

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

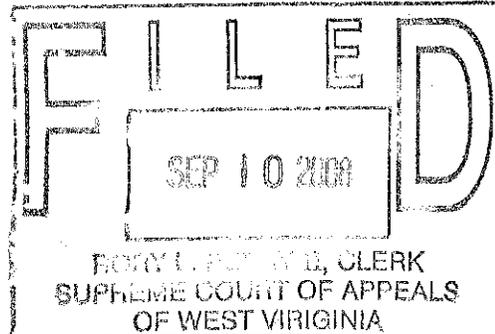
Petitioner,

vs.

**Upon Original Jurisdiction
In Prohibition,
No. 081711**

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

Respondents.



**RESPONSE OF JOHN A. YANCHEK IN OPPOSITION TO PETITION FOR WRIT OF
PROHIBITION**

**JOHN A. YANCHEK
By Counsel**

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KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is an original proceeding wherein Petitioner has sought the award of a writ of prohibition against the Circuit Court of Harrison County and the Defendant Below, John A. Yanchek, in Civil Action No. 07-C-517-2 on the basis that the circuit court abused its power, committed clear error, and exceeded its legitimate authority. Specifically, relief is sought from an Order Granting Defendant's Motion to Dismiss Complaint and Motion to Dismiss Cross Claims Against John A. Yanchek entered by the trial court on November 16, 2007, by which the trial court determined that there was no factual support to make a finding of *in personam* jurisdiction as to John A. Yanchek under W. Va. Code § 55-3-33.

STATEMENT OF FACTS

This Petition arises from the November 17, 2007, Order Granting Defendant's Motion to Dismiss Complaint and Motion to Dismiss Cross Claims Against John A. Yanchek in Civil Action No. 07-C-517-2. After reviewing and considering Defendant, John A. Yanchek's Motion to Dismiss the Complaint, Defendant John A. Yanchek's Motion to Dismiss Cross Claim of Gulf Coast Collection Bureau, Inc., Plaintiff's and Defendant, Gulf Coast Collections Bureau, Inc.'s Responses and Defendant Yanchek's Reply thereto, and after conducting a thorough examination of the records and pertinent legal authority, the Circuit Court of Harrison County concluded 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, and, thus, there was insufficient evidence to establish *in personam* jurisdiction over John A. Yanchek pursuant to W. Va. Code § 55-3-33.

Five (5) months after the entry of the November 17, 2007, dismissal order, Petitioner filed Plaintiff's Motion for Reconsideration on or about April 16, 2008. In response to that motion, the trial court entered a Scheduling Order to establish a schedule for the filing of any

responses and replies to the motion. In response to the motion, Defendant Yanchek filed a Response to West Virginia National Auto Insurance Company's Motion for Reconsideration, and Petitioner filed its reply as set forth in the Scheduling Order. After reviewing the motion, response, and reply, and again examining the record and pertinent legal authority, the Circuit Court of Harrison County denied Petitioner's motion in its order of May 15, 2008, concluding that there was no factual evidence that would support the allegation that Mr. Yanchek transacted business in the State of West Virginia.

More than nine (9) months from the original order dismissing John A. Yanchek and three (3) months from the order denying Petitioner's motion for reconsideration, Petitioner filed its Petition for Writ of Prohibition on August 21, 2008.

PRELIMINARY STATEMENT

The Petition for Writ of Prohibition filed by West Virginia National Auto Insurance Company, Inc., ["Petitioner"] is not an appropriate remedy to challenge the errors allegedly committed by the Circuit Court of Harrison County; the appropriate course to be pursued to challenge the granting of a motion to dismiss based upon the absence of *in personam* jurisdiction is through the filing of a petition for appeal. Moreover, the Petition for Writ of Prohibition, filed more than nine (9) months after the entry of the order that it seeks to challenge, is untimely filed. Finally, the Petition for Writ of Prohibition does not satisfy the core requirements for a petition for extraordinary relief, because there clearly was an adequate remedy at law available to the Petitioner, which remedy was not followed and was, therefore, waived by Petitioner.

ARGUMENT

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF PROHIBITION BECAUSE THE REMEDY SOUGHT IS NOT AN APPROPRIATE REMEDY TO CHALLENGE THE ALLEGED ERRORS OF THE TRIAL COURT.

