

No. 072735

---

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

---

STATE EX REL. NATIONWIDE MUTUAL INSURANCE COMPANY

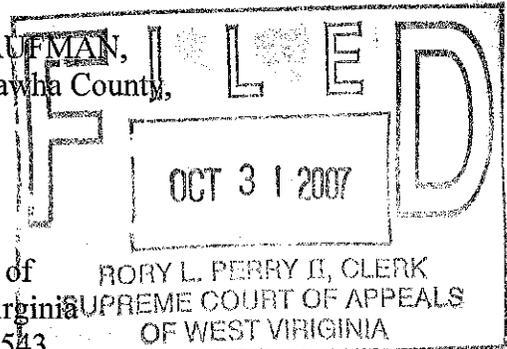
Petitioner,

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



---

RESPONSE TO PETITION FOR WRIT OF PROHIBITION  
AND RULE TO SHOW CAUSE

---

THE TINNEY LAW FIRM, PLLC  
John H. Tinney, Jr. (State Bar #6970)  
James K. Tinney (State Bar #9173)  
John K. Cecil (State Bar #9155)  
707 Virginia Street, East, 14<sup>th</sup> Floor  
P. O. Box 3752  
Charleston, WV 25337-3752  
(304) 720-3310

## TABLE OF CONTENTS

	<u>Page</u>
I. POINT OF CLARIFICATION .....	1
II. ISSUES PRESENTED.....	1
III. PROCEEDINGS AND RULINGS BELOW .....	2
IV. ARGUMENT.....	6
A. Nationwide's attempt to stop "indirect" discovery from Clegg is without merit .....	6
1. Defendant Clegg has failed to follow Rules of Civil Procedure, made untimely objections, failed to meet the requirements for claiming a valid privilege, and failed to comply with two direct Court orders .....	6
2. Contrary to Defendant's position, not every fact and document can be concealed from Plaintiffs under the guise of a secretly determined privilege .....	8
3. Defendant Nationwide has no standing to attempt to conceal discovery from Defendant Clegg.....	12
B. A stay of discovery is not necessary for Plaintiffs' direct claims against Nationwide.....	12
1. The court has discretion to manage discovery in a civil action pending before it. ....	12
C. The court below has not ruled on Nationwide's Motion to Bifurcate. ....	14
1. The issue of bifurcation is not ripe, as the court below took the issue under advisement. ....	14
V. CONCLUSION.....	15

## TABLE OF AUTHORITIES

### CASES

<u>Airheart v. Chicago and North Western Transp. Co.</u> , 128 F.R.D. 669 .....	10, 11
<u>Feather v. W.Va. Bd. of Medicine</u> , 562 S.E.2d 488, 497 (W.Va. 2001) .....	7
<u>Hall v. Sullivan</u> , 231 F.R.D. 468, 473-4 (D.Md. 2005) .....	7
<u>Kidwiler v. Progressive Paloverde Ins. Co.</u> , 192 F.R.D. 536, 543 (N.D. W.Va. 2000) .....	10
<u>Krewson v. City of Quincy</u> , 120 F.R.D. 6, 7 (D.Mass. 1988) .....	7
<u>Light v. Allstate Insurance Company</u> , 506 S.E.2d 64 (W.Va. 1998) .....	14
<u>Perry v. Golub</u> , 74 F.R.D. 360, 363 (N. D. Ala. 1976) .....	7
<u>Phillips v. Dallas Curriers Corp.</u> , 133 F.R.D. 475, 477 (M.D.N.C. 1990) .....	7
<u>Safeco Insurance Co. of America v. Rawstorm</u> , 183 F.R.D. 668, 671-672 (C.D. Cal. 1998) .....	7
<u>St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp.</u> , 197 F.R.D. 620, 634 (N.D. Iowa 2000) .....	10
<u>State ex rel. State Farm Fire &amp; Cas. Co. v. Madden</u> , 451 S.E.2d 721 (W. Va. 1994) .....	12, 13
<u>State ex rel. United Hospital Center, Inc. v. Bedell</u> , 484 S.E.2d 199, 208 (W.Va. 1997) .....	9
<u>State ex rel. Pritt v. Vickers</u> , 588 S.E.2d 210, 215 (W.Va. 2003) .....	9
<u>State ex rel. Westfield Ins. Co. v. Madden</u> , 602 S.E.2d 459 (W.Va. 2004) .....	3, 7
<u>State ex rel. Erie Insurance Property &amp; Casualty Co. v. Hon. James. P. Mazzone</u> , 625 S.E.2d 335, 365 (W.Va. 2005) .....	10
<u>Texas v. United States</u> , 523 U.S. 296, 1259 (1998) .....	14
<u>Thomas v. Union Cardibe Agricultural Products Co.</u> , 473 U.S. 568, 580-581 (1985) .....	14
<u>Truman v. Farmers Merchants Bank</u> , 375 S.E.2d 765, 768 (W.Va. 1988) .....	7

