

No. 34615

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

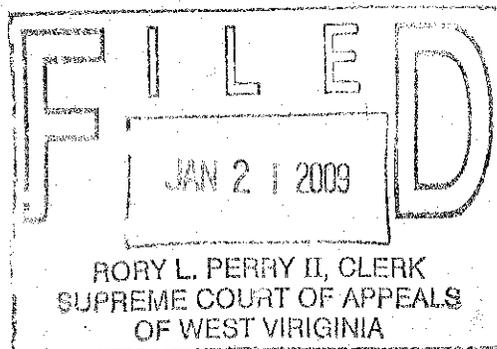
NATIONWIDE MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

HONORABLE J. LEWIS MARKS, JR.,
JUDGE OF THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA,

Respondent.



Rule to Show Cause
To the Circuit Court of
Harrison County, West Virginia
Civil Action No. 05-C-325-1

**RESPONDENT'S BRIEF IN OPPOSITION TO
THE GRANTING OF A WRIT OF PROHIBITION**

David J. Romano
W.Va. State Bar ID No. 3166
Rachel E. Romano
W.Va. State Bar ID No. 10688
ROMANO LAW OFFICE
363 Washington Avenue
Clarksburg, West Virginia 26301
(304) 624-5600

Counsel for Plaintiffs, Terry and Victor George

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**RESPONDENT'S BRIEF IN OPPOSITION TO
THE GRANTING OF A WRIT OF PROHIBITION**

This is a response to the Writ of Prohibition filed by Petitioner, Nationwide Mutual Insurance Company (hereinafter sometimes referred to as "Petitioner" or "Nationwide") against the Respondent, and the subsequent Rule to Show Cause issued by this Court, all pursuant to Rule 14(d) of this Court's Rules of Appellate Procedure. This is the second extraordinary writ sought by Nationwide for a discretionary discovery issue in this case. A prior petition for writ of prohibition was rejected by this Court on January 10, 2008.

FACTS:

Petitioner, Nationwide is the insurance company of the Plaintiffs which provided underinsured motorist coverage insurance to the Plaintiffs for more than the last twenty years; Plaintiff Terry George was severely and permanently injured in an automobile crash on August 19, 2004, near Saltwell, Harrison County, West Virginia, when she was struck head-on by a driver who had a .241 blood alcohol and who was across the center line and was being chased by his girlfriend at the moment of the crash. These two individuals were Defendants in the underlying tort case.

Terry George suffered life threatening injuries in the crash and had a significant hospitalization and long recuperation period. During this time, Nationwide was made aware of the Plaintiffs' claims for various coverages under Terry George's Nationwide policy. Nationwide was aware of Plaintiffs' claims as early as August 2004, the same month the crash occurred; at that time, Nationwide communicated with the Plaintiffs and began gathering information regarding Plaintiffs' first party claims; however, Nationwide never paid any of the first party benefits, including the UIM coverage, for more than one year after the automobile crash involving Plaintiffs, and Nationwide still has not paid all of the first-party benefits. Plaintiffs ultimately had to retain counsel and file suit, including a first party claim against Nationwide.

As the case proceeded to trial, Plaintiffs have sought various information from Nationwide through discovery regarding why Nationwide would refuse to offer Terry George her UIM and other first party benefits understanding the absolutely clear liability and enormous damages incurred as a result of the head on crash. Nationwide stonewalled on most of the discovery requests by interposing boilerplate, non-specific objections such as "overly broad, burdensome, oppressive, vague, and ambiguous" [See Respondent's Appendix, "**Exhibit 1**"].¹ Although attempts were made to resolve such issues Nationwide

¹ Respondent's Appendix hereinafter referred to as ["**R. App., Ex. __.**"]