Remedies of the nature of an extraordinary writ are “generally ‘reserved for really extraordinary causes.’” State ex rel. Suriano v. Gaughan, 198 W. Va. 339, 345, 480 S.E.2d 548, 554 (1996)(quoted in State ex rel. Brooks v. Zakaib, 214 W. Va. 253, 259, 588 S.E.2d 418, 424 (2003)). Accordingly, a writ of prohibition may lie only as a matter of right in cases in which the lower court, having jurisdiction, exceeds its legitimate powers. W. Va. Code § 53-1-1 (2008). However, prohibition is only used to correct substantial, clear-cut, legal errors which are plainly in contravention to a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial court will be completely reversed if the error is not corrected. State ex rel. Charleston Mail Association v. Ranson, 200 W. Va. 5, 488 S.E.2d 5 (1997). As will be demonstrated herein, Petitioner fails to meet the standard for issuance of an extraordinary writ and has waived the appropriate remedy available to it by failing to file a petition for appeal within four (4) months of the entry of the order dismissing John A. Yancheck from Civil Action No. 07-C-517-2.

A review of the opinions of the West Virginia Supreme Court of Appeals fails to reveal any case law concerning the propriety of seeking a petition for writ of prohibition to challenge a lower court’s dismissal of a civil defendant for lack of *in personam* jurisdiction. To the contrary, the majority of the cases involve the situation wherein a lower court denies a motion to dismiss finding that there is *in personam* jurisdiction over the defendant. Thereafter, the defendant who remains in the civil action seeks a writ of prohibition, because there is no other remedy available

to the defendant at that time. To the contrary, the facts presented by this present matter pose a different scenario which illustrates why a writ of prohibition does not apply when a defendant is dismissed from a civil action for lack of personal jurisdiction.

As Justice Cleckley stated in his concurrence in State ex rel. Allen v. Bedell, 193 W. Va. 32, 37, 454 S.E.2d 77, 82 (1994),

Mere doubt as to the correctness of a trial court's ruling on a motion *in limine* regarding an evidentiary issue is an insufficient basis to invoke this Court's writ power. To justify this extraordinary remedy, petitioner has the burden of showing that the lower court's jurisdictional usurpation was clear and indisputable and, because there is no adequate relief at law, the extraordinary writ provides the only available and adequate remedy. Thus, writs of prohibition, as well as writs of mandamus and habeas corpus, should not be permitted when the error is correctable on appeal. (Emphasis added.)

In his concurrence, Justice Cleckley expressed his concern for the abuse of the use of writs of prohibition when other remedies, such as petitions for appeal, are available to a party. Justice Cleckley then proceeded to identify five (5) questions that must be asked to determine if a writ of prohibition is appropriate. Those five (5) factors were later adopted by this Supreme Court in Syl. Pt. 4, State ex rel. Hoover v. Berger, 199 W. Va. 12, 483 S.E.2d 12 (1996).

The first factor to consider where it is claimed that the lower court exceeded its legitimate powers is whether the party seeking the writ has no other adequate means to obtain the desired relief. State ex rel. Hoover, at Syl. Pt 4. By order, dated November 17, 2007, Respondent Yanchek was dismissed from Civil Action No. 07-C-517-2. That order was a final order from which Petitioner could have submitted a petition for appeal but failed to do so. As the Petitioner cites in its Memorandum of Law in Support of Petition for Writ of Prohibition, "[w]here prohibition is sought to restrain a trial court for 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 12 (1996)(emphasis added). Moreover, as Justice Cleckley previously indicated, “we should not allow a writ of prohibition as a substitute for an appeal.” State ex rel. Allen, 193 W. Va. at FN1, 454 S.E.2d at FN1 (Cleckley, F., concurring).

With regard to this present matter, an appeal was available following the entry of the November 17, 2007, order; however, Petitioner neglected to file such petition. Clearly, Petitioner’s own failure to file a petition for appeal within four (4) months following the final order dismissing Mr. Yanchek cannot be cited to support the proposition that an appeal is not presently available. A second remedy remains for Petitioner—Petitioner could file its claim against Respondent in a jurisdiction in which personal jurisdiction could be properly asserted over him. Because Petitioner had an opportunity to file a petition for appeal and because Petitioner could file his claim against Respondent in another jurisdiction having personal jurisdiction over Respondent, Petitioner clearly has had and still has other remedies available to it.