## AUTHORITIES

Rule 33 of the West Virginia Rules of Civil Procedure.....	6
Rule 34 of the West Virginia Rules of Civil Procedure.....	6
W.Va. Code § 33-11-4 .....	13
W.Va. Code § 33-11-4a .....	13

## I. POINT OF CLARIFICATION

This Court's October 11, 2007, Order directing respondent to show cause transposed the parties. The petition for a writ of prohibition directed against the Honorable Tod Kaufman, Kanawha County was jointly filed by petitioners herein and defendants below Nationwide Mutual Insurance Company – represented by Martin & Seibert, L.C. – and Stephen D. Clegg – represented by the Law Offices of W. Stephen Flesher, Employees of Nationwide Mutual Insurance Company. The respondents herein and plaintiffs below are Donald E. Smith, II and Sherri Smith – represented by The Tinney Law Firm, PLLC.

## II. ISSUES PRESENTED

The Petitioners, Defendants Nationwide Mutual Insurance Company (“Nationwide”) and Stephen D. Clegg (“Clegg”), Petition for a Writ of Prohibition raises four separate and distinct issues before this Court.

First, where the petitioner, Stephen Clegg, has filed false discovery answers, concealed the existence of a witness with knowledge directly related to liability for over one year, and failed to produce a privilege log for items claimed to be privileged, despite multiple Orders directing him to do so by the trial court, may the trial court direct the production of responsive materials in his possession for an *in camera* review to determine whether the defendant has additional materials that should have been produced in response to discovery requests filed nearly one year ago?

Second, where the petitioner, Nationwide, has been joined as a party under separate and distinct direct causes of action by Plaintiffs, may the trial court below deny Nationwide's attempt

to intervene and stay the discovery from Defendant Clegg, where Defendant Clegg has repeatedly ignored the trial court's Orders and has filed blatantly false discovery responses?

Third, where the petitioner, Nationwide, has been sued for spoliation, and waiver and estoppel, is the trial court required to stay all discovery against the petitioner until the final resolution of the personal injury action against Clegg, or may the trial court exercise its discretion to manage the litigation in an efficient manner?

Finally, where the petitioner, Nationwide, has been sued for spoliation, and waiver and estoppel, and the petitioner moves for bifurcation of those claims from the personal injury action pending against its insured, may the court below take the motion under advisement until a later date?

### III. PROCEEDINGS AND RULINGS BELOW

The development of the disputes leading to the Petition is recorded in the trial court's findings of facts, entered by Order of the trial court on September 12, 2007. Order, attached as **Exhibit A**.<sup>1</sup> This Order was entered following Nationwide's request for a more detailed Order, including findings of fact and conclusions of law, for use with their Petition. The Order incorporates the trial court's two prior Orders of July 18, 2007 and August 30, 2007. July 18, 2007 Order, attached as **Exhibit B**; August 30, 2007 Order, attached as **Exhibit C**. In addition, the court discusses its original May 24, 2007 Order granting Plaintiffs' original Motion to Compel. May 24, 2007 Order, attached as **Exhibit D**.

