

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

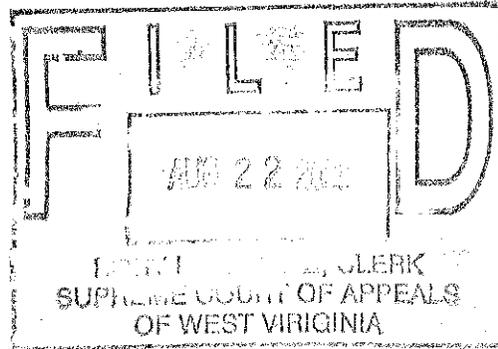
WEST VIRGINIA NATIONAL
AUTO INSURANCE COMPANY, INC.,

Petitioner,

v.

THE HONORABLE THOMAS A. BEDELL,
JUDGE OF THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA
and JOHN A. YANCHECK [*sic*], ESQUIRE,

Respondents.



Upon Original Jurisdiction
In Prohibition,
No. _____

**MEMORANDUM OF LAW IN SUPPORT OF
PETITION FOR WRIT OF PROHIBITION**

**WEST VIRGINIA NATIONAL AUTO
INSURANCE COMPANY, INC.,**

By Counsel:

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TABLE OF CONTENTS

KIND OF PROCEEDING AND NATURE OF RULING BELOW 1

STATEMENT OF FACTS 2

STANDARD FOR GRANTING A WRIT OF PROHIBITION 4

ISSUE 5

THE TRIAL COURT ABUSED ITS POWER, COMMITTED CLEAR
ERROR, AND EXCEEDED ITS LEGITIMATE AUTHORITY BY
GRANTING YANCHEK’S MOTION TO DISMISS COMPLAINT 5

ARGUMENT 5

CONCLUSION 11

TABLE OF AUTHORITIES

Cases

<u>Abbott v. Owens-Corning Fiberglas Corp.</u> , 191 W. Va. 198, 444 S.E.2d 285 (1994)	6
<u>Bashaw v. Belz Hotel Management Co.</u> , 872 F. Supp. 323, 325 (S.D. W. Va. 1995)	6
<u>Combs v. Bakker</u> , 886 F.2d, 673 (4th Cir. 1989)	5, 7
<u>Easterling v. American Optical Corp.</u> , 207 W. Va. 123, 529 S.E.2d 588 (2000)	6, 7, 9
<u>Harman v. Pauley</u> , 522 F. Supp. 1130 (S.D. W. Va. 1981)	6, 9, 10
<u>Hill v. Showa Denko, K. K.</u> , 188 W. Va. 654, 425 S.E.2d 609 (1992)	7
<u>Hodge v. Sands Mfg. Co.</u> , 151 W. Va. 133, 150 S.E.2d 793 (1966)	7
<u>Hoover v. Moran</u> , Slip Op. No. 33460 (March 14, 2008)	9
<u>International Shoe Co. v. Washington</u> , 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)	7
<u>Kidwell v. Westinghouse Elec. Co.</u> , 178 W. Va. 161, 358 S.E.2d 420 (1986)	6
<u>Lesnick v. Hollingsworth & Vose Co.</u> , 35 F.3d 939 (4th Cir. 1994)	7, 10
<u>Norfolk & W. Ry. v. Pinnacle Coal Co.</u> , 44 W. Va. 574, 30 S.E. 196 (1898)	4, 7
<u>Pascocciello v. Interboro Sch. Dist.</u> , 2005 U.S. Dist. LEXIS 31421	6

State ex rel. Hoover v. Berger,
199 W. Va. 12, 483 S.E.2d 12 (1996) 5

State ex rel. Lynn v. Eddy,
152 W. Va. 345, 163 S.E.2d 472 (1968) 4

State ex rel. Williams v. Narick,
164 W. Va. 632, 264 S.E.2d 851 (1980) 4

Vass v. Volvo Trucks N. Am., Inc.,
304 F. Supp. 2d 851 (S.D. W. Va. Jan 16, 2004) 1

Woodall v. Laurita,
156 W. Va. 707, 195 S.E.2d 717 (1973) 5

World-Wide Volkswagen,
444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501) 7

Statutes

W. Va. Code § 31-1-15 6

W. Va. Code § 56-3-33 6

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Respondents.

KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an original proceeding seeking a Writ of Prohibition against the Respondents on the grounds that the circuit court abused its power, committed clear error, and exceeded its legitimate authority by entering its November 16, 2007 Order granting Yanchek's Motion to Dismiss Complaint. *See Exhibit 1*. Despite the "very low threshold showing necessary to establish a *prima facie* case of personal jurisdiction," the circuit court concluded that it did not have personal jurisdiction over Yanchek. Vass v. Volvo Trucks N. Am., Inc., 304 F. Supp. 2d 851 (S.D. W. Va. Jan 16, 2004). West Virginia National, therefore, files this Petition for Writ of Prohibition seeking to prevent enforcement of the circuit court's Order Granting Yanchek's Motion to Dismiss Complaint.

On September 26, 2007, Yanchek filed his Motion to Dismiss. Consequently, on October 19, 2007, West Virginia National filed its Response in Opposition to Yanchek's motion to dismiss. Additionally, on October 24, 2007, Defendant Gulf Coast Collection Bureau, Inc. (hereinafter

referred to as "Gulf Coast") filed its Memorandum in Opposition to Yanchek's Motion to Dismiss. Subsequently, on November 2, 2007, Yanchek filed his Reply to West Virginia National's Response in Opposition to his Motion to Dismiss. Thereafter, on November 16, 2007, the circuit court entered its "Order Granting Defendant's Motion to Dismiss Complaint and Motion to Dismiss Cross Claims Against John A. Yanchek."

On or about April 16, 2008, West Virginia National filed its Motion for Reconsideration, requesting the circuit court to overrule its prior order granting Yanchek's Motion to Dismiss. Upon receipt of the same, the circuit court set West Virginia National's Motion for Reconsideration for briefing. As a result, on May 5, 2008, Yanchek filed his Response (in opposition) to West Virginia National's Motion for Reconsideration. Accordingly, on May 12, 2008, West Virginia National then filed its Reply to Yanchek's Response to West Virginia National's Motion for Reconsideration. Finally, on May 15, 2008, the circuit court denied West Virginia National's Motion for Reconsideration, stating that it continued to find that there was "no factual evidence that would tend to support the allegation that Mr. Yanchek was transacting business in the State of West Virginia."

See Exhibit 2.

STATEMENT OF FACTS

In or about November 2003, West Virginia National entered into a contractual agreement with Defendant Gulf Coast (hereinafter sometimes referred to as "GCCB"), whereby West Virginia National began placing accounts with GCCB for collection. By way of background, GCCB is a Florida corporation engaged in the practice of debt collection which conducts business in and throughout the State of West Virginia, including Harrison County. Over the next three and one-half (3 ½) years, West Virginia National forwarded at least sixty-nine (69) accounts to GCCB for

collection totaling at least Five Hundred Seventy-nine thousand fifty-eight dollars and forty-eight cents (\$579,058.48). Of the sixty-nine (69) accounts forwarded by West Virginia National to GCCB for collection, GCCB forwarded approximately thirteen (13) to Yanchek for the purpose of initiating suit against the debtors. As set forth in the affidavit of Jack W. Brown, III, Vice President of GCCB, for some time Gulf Coast utilized the services of Yanchek, a Florida attorney who could not practice law in West Virginia but would retain West Virginia counsel to assist him in prosecuting any West Virginia actions. *See Exhibit 3, Affidavit of Jack W. Brown, III at page 1.* Yanchek accepted money for filing fees to pursue West Virginia actions on behalf of West Virginia National and routinely reported to Gulf Coast that he was actively engaged in the pursuit of collection of various subrogation matters in West Virginia. *See Exhibit 3, Affidavit of Jack W. Brown, III at page 2.*

The thirteen (13) above-referenced accounts forwarded to Yanchek for collection had a value of One Hundred Seventy-One Thousand Six Hundred Forty-Five Dollars and Eighteen Cents (\$171,645.18) for which West Virginia National forwarded suit filing fees in excess of Two Thousand Two Hundred Fifty Dollars (\$2,250.00). Despite accepting suit filing fees and notwithstanding his obligation to initiate suit in those matters forwarded to him, Yanchek failed to file a single civil action, causing those actions to be barred by the statute of limitations. *See Exhibit 3, Affidavit of Jack W. Brown, III at page 2.* According to Yanchek, himself, he was unable to get admitted *pro hac vice* for suit. *See Exhibit 4, correspondence to Attorney Crim from Yanchek, dated March 30, 2007.*