The second factor to be considered is whether the Petitioner will be damaged or prejudiced in a way that is not correctable on appeal. State ex rel. Hoover, at Syl. Pt 4. As explained above, Petitioner had four (4) months to file a petition for appeal following the entry of the order dismissing Mr. Yanchek. Any proposed damage or prejudice obviously could have been addressed by this Supreme Court of Appeals had such a petition been filed. Furthermore, a brief survey of the opinions by the West Virginia Supreme Court of Appeals illustrates that this Court has granted petitions for appeal in which a lower court had dismissed a defendant for lack of personal jurisdiction, and reversed the issue on appeal. *See, e.g.*, Griffith & Coe Advertising.

Inc. v. Farmer & Merchants Bank and Trust, 215 W.Va. 428, 599 S.E.2d 851 (2004). Had Petitioner filed an appeal within the appropriate time frame, any alleged damage or prejudice could have been addressed by this Court on appeal.

The third factor to be considered is whether the lower court's order is clearly erroneous as a matter of law. Petitioner appears to assert that the lower court's order is clearly erroneous as a matter of law. State ex rel. Hoover, at Syl. Pt 4. To the contrary, in concluding that the facts presented to the trial court failed to establish that the Respondent transacted business in the State of West Virginia, the Circuit Court of Harrison County reviewed the allegations made by all parties and determined that the allegations, when construed in the light most favorable to Petitioner, supported its conclusion that there was no evidence that Respondent transacted business in this state. As this Court has stated,

[T]his Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and **only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.**

Syl. Pt. 1, in part, State ex rel. DeFrances v. Bedell, 191 W.Va. 513, 446 S.E.2d 906 (1994), quoting Syl. Pt. 1, Hinkle v. Black, 164 W.Va. 112, 262 S.E.2d 744 (1979) (emphasis added). This matter does not involve the factual scenario in which a trial would be reversed if the alleged error is not corrected. Most importantly, more than (4) months has passed since the entry of the order dismissing Respondent Yanchek, during which time the Petitioner could have filed a petition for appeal. During the nine (9) months since the dismissal of Respondent Yanchek, Petitioner has continued to pursue its claim against Gulf Coast Collection Bureau, Inc., the original co-defendant in the matter below, and the party with which the Petitioner originally

contracted. The dismissal of Respondent Yanchek has not impacted the Petitioner's ability to pursue its claim and would not result in the reversal of any verdict reached by a jury.

The fourth and fifth factors are not entirely relevant for purposes of the matter presently before the Court. There is no claim by Petitioner that this is an oft-repeated error by the trial court. Furthermore, *in personam* jurisdiction is an issue in every civil action, and the lower court's ruling on a motion to dismiss for lack of *in personam* jurisdiction does not raise new and important problems or issues of law of first impression.

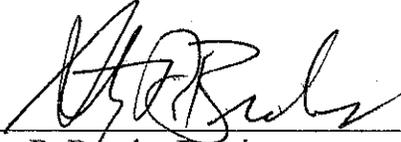
Finally, on November 17, 2007, Defendant Yanchek was dismissed from the on-going civil action. Since Defendant Yanchek's dismissal, the parties below have had nine (9) months to conduct discovery and otherwise prepare this matter for trial. Petitioner was aware of Defendant Yanchek's dismissal from this matter as it was served a copy of the dismissal order. This Petition for Writ of Prohibition, filed more than nine (9) months after the entry of the order that it seeks to challenge, is untimely filed.

CONCLUSION

Petitioner presently seeks an inappropriate remedy after permitting the time frame for which an appeal could have been filed to expire. A petition for appeal was the appropriate remedy which Petitioner should have sought. As this Court has previously acknowledged, and as has been discussed at length herein, a writ of prohibition is not a mere substitute for an appeal. A remedy for Petitioner was available in the form of a petition for appeal, and a remedy remains in the form of filing the action with a court having personal jurisdiction over Respondent. Petitioner cannot satisfy the standard for issuance of this extraordinary writ.

For the reasons set forth above, the Respondent, John A. Yanchek, prays that this Court deny the Petition for Writ of Prohibition Petition together with such other and further relief as this Supreme Court of Appeals may deem proper.

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CERTIFICATE OF SERVICE

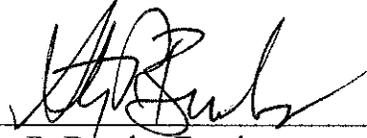
I, Stephen R. Brooks, hereby certify that on the 9th day of September, 2008, I served a true copy of the foregoing **“RESPONSE OF JOHN A. YANCHEK IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION”** upon all counsel of record by depositing a true copy thereof in the United States mail, postage pre-paid, in envelopes addressed as follows:

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A handwritten signature in black ink, appearing to read 'S. Brooks', written over a horizontal line.

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