The original personal injury action against Defendant Clegg involved a traffic accident on May 31, 2005, where it is alleged that Defendant Clegg turned his SUV across Plaintiff Donald E. Smith, II's lane of travel, striking his motorcycle and causing him significant physical injuries.

---

<sup>1</sup> After the entry of the trial court's Order on August 30, 2007, Nationwide sought a more detailed Order, including findings of fact and conclusions of law from the Court. Both Nationwide and Plaintiffs submitted proposed findings. The trial court took both proposals under advisement and entered its own Order on September 12, 2007.

September 12, 2007 Order, Findings of Fact, ¶ 1-3. In January of 2006, Nationwide accepted liability on behalf of its insured, settled the property damage claim with Plaintiffs, and induced Plaintiffs, as a condition of that settlement, to turn over the motorcycle Mr. Smith was riding and the helmet he was wearing at the time of the accident. *Id.* at ¶ 4-9. Nationwide then auctioned the motorcycle and reversed its position, denying liability for Plaintiffs' personal injuries. As a result, Plaintiffs filed suit on August 10, 2006. *Id.* at ¶ 10.

The origin of the underlying discovery dispute stems from false discovery answers filed by Defendant Clegg. Namely, in response to interrogatories inquiring whether the Defendant or anyone acting on his behalf had taken a witness statement, Defendant Clegg replied that no witness statements, written or oral, had ever been taken. *Id.* at ¶ 14. In addition, in response to a request for production seeking pre-litigation correspondence between the Defendant and his insurer, the Defendant, without responding substantively and without filing a privilege log, claimed that the attorney-client privilege and the attorney work product doctrine applied to an unidentified number of communications. *Id.* at ¶ 15. As the first statement seemed unlikely and the second statement made it impossible to analyze Defendant's blanket claim of privilege, and as no privilege log was produced as required by State ex rel. Westfield Ins. Co. v. Madden, 602 S.E.2d 459 (W.Va. 2004), Plaintiffs began seeking supplementation. Findings of Fact, at ¶ 16-21. Ultimately, Plaintiffs discovered that Defendant's response was false.

Defendant Clegg supplemented his original response on March 7, 2007, the day of his rescheduled deposition, stating that, in fact, two statements did exist and were taken by Tammy Fore, a Nationwide Claims Representative, but that those statements were protected by the attorney work product doctrine. Finding of Fact, at ¶ 22. The refusal of the Defendant to

provide the statements to Plaintiffs led to Plaintiffs' original Motion to Compel. Findings of Fact, at ¶ 23-27.

After a May 10, 2007 hearing, the trial court entered an Order granting the Motion to Compel and ordering Defendant to provide answers and a privilege log within twenty (20) days. Findings of Fact, at ¶ 28.<sup>2</sup> Defendant Clegg did not respond within the time frame ordered by the trial court. Twenty-five days after entry of the Order, Plaintiffs requested that Clegg comply with the Order. Findings of Fact, at ¶ 33. In response to Plaintiff's request for compliance with the trial court's Order, Defendant Clegg offered to produce his own statement and stated that other documents would be provided by June 29, 2007, 36 days after the deadline set forth in the court's Order. Finding of Fact, at ¶ 34. Upon review of Clegg's statement, Plaintiffs discovered several material discrepancies with Defendant Clegg's previous discovery responses and filed its Motion for Contempt of Discovery Order. On the eve of the contempt hearing, Defendant Clegg produced some additional pages, including a notation that a Nationwide investigator had taken an oral statement from a previously undisclosed witness who saw the Defendant turning into his driveway, i.e. across Plaintiff Donald E. Smith, II's lane of travel. Finding of Fact, at ¶ 36. Defendant Clegg also stated in his supplemental response that "[A] privilege log is unnecessary at this time." Defendant Clegg's Second Supplemental Response, page 2, attached as **Exhibit F**. Despite having been ordered by the trial court to file a privilege log, as required by Westfield, *supra*, Defendant Clegg expressly refused to do so.