Subsequently, on or about May 2, 2007, the contract between West Virginia National and GCCB was terminated by West Virginia National. At the time of termination, GCCB had allowed the statute of limitations to run on forty-five (45) of the sixty-nine (69) accounts which West

Virginia National had forwarded to GCCB for collection. Likewise, at the time of the termination of the agreement, the statute of limitations had run on eleven (11) of the thirteen (13) accounts forwarded to Yanchek by GCCB.

STANDARD FOR GRANTING A WRIT OF PROHIBITION

“The writ of prohibition lies as a matter of right in all cases of usurpation and abuse of power when the court does not have jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers.” State ex rel. Lynn v. Eddy, 152 W. Va. 345, 163 S.E.2d 472 (1968). “The writ is no longer a matter of sound discretion, but a matter of right; it lies in all proper cases whether there is other remedy or not.” Norfolk & W. Ry. v. Pinnacle Coal Co., 44 W. Va. 574, 576, 30 S.E. 196, 197 (1898).

“Traditionally, the writ of prohibition speaks purely to jurisdictional matters.” State ex rel. Williams v. Narick, 164 W. Va. 632, 635, 264 S.E.2d 851, 854 (1980).

“In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal’s order is clearly erroneous as a matter of law; (4) whether the lower tribunal’s order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal’s order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is

clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.” Syl. pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

Finally, “[w]here prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court should review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate. . . .” Syl. pt. 2, Woodall v. Laurita, 156 W. Va. 707, 195 S.E.2d 717 (1973).

ISSUE

THE TRIAL COURT ABUSED ITS POWER, COMMITTED CLEAR ERROR, AND EXCEEDED ITS LEGITIMATE AUTHORITY BY GRANTING YANCHEK’S MOTION TO DISMISS COMPLAINT

ARGUMENT

This Court should grant West Virginia National’s Petition for Writ of Prohibition because the trial court abused its power, committed clear error, and exceeded its legitimate authority by granting Yancheck’s motion to dismiss. For the reasons discussed below, the trial court’s ruling lacks a basis in law, fact, and equity and should, therefore, be set aside by this Court.

“When a court’s personal jurisdiction is properly challenged by a Rule 12(b)(2) motion, the jurisdictional question is one for the judge, with the burden on the plaintiff to prove grounds for jurisdiction by a preponderance of the evidence.” Combs v. Bakker, 886 F.2d, 673, 676 (4th Cir. 1989). However, when . . . the . . . court addresses such a motion without an evidentiary hearing, and reviews the question solely on the basis of the motion, the memoranda of law, and the complaint, the plaintiff need only prove a *prima facie* case of personal jurisdiction.” Id. at 676. “In deciding whether the plaintiff has proved a *prima facie* case of personal jurisdiction, the . . . court

must draw all reasonable inferences arising from the evidence and resolve all factual disputes in the plaintiff's favor." Id. at 676.

Traditionally, the resolution of the question of jurisdiction over a non-resident defendant is a two-step process. Pascocciello v. Interboro Sch. Dist., 2005 U.S. Dist. LEXIS 31421. The first step involves determining whether the defendant's actions satisfy our personal jurisdiction statutes set forth in W. Va. Code § 31-1-15 and W. Va. Code § 56-3-33. The second step involves determining whether the defendant's contacts with the forum state satisfy federal due process." Abbott v. Owens-Corning Fiberglas Corp., *Syl. Pt. 5*, 191 W. Va. 198, 444 S.E.2d 285 (1994). "However, in cases where the state's long-arm statute extends to the limits of due process, the analysis collapses to the second step only, and the court need only determine whether the exercise of jurisdiction comports with due process." Pascocciello citing Bashaw v. Belz Hotel Management Co., 872 F. Supp. 323, 325 (S.D. W. Va. 1995). Indeed, West Virginia's long-arm statute has been held to extend to the limits of due process. Thus, the court may consider solely the due process issue in its personal jurisdiction analysis. Pascocciello citing Harman v. Pauley, 522 F. Supp. 1130, 1135 (S.D. W. Va. 1981).