continued to employ such obstructive and dilatory tactics such that a motion to compel was necessary. The Trial Court entered two protective orders to restrict the usage and dissemination of any document which Nationwide designated as confidential. This was unsatisfactory to Nationwide regarding several of Plaintiffs' discovery requests including the request for prior bad faith claims information which is the subject of this writ of prohibition. Nationwide refused to produce identification information about its prior claims, including the names, addresses and telephone numbers of the claimants, attorneys, and Nationwide employees involved in such prior bad faith claims. [See R. App., Ex. 1] Nationwide asserted, as it has in the past, that it does not readily have such information and that a manual review of its files would be necessary. [See R. App., Ex 1] However, these assertions by Nationwide in its discovery responses has been contradicted by its own former claims representatives (all of whom are attorneys) in sworn affidavits in a class action case against Nationwide in the Circuit Court of Roane County. [See R. App., "Ex 2"] Plaintiffs need this information to pursue investigation of these other bad faith claimants to secure witnesses and documents for potential proof of Nationwide's general business practices as required by the statute. W.Va. Code §33-11-4(9) Plaintiffs also sought a brief description of the bad faith conduct that formed the complaint or civil action by the prior claimants. Plaintiffs need this information to determine which prior claims would be the most similar to Plaintiffs' factual situation and thus make the most persuasive proof at trial as well as categorizing which prior claims would be most deserving of further investigation at the discovery stage of the litigation. Finally Plaintiffs requested a description of any result of such prior bad faith claims and a copy of any document which would reflect such results. This is why the settlement documents became an issue. The settlements are relevant because they will provide much of the identification information that Nationwide either refuses to provide or says it can't provide. They will also allow Plaintiffs to assess which cases had the most egregious conduct by comparing the amount

of the settlement with the description of the conduct involved, as the greater the amount paid by Nationwide, the more likely that the conduct was particularly inappropriate as it reflects the likelihood that a punitive damage verdict was a real potential in that particular matter. Of course Plaintiffs asked for all bad faith verdicts against Nationwide for the time period of the Request, but Nationwide refused to produce those as well. Nationwide seeks to hide this relevant information to gain tactical advantage over the Plaintiffs at trial. It is easy to picture Nationwide's witnesses, as well as Nationwide's attorney's, making both direct and indirect references to Nationwide's fair claims handling practices and the paucity of Plaintiff's evidence to the contrary. *Nationwide will argue "where's the beef" and Plaintiffs will have nothing to respond with but a piece of old cheese!* All of the requested information is within Nationwide's corporate records [See R. App., "Ex. 3"], but Nationwide refuses to make the diligent inquiry as Rule 33 requires, and retrieve this information. In an effort to provide Plaintiffs with the evidence and leads for evidence needed to prosecute their case, the Trial Court had no alternative but to compel Nationwide to comply with the discovery Rules and provide all discoverable information.²

I. PLAINTIFFS' DISCOVERY REQUESTS AS COMPELLED BY THE TRIAL COURT HAVE ALL BEEN PREVIOUSLY DETERMINED BY THIS COURT TO BE RELEVANT AND DISCOVERABLE IN A "BAD FAITH" CASE

This Court has had several occasions to address the relevancy of discovery requests seeking prior claims information from an insurance company defendant in a bad faith case, and in every instance, has ruled they are discoverable if not oppressively

² In compelling discovery from Nationwide, the Trial Court entered an Order tendered by Nationwide; however, Nationwide never advised the Trial Court that it intended to seek a writ of prohibition on the matter nor did Nationwide request that the Trial Court make findings of fact and conclusions of law with regard to its discovery order as required by this Court; River Riders, Inc. v. Steptoe, ___ S.E.2d ___, 2008 WL 5194798 (W.Va. 2008) [mandatorily requiring party to request trial court to prepare findings of fact and conclusions of law for the basis of the decision if an interlocutory appeal is intended by such party, Syl. Pt. 5].

burdensome. As recent as November 2006 this Court denied a writ of prohibition by Allstate Insurance Company seeking to prohibit the trial court's order directing production of 10 years of prior claim files involving similar claims as the plaintiffs which involved a first party bad faith action for failure to properly settle plaintiff's fire damage claim. This Court in denying the writ reiterated that the extraordinary remedy by way of interlocutory appeal was restrictive in its use and was not a substitute for an appeal. The Court then upheld the trial court's discretionary ruling which required Allstate to produce the requested claim files of non party policyholders by finding no "clear error" in the trial court's conclusion that the discovery requests were relevant and material and not oppressively burdensome even in view of Allstate's purported assertion that the cost to produce the discovery would be over \$70,000.00. State ex rel Allstate v. Gaughan, 220 W.Va. 113, 640 S.E.2d 176 (2006). Plaintiffs in this case sought much more discrete information. They did not seek the entire claim file but only the identity of any prior bad faith claims including ones involving civil actions, the persons involved, the results of the matter and a copy of any document memorializing such result. The entire request was as follows (Request No. 10, also at issue, is similar but was a catch all for bad faith claim that might not be within the scope of Request 8; [See **R. App., Ex. 1**] for the full text of both Requests and Nationwide's answers and response to Plaintiffs' motion to compel):

