability claims against Clegg, and, they have continued to vigorously pursue those claims against him.

Additionally, the Plaintiffs assert that Nationwide, the Defendant's insurer, by virtue of its claims handling and initial payment decisions is now estopped or has waived its right to deny liability, on behalf of its insured, Stephen Clegg, for the Plaintiffs' claimed injuries relating to this automobile accident. Although Nationwide initially paid the Plaintiffs' property damage claim, further and ongoing investigation into the accident revealed additional facts which supported that Mr. Clegg was not responsible for causing the motor vehicle accident. In the underlying tort action asserted against Mr. Clegg, he has consistently and emphatically maintained that he was not responsible or negligent in causing the motor vehicle accident. The waiver and estoppel claims or theories of recovery are, in essence, third-party bad faith claims, perversely labeled as "waiver and estoppel".²

The Plaintiffs, in conjunction with these direct claims against Nationwide, have also filed discovery requests directly against Nationwide, seeking information regarding its claims handling procedure, and, the basis for its claims decisions in this case. A review of the discovery requests reveals it is "classic" bad faith discovery, again supporting that the "waiver and estoppel" claims are merely "third-party bad faith" claims, clothed in another "title". See Discovery Requests, attached hereto as Exhibit D. Furthermore, prior to the time of Nationwide's involvement in this action, the Plaintiffs served interrogatories and requests for production of documents on the Defendant, Clegg.

²As this Court is aware, the enactment of W. Va. Code § 33-11-4a, eliminated the right of a third-party to file a private cause of action against an insurer alleging violations of the Unfair Trade Practices Act.

One request for production at issue regarding Nationwide's Motion for Protective Order is Request for Production No. 16.

Request for Production No. 16 states as follows:

16. Please produce a copy of any and all communications between defendant and defendant's insurance company(ies) and/or any insurance company(ies) providing coverage for the motor vehicle defendant was driving during the accident, which addresses, in any manner, the incident, the possible causes of the incident, and/or the issues made the subject of the plaintiffs' complaint, including, but not limited to, letters, electronic mail, faxes, notes, memoranda, reports, phone logs, diaries, journals, and transcripts.

In response to this request for production of documents, the Defendant, Clegg, produced communications occurring between Clegg and Nationwide Mutual Insurance Company, including a recorded statement given by the Defendant, Stephen D. Clegg, to his insurance carrier.

Various discovery disputes have since arisen relating exclusively to the scope of this discovery request. The Plaintiffs contend and the Respondent has so ordered that this discovery request requires production of Nationwide's entire claim file relating to the instant motor vehicle accident and the adjustment and claims decisions by Nationwide on behalf of its insured.

Nationwide moved the lower Court to bifurcate the allegations against it and bifurcate and stay all discovery asserted against it until the underlying negligence action asserted against Stephen D. Clegg for the motor vehicle accident is resolved. Furthermore, the Defendant, Nationwide, sought a protective order from the lower Court, seeking to prohibit all discovery propounded to it, including the production of the claim file relating to this accident, until resolution of the underlying tort claim against Mr. Clegg is fully resolved. The Respondent denied the Motion

and refused to bifurcate and stay the discovery against Nationwide on the direct claims asserted against.³ The Respondent also ordered production of the claims file.

III. ASSIGNMENT OF ERROR

1. Did the Respondent abuse his discretion by failing to bifurcate and stay all claims and discovery against Nationwide until the underlying negligence action against Stephen Clegg is fully and finally resolved and by ordering the production of the claims file?

IV. ARGUMENT

A. PROHIBITION IS THE ONLY REMEDY TO CORRECT A CLEAR LEGAL ERROR.

Prohibition lies as a matter of right where a lower court, having proper jurisdiction over a matter, exceeds its legitimate powers. West Virginia Code §53-1-1; see also, *Handley v. Cook*, 162 W. Va. 629, 252 S.E.2d 147 (1979). "Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari." Syl Pt. 1, *State ex rel. Billups v. Clawges* (No. 32513, May 26, 2005); Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953); *Handley v. Cook*, 162 W. VA. 629, 252 S.E.2d 147 (1979); *State ex rel. Kees v. Sanders*, 192 W. VA. 602, 453 S.E.2d 436 (1994). A writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of discretion in regard to discovery Orders. *State ex rel. USF&G v. Canady*, 194 W. VA. 431,

³The Respondent took under advisement whether the trial on some or all of the claims against Nationwide would be bifurcated from the trial on the underlying tort claim. Defendant Clegg's right to a fair trial is directly affected by the allegations asserted against his insurance company.