Consequently, as acknowledged in Easterling v. American Optical Corp., 207 W. Va. 123, 130, 529 S.E.2d 588, 595 (2000), the West Virginia Supreme Court of Appeals has held that the long-arm statute "must be read in conjunction with the constitutional due process concept that a foreign corporation must have certain 'minimum contacts' before it is amenable to personal jurisdiction in our courts." Easterling citing Kidwell v. Westinghouse Elec. Co., 178 W. Va. 161, 162, 358 S.E.2d 420, 421 (1986). "[T]he standard of jurisdictional due process is that a foreign corporation must have such minimum contacts with the state of the forum that the maintenance of

an action in the forum does not offend traditional notions of fair play and substantial justice.” Easterling at 130, 595 *citing* Hodge v. Sands Mfg. Co., Syl. Pt. 1, 151 W. Va. 133, 150 S.E.2d 793 (1966) *et al.*

“[T]he critical element for determining minimum contacts is not the volume of activity but rather, ‘the quality and nature of the activity in relation to the fair and orderly administration of the laws.’” Easterling at 130, 595 *citing* Norfolk S. Ry. v. Maynard, 190 W. Va. 113, 116, 437 S.E.2d 277, 280 (1993), (quoting International Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S. Ct. 154, 160, 90 L. Ed. 95, 104 (1945)). “To what extent a nonresident defendant has minimum contacts with the forum state depends upon the facts of the individual case.

The test to be applied when determining whether the exercise of personal jurisdiction comports with due process requires the court to determine whether (1) the defendant has created a substantial connection to the forum state by action purposefully directed toward the forum state or otherwise invoking the benefits and protections of the laws of the state; and (2) the exercise of jurisdiction based on those minimum contacts would not offend traditional notions of fair play and substantial justice, taking into accounts such factors as (a) the burden on the defendant, (b) the interests of the forum state, (c) the plaintiff’s interest in obtaining relief, (d) the efficient resolutions of controversies as between states, and (e) the shared interest of the several states in furthering fundamental substantive social policies.

Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945-46 (4th Cir. 1994).

Finally, as recognized in Easterling at 130, 595, foreseeability is a necessary element in determining whether a defendant’s contacts satisfy due process. “[T]he foreseeability that is critical to due process analysis . . . is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.” Easterling at 130, 595 *citing* Hill v. Showa Denko, K. K., 188 W. Va. 654, 657, 425 S.E.2d 609, 612 (1992), (quoting World-Wide Volkswagen, 444 U.S. at 297, 100 S. Ct. at 567, 62 L. Ed. 2d at 501)).

Despite the requirement that the circuit court draw all reasonable inferences and resolve all factual disputes in the plaintiff's favor, in the instant civil action the circuit court failed to do so in West Virginia National's favor. See Combs, *supra*. Yanchek has had such sufficient minimum contacts with the State of West Virginia that the maintenance of this action in the State of West Virginia certainly does not offend traditional notions of fair play and substantial justice. See Easterling, *supra*. Yanchek acted purposefully toward the State of West Virginia and invoked the benefits and protections of the laws of the State of West Virginia by undertaking representation of West Virginia National, a West Virginia corporation, with the knowledge that such representation would entail the filing of suits in the State of West Virginia. Moreover, Yanchek undertook representation of West Virginia National with the expectation that he would derive a benefit from such representation (i.e. that of payment for his services by West Virginia National). See Harman, *supra*.

In fact, Yanchek accepted money for filing fees to pursue West Virginia actions on behalf of West Virginia National and routinely reported to Gulf Coast that he was actively engaged in the pursuit of collection of various subrogation matters in West Virginia. See *Exhibit 3, Affidavit of Jack W. Brown, III at page 2*. Indeed, for some time Yanchek and Gulf Coast maintained an agreement wherein Gulf Coast utilized Yanchek's services knowing that Yanchek could not practice law in West Virginia but, rather, would retain West Virginia counsel to assist him in prosecuting any West Virginia actions. See *Exhibit 3, Affidavit of Jack W. Brown, III at page 1*. With regard to the instant action, Yanchek, himself, admitted that efforts had been undertaken to get admitted, *pro hac vice*, to file lawsuits in West Virginia on West Virginia National's accounts.