Request No. 8: Has Defendant Nationwide at any time within the past 10 (ten) years, in the State of West Virginia, paid any money or granted any other thing of value in order to settle, resolve, or to satisfy any judgment, claim, or allegation, either directly or indirectly, which: (1) asserted first-party unfair insurance claims settlement practices; (2) asserted other insurance bad faith settlement conduct of any kind or nature; or, (3) asserted violations of the West Virginia Unfair Trades Practices Act, W.Va. Code §33-11-1, et seq., against Defendant Nationwide whether asserted by your insured or a

third-party claimant? If the answer to this Request is in the affirmative, please provide the following information for each:

- (a) Name, address and telephone number of the claimant or claimants and their attorneys, if any;
- (b) Name, home and business addresses and telephone numbers of any of your agents, servants, or employees whose conduct was at issue in the claim, including the current employment status of such individual or individuals with you and such person's last known address and telephone number;
- (c) A brief description of the allegations against you, your agents, servants and employees;
- (d) If the dispute resulted in a written claim being made to you, the West Virginia Insurance Commissioner and/or a complaint filed with any court of law, PRODUCE a copy of each of the same; and,
- (e) The details of any settlement, resolution, verdict, judgment, or any other disposition of each such dispute, whether in writing or oral, and PRODUCE a copy of the same, if in writing. This request shall include any "confidential settlements" or "resolutions" for each such dispute.

These same type of requests for other similar acts information, sometimes referred to 404(b) requests or other similar incidents (OSI) are standard in bad faith litigation as they are in almost every other type of tort case, including products liability, premises liability (slip & fall), negligent hiring or retention, wrongful discharge, employment discrimination, medical malpractice, and many others including what may initially appear to be simple car crashes.³ See generally, Hotchkiss v. Sears, Roebuck & Co., 139 FRD 313, 315-18 (M.D. Pa. 1991)[court required production of R&D records, market studies,

³ As an example of the importance of such requests, the undersigned attorney recently determined by requesting OSI's in what appeared to be a simple automobile crash, that the defendant driver was addicted to prescription narcotic drugs, and even though no determinative testing was available for the crash involved in litigation, that other factors, including prior medical records and statements from treating physicians, demonstrated, and plaintiff's experts were able to conclude based on such documents, that the defendant driver most probably was under the influence of controlled substances at the time of the crash. Without broad based discovery, this important fact would not have been determined, and more importantly, a serious danger to the public would not have been identified as this driver had been driving impaired for several years with numerous previous automobile crashes with some involving serious injury.

follow-up customer interviews, testing reports for alternative design, all under protective order]; Chicago Cutlery Co. v. District Court, 568 P.2d 464, 466 (Colo. 1977)(en banc)[requiring production of customer lists]; Josephs v. Harris Corp., 677 F2d 985, 991 (3rd. Cir. 1982) [requiring production of information regarding all prior injuries involving same printing press and similar printing presses]

There can be no question whatsoever that all of the information sought by Requests Nos. 8 and 10 is clearly discoverable by explicit language of Rule 26. The Rule directly states that information of "any [relevant] matter" is discoverable "including the existence, description, nature, custody, condition and location of persons having knowledge of any discoverable matter." Subsections (a) and (b) of Request 8 seek identification of knowledgeable individuals; this enables counsel to interview or depose such persons if desired; subsection (c) seeks a description of the claim or suit which depending on the response may lead to further investigation or abandonment of that particular matter as not being helpful, all of which is a trial strategy decision; subsection (d) seeks production of a copy of any such complaint, grievance or suit many of which will be public documents;⁴