460 S.E.2d 677 (1995); *State ex rel. State Farm Mut. Ins. Co. v. Stephens*, 188 W. VA. 622, 425 S.E.2d 577 (1992). When a discovery Order involves the probable invasion of confidential materials which are exempted from discovery, the exercise of the Supreme Court of Appeals' original jurisdiction is appropriate. *Canady, supra*.

Here, both issues are presented. The court below exceeded any legitimate power it may have in ordering Nationwide to provide discovery to the Plaintiffs while the underlying action is pending. The trial court's Order is clearly in contravention to the common law as it eviscerates the long-standing rule that direct actions against insurance companies, including discovery relating thereto, must be bifurcated and stayed until full and final resolution of the underlying negligence action against the insured tortfeasor. Immediate relief from this Court is necessary to shield the Defendant, Clegg, from unfair prejudice and to assure him a fair and unbiased opportunity to litigate the claims asserted against him.

B. THE RESPONDENT ABUSED HIS DISCRETION BY FAILING TO BIFURCATE AND STAY ALL DIRECT CLAIMS AND DISCOVERY AGAINST NATIONWIDE UNTIL THE UNDERLYING NEGLIGENCE ACTION AGAINST NATIONWIDE'S INSURED, STEPHEN CLEGG, IS FULLY AND FINALLY RESOLVED, AND BY ORDERING PRODUCTION OF THE CLAIMS FILE.

It is well settled in West Virginia that third-party claims against a defendant's insurer shall be bifurcated from the underlying tort action against the individual insured, and all discovery against the insurer must be stayed pending resolution of the underlying tort action. *State ex rel. State Farm Fire & Cas. Co. v. Madden*, 192 W. Va. 155, 451 S.E.2d 721 (1994). Indeed, this Court in *Madden* precisely explained, in overruling the lower court, that "the circuit court erred in failing to grant State

Farm's motion to prohibit discovery. To prevent undue prejudice to Wendy's – the insured in Mr. Thompson's personal injury suit – any discovery or additional actions against the insurer, State Farm, must be stayed pending resolution of the underlying suit." Emphasis added, *Id.* at 724.

Importantly, the counts ordered stayed in *Madden* included not only unfair trade practices and bad faith claims against the defendant's insurer, State Farm, but significantly also included other direct claims asserted against State Farm and Wendy's for spoliation, invasion of privacy, and the tort of outrage. Thus, it is the clear and unambiguous law in West Virginia all claims asserted against an insurance company, that are joined in the tort action against the insured which in any way challenge the company's action or conduct, irrespective of the exact nature or title of the claim, must be bifurcated from the underlying tort action and all discovery pertaining to those claims must be stayed. Failure to do so will result in irreversible prejudice to the insured. *Madden, Id.* Furthermore, the mandate of bifurcating and staying the claims against the insurance carrier, promotes and upholds the longstanding policy in this State, which is to avoid the unnecessary mention of insurance coverage at trial because of the possibility of prejudicial impact to the jury. *Madden*, at 724, citing *Jenkins v. J. C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 280 S.E.2d 252 (1981), and *Davis v. Robertson*, 175 W. Va. 364, 332 S.E.2d 819 (1985).

Importantly, this Court in *Madden* directed that although the joinder of the claims against an insurance company with the underlying tort action was permissible, extensive discovery which includes requests for the insurance company's claims file is inappropriate in the underlying tort action and said requests for discovery must be stayed pending resolution of that tort claim. Quite simply, requests for information from the insurance carrier, including the claim file materials should be shielded, entirely, from discovery in the underlying tort action against the insured. This clear

mandate should not be circumvented merely by allowing the request to be made to the insured defendant.