On July 13, 2007, during the hearing on Plaintiffs' first Motion for Contempt of Discovery Order, the trial court attempted to determine that all responsive, discoverable documents had been produced. July 13, 2007, Hearing Trans. at pg. 3, attached as **Exhibit G**. Counsel for Defendant Clegg refused to state for the record that such was the case and requested

---

<sup>2</sup> The May 10, 2007, Hearing Transcript is attached as **Exhibit E**.

additional time to “look through his file.” Id. at pg. 4-5, 15; Findings of Fact, at ¶ 39. Plaintiffs, in light of the false answers and the failure to comply with the trial court’s Order, moved for default judgment. Findings of Fact, at ¶ 38. Instead, the trial court again ordered Clegg to produce all non-privileged documents related to the case and again ordered Clegg to produce a privilege log containing a description of all the documents he contended were privileged. Findings of Fact, at ¶ 40. At Clegg’s request, the court’s second order provided Clegg with an additional twenty (20) days, or until August 2, 2007, to comply with the second Order. Findings of Fact, at ¶ 40.

Instead of complying and producing documents and/or a privilege log, as required by Westfield, the Rules of Civil Procedure, the court’s first Order compelling discovery, and the court’s second Order compelling the same discovery, Defendant Clegg waited until the trial court’s deadline, i.e. August 2, 2007, then filed a motion to vacate the court’s second Order compelling discovery. Findings of Fact, at ¶ 41.

On August 7, 2007, having previously been joined as a party to the action for direct claims of spoliation, and waiver and estoppel, Nationwide filed a motion seeking (1) to intervene in the discovery dispute between Plaintiffs and Clegg and stay the discovery that the trial court had twice ordered Clegg to produce; (2) stay all discovery against Nationwide; and (3) bifurcate all claims directly against Nationwide. Findings of Fact, at ¶ 43. On August 8, 2007, Plaintiffs filed their second Motion for Contempt regarding Defendant Clegg’s failure to comply with the court’s two prior Orders. Findings of Fact, at ¶ 44.

On August 29, 2007, during the third hearing regarding Defendant Clegg’s failure to comply with the trial court’s Orders and Nationwide’s motion to stay discovery, Nationwide represented that all discovery against Nationwide must be stayed and that the materials sought

from Clegg were the “same materials” and should not be produced. The court, relying on its prior Orders, ordered, for a THIRD time, that Clegg had to produce a privilege log and, in an effort to resolve the dispute, Clegg must produce the documents that he was withholding to the court for an *in camera* inspection. Findings of Fact, at ¶ 46. In addition, the court found that the discovery was sufficiently intertwined that there was no need to stay discovery against Nationwide. Finally, the court took Nationwide’s motion to bifurcate under advisement. Findings of Fact, at ¶ 46.

Defendant Clegg and Nationwide filed this Petition on August 31, 2007, seeking to prevent discovery from Clegg, stay discovery against Nationwide and require a bifurcation of the waiver, estoppel and spoliation claims from the personal injury claims.

#### IV. ARGUMENT

A. Nationwide’s attempt to stop “indirect” discovery from Defendant Clegg is without merit.

1. **Defendant Clegg has failed to follow Rules of Civil Procedure, made untimely objections, failed to meet the requirements for claiming a valid privilege, and failed to comply with two direct court Orders.**

Rule 33 of the West Virginia Rules of Civil Procedure (“West Virginia Rules”) provides, in relevant part:

- (3) The party upon whom interrogatories have been served shall serve a copy of the answer, and objections if any, within 30 days after the service of the interrogatories...
- (4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection shall be waived unless the party’s failure to object is exercised by the court for good cause shown.

W.Va. R.C.P. 33.