⁴ To gauge Nationwide's good faith or lack thereof in complying with discovery as the Trial Court had to do, this Court should review Nationwide's objection to providing copies of grievances regarding claims handling practices, including letters to the insurance commissioner or complaints filed in civil actions, which according to Nationwide if these documents may be available in public files, then Plaintiffs should be required to spend the time and money to go look for them in various locations, assuming they still exist, rather than Nationwide producing them from their regularly kept business files in response to discovery [see **R. App., Ex. 1**, Response to Req 8 §§ (c) & (d)]; such conduct is obstructionist and does not comply with the Rules of Discovery and has been rejected by other courts; Fort Washington Resources Inc., v. Tannen, 153 FRD 78, 79 (E.D. Pa. 1994) [cited in Moore's Federal Practice 3rd Ed. §26.60[3] p.26-432; "The fact that the information sought might already be in the possession of the requesting party or obtainable from another source is not a bar to discovery of relevant information."]; such conduct also violates Rule 1, which requires construction and administration of the Rules be in a manner "to secure the just, speedy and inexpensive determination of every action." Of course, that is not the goal of some defendants.

Such past claim or other similar incident information as ordered produced by almost all courts addressing the issue, including this Court in Allstate v. Gaughan, is relevant because it may prove, or lead to the discovery of admissible evidence tending to prove, that a defendant knew of similar wrongful conduct and took no remedial action, thus also negating the defense of accident or mistake which in this case includes the failure to fairly and promptly settle Plaintiffs' first party claims without undue delay and expense; besides eliminating the defense of mistake or inadvertence, it may also demonstrate malice and intent, and is probative to prove entitlement to punitive damages. Also important, such information may be critical for impeachment of Nationwide's witnesses especially their expert witnesses who will have access to such information while review of such information is denied to Plaintiffs' experts. Plaintiffs' experts should not be denied the opportunity to review the other claims information including the results of any prior bad faith claims or actions memorialized in a settlement agreement when such information may be critical to the expert's evaluating the fairness of Nationwide's claims handling practices. It is not difficult to imagine that Nationwide's experts may testify to the effect that they have reviewed Nationwide's conduct in this George claim, and that in their opinion Nationwide's settlement practices generally, and in this claim particularly, complies with insurance industry standards relating to fair claims settlement practices. Without prior claims information including, the number of prior bad faith claims, nature of those claims, and results of those claims, Plaintiffs will be left holding the proverbial bag.

The only real issue before this Court is whether the settlement agreements are discoverable, in toto or in part, should they contain an agreement between the parties to keep the settlement confidential, or if the settlement agreement is subject to some type of protective order. Although this Court has never directly answered this question, by ruling that prior claims files are discoverable (see Allstate v. Gaughan, supra, State Farm v. Stephens, infra, and Dodrill v. Nationwide, infra) this Court has at least approved sub

silento the production of the amount of payment or settlement by the insurance company and most probably the settlement agreement itself, as all of this information would no doubt be in the claim file as required by law. (See CSR §114-14-3) The problem here is that the neither the Trial Court, nor this Court or Plaintiffs' counsel will have had the opportunity to review the language of the settlement agreements to determine whether they contain such provisions, and if so, the scope of the provision. Importantly because the Trial Court has not reviewed the settlement agreements no determination was made as to the scope of the confidentiality agreement. It very well may be that only the claimant is bound by such agreement as traditionally only the claimant signs the document. Nationwide may not even be bound by such confidentiality agreement and thus Nationwide's objection would have no merit and would be moot. A private agreement to maintain confidentiality of a document, including a settlement, may bind the parties to the agreement, but it does not create a privilege or immunize the document from discovery. Courts long ago put to rest the notion that information could be immunized from discovery by means of a confidentiality agreement. See Edgar v. Finley, 312 F2d 533 (8th Cir. 1963).

In Edgar, an attorney refused to identify names of witnesses who had been furnished to him under an agreement of confidentiality. Id at 535-36. The Eighth Circuit in reversing the district court below and awarding a new trial held that such information was discoverable even in view of the confidentiality agreement and failure to require production was reversible error. The Appellate Court relied upon the clear language of Rule 26 wherein it states that "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action...." (emphasis added) The Appeals Court went on to observe that an agreement of confidentiality was not a recognized privilege and to allow relevant information to be shielded under such a rubric would permit "the discovery provisions...to a marked degree, be effectively nullified." Id. at 536. The same is true for the case at Bar. People cannot create their own privilege

which binds a court or precludes a litigant from securing relevant evidence.