Moreover, this Court recognized more than 25 years ago the considerable prejudice that may result if the insurance claim file materials are disclosed in the underlying suit. *Robinson v. Continental Cas. Co.*, 185 W. Va. 244, 406 S.E.2d 470 (1991) (overruled on other grounds). In *Robinson*, this Court unequivocally instructed claim file discovery is inappropriate until the underlying tort action is ultimately resolved. In this regard, *Robinson* recognized the possibility of the claim file materials causing unfair prejudice to the insured. Specifically, *Robinson* stated, “it is entirely possible that the contents of the insurance company claims file would prejudice [the insured] Doctor Biswas’ case. Of course, the insurance company or the Doctor could move the court to restrict production of documents that would qualify as work or would otherwise be privileged. However, this is a Pandora’s Box that we would as soon not open.” *Robinson*, 406 S.E.2d at 471. Thus, this case makes clear that claim file materials and other claims related discovery should not be ordered produced in the tort action.

Furthermore, this Court’s holding in *Madden* is precisely controlling of the issues in the instant case and supports the finding that the Respondent committed clear legal error. Specifically, this Court directed that the spoliation claims and claims for invasion of privacy and the tort of outrage against State Farm and Wendy’s be bifurcated and all related discovery stayed from the underlying negligence against the insured. Furthermore, this Court explained that while the decision to order separate trials is usually within the sound discretion of the Court, the paramount and overriding concern must be to “provide a fair and impartial trial to all litigants.” *Id.* at 726. Simply, the “prejudice inherent in allowing the personal injury claim against Wendy’s to be tried before the

same jury as the additional claims against State Farm and Wendy's, is such that the court's refusal to bifurcate was a clear abuse of discretion." *Id.* at 726.

Additionally, this Court in *Madden* squarely held that all discovery against the insurer must be stayed. Further, *Madden* explained, "allowing the additional claims against State Farm to proceed would necessarily entail discovery of State Farm's files that would undoubtedly prejudice Wendy's ability to defend itself against Mr. Thompson's original negligence claims." Thus, unless the counts against State Farm, and additional claims against Wendy's, which specifically include spoliation claims and the tort of outrage claims, are separated from the underlying negligence claim, "the jury would be inundated with details pertaining to the insurance coverage of Wendy's. The jury would be confronted with the alleged egregious and intentional acts of State Farm, acting in concert with Wendy's through its private investigator, Mr. Sizak, and then, the same jury would be expected to reach an unbiased decision in Mr. Thompson's personal injury claim." *Id.* Further, *Madden* reiterated the long-standing policy that guards a jury being informed of the insured or uninsured status of the defendant. Simply, the "disclosure might influence the jury to decide the underlying claim based upon the fact of insurance coverage, and not on the merits of the case." *Id.* at 726.

In the instant case, the assertion of the waiver and estoppel claims are mere attempts to circumvent the statute abolishing third-party bad faith claims, and, in essence, are claims which mimic, in all critical aspects, those which allege violations of the Unfair Trade Practices Act. In such a third-party bad faith action, there would be no doubt that the claims, including discovery regarding those claims asserted directly against the insurance company would be subject to a mandatory bifurcation and stay order. This case is no different. The Plaintiffs are seeking to interject the insurance company's actions and decisions into this simple motor vehicle accident. Such action is

clearly inappropriate. Moreover, the Plaintiffs are seeking discovery regarding Nationwide's claims decisions as a means to use those decisions to adversely affect Mr. Clegg's ability to defend against the negligence claims against him. Indeed, the plaintiffs have precisely alleged, by asserting waiver and estoppel, that Stephen Clegg, an individual insured, should be legally precluded from denying wrongdoing in the accident because of actions by his insurance carrier. Again, this is improper. Indeed, such an attempt to legally hinder the right of the insured to deny liability and wrongdoing, when his assets may be at risk, is certainly violative of his due process rights. Thus, to allow discovery aimed entirely and solely at trying to so improperly bind and control the Defendant Clegg's challenge to liability is, on its face, prejudicial, and is exactly what *Madden* seeks to prohibit.

Accordingly, the Respondent clearly abused his discretion when he failed to bifurcate and stay all claims against Nationwide, including particularly the discovery requests directly asserted against Nationwide. If the claims are not bifurcated and discovery stayed, the mention of insurance will permeate through each and every stage of this litigation. *Madden* precisely addressed the issue, and, held "in view of the potential prejudicial affect on Wendy's of allowing continued discovery relating to Counts II through IV, and the fact that the insurance issue is inextricably intertwined in the aforementioned counts, we order bifurcation and grant Wendy's writ of prohibition as molded."