Similarly, Rule 34 of the West Virginia Rules requires that a party respond to document requests within 30 days of service of said request or provide whatever objection he/she believes

to be applicable. Although Rule 34 does not specifically contain Rule 33's language regarding the waiver of an objection not asserted in a timely fashion, several federal courts interpreting Rule 34 of the Federal Rules of Civil Procedure ("Federal Rules") have nevertheless held that the waiver language is applicable to Rule 34.<sup>3</sup>

For example, the United States District Court for Maryland held that failure to properly object with particularity in a timely answer, including objections of work product immunity, will constitute a waiver of said privileges. Hall v. Sullivan, 231 F.R.D. 468, 473-4 (D.Md. 2005); *see also* Perry v. Golub, 74 F.R.D. 360, 363 (N.D. Ala. 1976); Krewson v. City of Quincy, 120 F.R.D. 6, 7 (D.Mass. 1988); *and* Phillips v. Dallas Curriers Corp., 133 F.R.D. 475, 477 (M.D.N.C. 1990). Further, the filing of new objections in a supplemental response, after the deadline for response for the original requests has passed, has been found to be ineffective to avoid waiver. Safeco Insurance Co. of America v. Rawstorm, 183 F.R.D. 668, 671-672 (C.D. Cal. 1998); *see also* Franklin D. Cleckly, Robin J. Davis, and Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, 906 (2d ed. 2006) ("[t]he position adopted in Safeco presents the better and more legally sound approach to the issue.").

In addition to the requirements of asserting a timely objection, this Court has held that any party asserting an objection based upon the attorney work product doctrine shall provide a privilege log to the party making the discovery request and provide the trial court with the materials to which the party objects to providing. Syl. Pt. 1, State ex rel. Westfield Ins. Co. v. Madden, 602 S.E.2d 459 (W.Va. 2004); Feather v. W.Va. Bd. of Medicine, 562 S.E.2d 488, 497 (W.Va. 2001).

---

<sup>3</sup> This Court has held that when a Federal Rule is substantially equivalent to a West Virginia Rule, the Supreme Court will consider federal case law persuasive. Truman v. Farmers Merchants Bank, 375 S.E.2d 765, 768 (W.Va. 1988).

In this case, Defendant Clegg failed to comply with any of these requirements. The assertion of new objections in supplemental discovery answers intended to correct his false answers fails to avoid waiver of those objections. Further, the attempt to assert a work product privilege without a privilege log fails to assert the privilege correctly. Making matters worse, Defendant Clegg chose to ignore the court's Order to produce a privilege log and expressly denied that a privilege log was necessary, after the trial court expressly ordered him to produce one. Of course, the difficulty this places Plaintiffs in is obvious, since the various claims of work product privilege cannot be evaluated. Ultimately, it took nearly one year and three court Orders to compel Defendant Clegg to create a privilege log. Defendant Clegg long ago abandoned any right to assert such a privilege.

2. **Contrary to Defendants position, not every fact and document can be concealed from Plaintiffs under the guise of a secretly determined privilege.**

Even if Defendant Clegg had not filed false discovery answers and failed to comply with the requirements to assert the attorney work product privilege, that does not change the need for, or Plaintiffs' entitlement to, the requested discovery. Nor would it mean that the documents were privileged. One of the main difficulties with Defendant Clegg's failure to produce a privilege log, as required and as ordered repeatedly, is the resulting inability to analyze his blanket claim of privilege over undisclosed, indeterminate information. Further, both Defendant Clegg and Nationwide have repeatedly taken the position that all of these unidentified and indeterminate documents were privileged simply because they were part of a "claims file," a term frequently employed by Defendants as if it were some magical incantation casting secret

privilege from disclosure over every piece of paper they may choose to place in it.<sup>4</sup>

This ludicrous position creates a new privilege that solely benefits insurance companies and their insured. According to Defendants, Nationwide can provide its claims file to Defendant Clegg, who is represented by Nationwide's captured law firm, and Clegg may utilize any part of the file that may benefit his case, while denying the existence of any part of the file that is detrimental. Additionally, Defendants' argument would permit Defendant Clegg could render any document privileged by simply placing the document into the "claims file" provided by Nationwide to support Clegg's defense.