Very recently, the minimal standard applied when ruling upon a motion to dismiss re-visited by this Court in Hoover v. Moran, Slip Op. No. 33460 (March 14, 2008) wherein this Court noted that by viewing the allegations found in the complaint in the light most favorable to Hoover and drawing all reasonable inferences in his favor, the allegations were sufficient to sustain a motion to dismiss. Accordingly, this Court reversed the order dismissing the case pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

Significantly, in Hoover, *supra*, the agreement upon which the complaint, in part, was based was an oral agreement between the parties. Despite the lack of written documentation, this Court reversed the ruling of the circuit court, implicating the minimal standard necessary to overcome a motion to dismiss.

In the instant civil action, despite West Virginia National's request for further discovery as to the nature of the relationship among and between West Virginia National, Gulf Coast, and Yanchek, the circuit court denied said request without allowing the Plaintiff an opportunity to be heard on the issue. In addition, the circuit court further failed to conduct an evidentiary hearing on the issue of personal jurisdiction.

In accordance with Easterling, *supra*, the quality and nature of Yanchek's contacts with the State of West Virginia are critical for the determination of minimum contacts. However, foreseeability is equally critical, as to whether Yanchek's conduct and connection with the State of West Virginia are such that he should reasonably anticipate being haled into court in the State of West Virginia. *See Easterling, supra*. Unquestionably, Yanchek had to anticipate being "haled into court" in the State of West Virginia, as that was precisely what West Virginia National hired him to do. To be specific, West Virginia National hired Yanchek for the sole purpose of instituting suit

in the State of West Virginia on those matters forwarded to him by Gulf Coast. Had Yanchek performed those tasks which he was hired and paid to perform, Yanchek would have received substantial financial benefits from his activity as a result of his purposeful availment of the benefits and protection of the State of West Virginia. *See Harman, supra.* Ironically, however, Yanchek now insists that the very court system which he agreed to utilize for his own financial gain does not have jurisdiction over him.

Unfortunately, due to Yanchek's failure to institute civil actions on behalf of West Virginia National, the statute of limitation had run on eleven (11) of the thirteen (13) accounts forwarded to him. These eleven (11) accounts totaled more than One Hundred Sixty-Four Thousand One Hundred Twenty-Three Dollars and Sixteen Cents (\$164,123.16). Moreover, Yanchek has refused to return to West Virginia National the filing fees it forwarded to him, which conduct constitutes conversion.

While Yanchek resides in Florida, it is clear that he did have a reasonable expectation that his agreement to represent West Virginia National on actions to be filed in West Virginia would have resulted in his intentional and purposeful conduct in West Virginia. *See Harman, supra.* In addition, the orderly administration of laws is best accomplished in West Virginia since the accounts involved are West Virginia accounts in which the law of the State of West Virginia is applicable. *See generally, Lesnick, supra.* Finally, the interests of the State of West Virginia and those of its citizens in obtaining relief are most protected by an action in the State of West Virginia. *See generally, Lesnick, supra.*

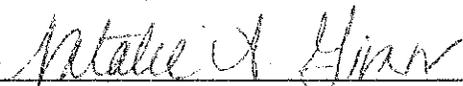
CONCLUSION

The trial court below abused its power, committed clear error, and exceeded its legitimate authority by granting Yanchek's Motion to Dismiss West Virginia National's Complaint. West Virginia National has no other adequate means, such as an appeal, to prevent the trial court's order granting Yanchek's Motion to Dismiss, as West Virginia National's right to appeal this issue is not yet ripe as the action is still pending before the trial court. Accordingly, your Petitioner, West Virginia National Auto Insurance Company, Inc., respectfully requests that this Honorable Court issue a rule to show cause and grant West Virginia National's Petition for Writ of Prohibition.

Respectfully submitted this 21st day of August, 2008.

**WEST VIRGINIA NATIONAL AUTO
INSURANCE COMPANY, INC.,**

By Counsel:



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Respondents.

CERTIFICATE OF SERVICE

This is to certify that on this 21st day of August, 2008, the undersigned counsel served the foregoing "***MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION***" upon counsel of record by depositing a true copy in the United States Mail, postage prepaid, in an envelope addressed as follows:

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