Consequently, all claims against an insurance company, not merely those based upon violations of the Unfair Trade Practices Act or bad faith must be bifurcated and all discovery stayed from the underlying negligence claim against the insured. Failure to bifurcate and stay the discovery will result in irreversible prejudice to the underlying defendant.

In the instant case, the prejudice is clear. Mr. Clegg contends that he was not responsible for the accident and that Mr. Smith, indeed, lost control of his motorcycle and impacted with

Mr. Clegg's vehicle. The conduct or action of Nationwide in adjusting the claim and property damage payment decisions it may have made early on have absolutely no bearing to Mr. Clegg's liability position in this case. To allow the claims to proceed against Nationwide without bifurcation and stay of discovery would undoubtedly result in prejudice to Mr. Clegg.

Consequently, the Respondent abused his discretion. This Court should, thus, grant the writ and instruct the lower Court to enter an Order staying all discovery against Nationwide Mutual Insurance Company, either directly or indirectly, including the claims made by Plaintiffs' counsel seeking discovery and production of Nationwide's claim file in the underlying case. This Court in *Madden* quite succinctly held that all discovery against an insurance company, including claim file materials are not to be produced in an underlying negligence case against an insured, as such discovery would unquestionably result in unfair prejudice to the underlying defendant. Accordingly, the bifurcation and stay of the discovery is mandatory; and, the Respondent abused his discretion.

V. CONCLUSION

The Respondent improperly denied Nationwide Mutual Insurance Company's Motion to Bifurcate and Stay all claims against it including all discovery related thereto and improperly denied Nationwide's Motion for a Protective Order regarding discovery propounded directly to it as well as discovery propounded to Clegg relating particularly to claim file materials. This Order denying the Motion to Bifurcate and Stay and Motion for a Protective Order is violative of the clear law of the State of West Virginia which holds that direct claims against an insurance company that are joined in with claims against an underlying defendant must be bifurcated and all discovery related thereto stayed until full resolution of the underlying claims against the insured defendant. The

failure to bifurcate and stay the claims and discovery is a clear abuse of discretion as such bifurcation and stay is mandatory. Thus, by entering the Order directing that the claims not be bifurcated and that the discovery continue against Nationwide is clear error. This clear error will result in substantial prejudice to both Nationwide and Stephen Clegg in his defense of the underlying action. As such, the Respondent's Order from the hearing on August 29, 2007, must be reversed and remanded for proceedings consistent with the points and authorities set forth herein.

Respectfully submitted,

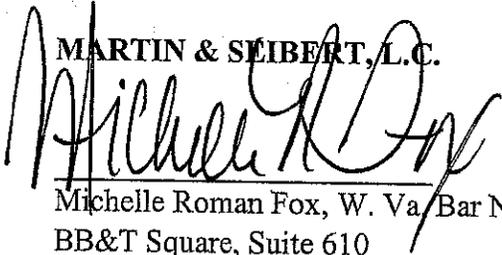
**NATIONWIDE MUTUAL
AUTOMOBILE INSURANCE COMPANY**

By Counsel

STEPHEN D. CLEGG

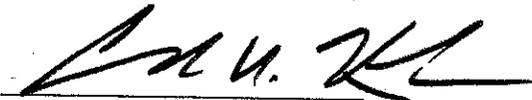
By Counsel

MARTIN & SEIBERT, L.C.



Michelle Roman Fox, W. Va. Bar No. 5753
BB&T Square, Suite 610
300 Summers Street
Charleston, WV 25301
(304) 380-0800

Counsel for Defendant Nationwide Mutual Insurance Company



Asad U. Khan, W. Va. State Bar No. 7071
Law Offices of W. Stephen Flesher
300 Summers Street, Suite 740
Charleston, WV 25301
(304) 346-2272

Counsel for Defendant Stephen D. Clegg

MEMORANDUM OF PERSONS TO BE SERVED

Persons to be served the Rule to Show Cause should this Court grant the relief requested by this Petition for Writ of Prohibition are as follows:

The Honorable Tod Kaufman
CIRCUIT COURT OF KANAWHA COUNTY
Kanawha County Judicial Annex
111 Court Street
Charleston, WV 25301

John H. Tinney, Esq.
James K. Tinney, Esq.
John K. Cecil, Esq.
The Tinney Law Firm, PLLC
P. O. Box 3752
Charleston, WV 25337-3752

Michael O. Callaghan, Esq.
159 Summers Street
Charleston, WV 25301