Defendants' argument disregards the purposely broad scope of discovery<sup>5</sup> and the severe limitations intentionally placed on party's ability to avoid his/he discovery obligations. Specifically addressing scope of permissible objections, this Court found:

It is a fundamental principle "that the public ... has a right to every man's evidence." "Exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." (citations omitted).

State ex rel. United Hospital Center, Inc. v. Bedell, 484 S.E.2d 199, 208 (W.Va. 1997).

In this case, Plaintiffs have continually sought the production of documents which are not protected by privilege. As this Court has held, the work product doctrine is "to be strictly construed." Id. Whether a document will be protected from discovery depends on the threshold question: was the document prepared in anticipation of litigation? Id. at 212. For a document to qualify as being prepared in anticipation of litigation, "the primary motivating purpose behind

---

<sup>4</sup> Plaintiffs have never specifically requested the Nationwide "claims file" from Defendant Clegg. Instead, Plaintiffs sought discovery to which they are entitled under the West Virginia Rules of Civil Procedure no matter the location of the responsive documents. Defendant Clegg interjected the term "claims file" into the discovery dispute.

<sup>5</sup> In discussing the purpose of discovery, this Court held that "the overarching purpose of discovery is to clarify and narrow the issues in litigations, so as to efficiently resolve disputes. This purpose makes litigation less of a game of 'blindman's bluff' and more a contest that seeks a fair and adequate resolution of a dispute." State ex rel. Pritt v. Vickers, 588 S.E.2d 210, 215 (W.Va. 2003); (quoting Cleckley, Litigation Handbook, § LG, at 540).

the creation of the documents must have been to assist in pending or probable future litigation.” Bedell, at Syl. Pt. 7. “[T]he mere possibility that litigation may occur or even ‘the mere fact that litigation does eventually ensue’ is insufficient to cloak materials with the mantle of the work product doctrine.” Id. at 212. Materials prepared and/or assembled in the ordinary course of business are not protected by the work product doctrine. Id. at 211.

As required by the precedent established in Bedell, *supra*, documents and facts collected by an insurance company in the ordinary course of business are not privileged. See State ex rel. Erie Insurance Property & Casualty Co. v. Hon. James P. Mazzone, 625 S.E.2d 335, 365 (W.Va. 2005) (Davis, R., concurring), *quoting* Kidwiler v. Progressive Paloverde Ins. Co., 192 F.R.D. 536, 543 (N.D. W.Va. 2000) (“[It was] determined properly that these documents were not subject to the work product doctrine because they were notes ‘taken as a routine business practice.’ A document created in the ordinary course of business is not created under the anticipation of litigation and, therefore, is not protected by the work product doctrine.”); and St. Paul Reinsurance Co., Ltd. v. Commercial Fin. Corp., 197 F.R.D. 620, 634 (N.D. Iowa 2000) (“[C]ourts have routinely recognized that the investigation and evaluation of claims is part of the regular, ordinary, and principal business of insurance companies. Thus, even though litigation is pending or may eventually ensue does not cloak such routinely generated documents with work product protection.”).

Plaintiffs, even if Nationwide had never been made a party this action, would be entitled to the discovery sought from Defendant Clegg. See, Airheart v. Chicago and North western Trans. Co., 128 F.R.D. 669 (D. S.D. 1989). In Airheart, the federal district court was asked to consider whether the work product doctrine precluded a defendant from obtaining investigational materials prepared by the plaintiff’s insurance company in a civil action to which the insurance

company was not a party. In analyzing the issues, the district court determined that the investigational materials were not prepared in anticipation of litigation. Id. at 671. In fact, the court found:

The very business of [insurance companies] is to conduct the type of investigation performed in order to fulfill a contractual responsibility to its insured. While litigation is a possibility, it is not a certainty. The mere fact that litigation may result later does not automatically protect the file with the work product doctrine.

Id. (internal citations omitted) As such, the district court concluded that the work product doctrine was inapplicable to the investigational materials held by the plaintiff's insurance company and, pending a relevancy determination, that the material was discoverable. Id. at 671-672.

Plaintiffs have sought documents, created during the ordinary course of business by Defendant Clegg's insurer and currently in the possession of his counsel. Despite having those documents in his possession, Clegg first denied they existed. Then, once their existence was discovered, Clegg then asserted a frivolous attorney work product privilege. Despite asserting the privilege, no privilege log was provided, as required. After two court orders, Defendant Clegg continued to refuse to file a privilege log. Having now been forced to provide partially true answers to interrogatories, and having produced a privilege log, and produced documents for an *in camera* review, nearly one year after the original requests were filed, Plaintiffs have discovered that Defendant Clegg is actually attempting to assert a work product privilege over every single document going back to the date of the incident, including recordings of witness statements and investigative reports, which were previously denied to exist.<sup>6</sup> Privilege log, pgs. 8-17, attached as **Exhibit H**; Defendant's Amended Responses, Interrogatory No. 8, Request for

---

<sup>6</sup> Ten of the fifteen pages of Defendant's belated privilege log concern documents, notes, statements and investigative reports that pre-date the filing of any lawsuit. Plaintiffs will address these privilege claims upon return to the trial court.

Production No. 11, Request for Production No. 12, attached as **Exhibit I**. Defendant's conduct is outrageous.

**3. Defendant Nationwide has no standing to attempt to conceal discovery from Defendant Clegg.**

As part of its motion, Nationwide has now attempted to block what it refers to as "indirect" discovery from Defendant Clegg. Nationwide has no standing to do so. Further, as discussed above, Nationwide's blanket "claims file privilege" does not protect any and all materials in the possession of Defendant Clegg's counsel.

**B. A stay of discovery is not necessary for Plaintiffs' direct claims against Nationwide.**

**1. The court has discretion to manage discovery in a civil action pending before it.**

Defendant Nationwide contends that this Court's holding in State ex rel. State Farm Fire & Cas. Co. v. Madden, 451 S.E.2d 721 (W. Va. 1994) requires an immediate stay of Plaintiffs' spoliation, waiver and estoppel claims against Nationwide because they are an attempt to assert "third-party bad faith claims." This mischaracterizes the posture of this case.

Plaintiffs' direct claims against Nationwide involve their inducement of Plaintiffs to turn over evidence, i.e. the motorcycle and helmet, by informing Plaintiffs that they accepted liability on behalf of their insured, Clegg. Then, after disposing of the evidence, Nationwide denied liability for Plaintiffs' personal injuries.<sup>7</sup> Hence, Plaintiffs' claims are direct claims involving the inducement to release, and then subsequent destruction of, potentially important evidence. Further, the acceptance of liability and the harm caused by that reliance supports an estoppel claim that Nationwide has accepted liability on behalf of Defendant Clegg. All of these claims

---

<sup>7</sup> Nationwide's counsel, during the August 29, 2007, hearing, essentially admitted that Nationwide accepted liability and, as a requirement of settlement, took possession of motorcycle and helmet. Thereafter, Nationwide disposed of the property and changed its position as to liability. August 29, 2007 Hearing Trans. at pg. 14, 22-23, attached as **Exhibit J**.

are direct claims and are not, in any way, discussed in the description of third-party bad faith claims, under W.Va. Code § 33-11-4. As Defendant Nationwide repeatedly asserts, Plaintiffs are no longer able to assert common law claims of third-party bad faith under the West Virginia statute. W.Va. Code § 33-11-4a. There is no third-party bad faith claim at issue. Instead, Plaintiffs assert a direct tort, i.e. that Nationwide has destroyed evidence, perhaps intentionally. Defendant Clegg's attorney contends that all the evidence, dating back to the date of the incident, was produced in anticipation of litigation. Accordingly, Nationwide induced Plaintiff to release evidence, which it in turn destroyed, while apparently, in contrast to its stated intent to accept liability, it was anticipating litigation.

In light of the recent repeal of the common law claim of third-party bad faith, the protections contemplate by the Court in Madden, the Plaintiffs suggest, are now moot. Insurance companies are no longer exposed to the threat of third-party bad faith claims, therefore, they no longer require the extraordinary protection afforded by Madden. Rather, now that third-party bad faith claims have been abolished, insurance companies such as Nationwide should be held to the same standards as every other party to civil litigation. They should enjoy the same protections, but should also be required to adhere to the same rules. Here, Nationwide is attempting to use the abolishment of the third-party bad faith cause of action as a complete and total shield from discovery into direct claims regarding litigation misconduct. In Madden, this Court found the spoliation claim to be inextricably intertwined with the third-party bad faith claim. There is no third-party bad faith claim in this case. It is no different, for example, than asserting a spoliation and estoppel claim against a second Defendant. The only difference is that the evidence was destroyed by an insurer. While it may merit bifurcation, judicial economy

suggests that delaying discovery of a possible spoliation claim, or waiver and estoppel claim, is unnecessary.

For guidance, the Court in Light v. Allstate Insurance Company, 506 S.E.2d 64 (W.Va. 1998) discussed the reasons for staying discovery when bifurcating a bad faith claim. Although it was in the context of a first party bad faith claim, this Court stated that “[T]here is no justification to articulate a rule requiring discovery to be stayed in all bad faith actions whenever bifurcation and a stay of the bad faith claim is ordered.” Id., at 35. In looking at the factors laid out by the Court in Light, the trial court determined that discovery regarding the direct claims against Nationwide for spoliation, waiver and estoppel need not be stayed. Conclusions of Law, at ¶ 6.

**C. The court below has not ruled on Nationwide’s Motion to Bifurcate.**

**1. The issue of bifurcation is not ripe, as the court below took the issue under advisement.**

The United States Supreme Court has held, “A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” Texas v. United States, 523 U.S. 296, 1259 (1998); (quoting Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568, 580-581 (1985) (internal quotes omitted).

In this case, the trial court did not rule on Nationwide’s motion to bifurcate the claims asserted against it from those asserted against Defendant Clegg. Instead, as clearly articulated in the trial court’s September 12, 2007 Order, the trial court took the issue of bifurcation under advisement. Conclusions of Law, at ¶ 7. As such, Nationwide’s Petition for a writ of prohibition is based upon a contingent future event – the trial court denying Nationwide’s motion to bifurcate. Further, it is possible that the trial court will grant Nationwide’s motion for

bifurcation and, thus, render Nationwide's Petition moot. As such, Nationwide's Petition for a writ of prohibition is not ripe for consideration and should be denied.

However, as for the issues of waiver and estoppel, which are legal determinations which would be made by the judge, Plaintiffs suggest that there are significant reasons to avoid the bifurcation of the direct claims until it becomes necessary to do so.

## V. CONCLUSION

WHEREFORE, for the reasons discussed above, the Plaintiffs, Donald and Sherri Smith, request that this Court deny Defendant Clegg and Nationwide's Petition for Writ of Prohibition and allow discovery to continue in the trial court.

**DONALD E. SMITH, II and  
SHERRI L. SMITH**

By: The Tinney Law Firm, PLLC



John H. Tinney, Jr. (W.Va. Bar # 6970)  
James K. Tinney (W.Va. Bar # 9173)  
John K. Cecil (W.Va. Bar # 9155)  
707 Virginia Street, East, 14<sup>th</sup> Floor  
Post Office Box 3752  
Charleston, WV 25337-3752  
(304) 720-3310

and

Michael O. Callaghan (W.Va. Bar #5509)  
Neely & Callaghan  
159 Summers Street  
Charleston, WV 25301  
(304) 343-6500