The so called "confidential settlement agreements" which were ordered produced by the Trial Court, cannot be shielded from discovery merely because they are designated as confidential. A general concern for protecting confidentiality cannot, and should not, rise to the sanctity of legally established privileges as to allow such would permit parties to control adverse evidence against them and thwart justice. Even should the requested information be of the most private and sensitive kind, it is still discoverable if relevant. A recent opinion by the Fourth Circuit Court of Appeals sharply illustrates this point. That Court refused to reverse a district judges discovery order compelling the defendant hospital to comply with the plaintiff's request for "all peer review records related to all reviews of physicians for any reason" for the last 20 years. (District court did modify scope of request as to number of years) In doing so, the Fourth Circuit refused to recognize the defendant's claim that North Carolina's peer review privilege would shield such requested documents from discovery in a discrimination case brought by a physician against the defendant hospital. The Appeals Court stated that:

"There is an important distinction between privilege and protection of documents, the former operating to shield the documents from production in the first instance, with the latter operating to preserve confidentiality when produced. An appropriate protective order can alleviate problems and concerns regarding both confidentiality and scope of the discovery material produced in a particular case" Virmani v. Novant Health Incorporated, 259 F.3d 284, 87 f.n.4 (4th Cir. 2001).

In Virmani, the Fourth Circuit opinion analyzed why denying discovery was contrary to the "fundamental principle that the public has a right to every man's

evidence", and the Court further recognized " the primary assumption that there is a general duty to give what testimony one is capable of giving..." Id at 287. Thus, because it was possible that the plaintiff in Virmani would discover admissible evidence, or could lead to such discovery, the highly confidential peer review files of other physicians at the defendant hospital had to be produced, but with the comfort of a proper protective order. Denial of discovery was soundly rejected regardless of the defendant's claim of statutory privilege and general confidentiality.

The very issue as presented in this case regarding a settlement agreement made confidential by the private agreement of the parties, was determined to be discoverable under the same compelling logic as set forth in Virmani, supra. The case of Cadmus Communications Corp v. Goldman, 2006 WL 3359491 (W.D.N.C. 2006) is particularly instructive regarding the confidential settlement objection proffered by Nationwide. In Cadmus, the federal district court held that settlement agreements containing confidentiality provisions are not shielded from discovery, but may be entitled to a protective order. It based its ruling on the clear language of Rule 26 immunizing only information subject to a recognized privileged which a private confidentiality agreement is not, and the common sense finding that information and documents are not shielded from discovery merely because they are designated as confidential. The Cadmus Court cited, with approval, the case of DIRECTV v. Puccinelli, 224 FRD 677 (D. Kan. 2004) where the federal district court in Kansas was faced with the same issue regarding whether settlement agreements between DIRECTV and former adverse parties containing a confidentiality clause was discoverable. The Kansas federal court in DIRECTV held that they were discoverable, as the designation confidential or an agreement to be maintained as confidential, had no bearing on whether the settlement agreements were discoverable. Id at 684-85. The Court reasoned that "Simply put, litigants may not shield otherwise discoverable information from disclosure to others merely by agreeing to maintain its

confidentiality." The Court further stated that "To the extent that Plaintiff is objecting to providing these materials on the basis of confidentiality, the Court overrules the objection." Id at 684-85. The district court also found that the only consideration was whether the settlement agreements were relevant under the broad construction of that term in Rule 26. The Court found the settlement agreements to be relevant as they could show bias or motive of potential witnesses at trial i.e. parties to the confidential settlements who might be witnesses, and concluded that they were discoverable if there was "a[ny] possibility" they would be relevant to a claim or defense of the requesting party. Id at 684. The same is true for the case at Bar as it is likely that some of the parties to the settlement agreements with Nationwide will testify at the trial regarding their mishandled claims for which they received substantial settlement sums. (additional reasons that the settlement agreements are relevant will be discussed more fully infra.)

These cases, and the logical application of the discovery Rules, refutes Nationwide's argument in its request for extraordinary relief, and is precisely why this Court should deny Nationwide's request for a writ of prohibition. In the case at Bar, the Trial Court ordered the settlement information and documents produced subject to two protective orders. The Trial Court found such discovery relevant and no doubt questioned Nationwide's credibility regarding Nationwide's assertion that it could not produce such information without great difficulty, although such difficulty was never specified by Nationwide. This wasn't the Trial Court's, or the other Judges in this Circuit's first rodeo with Nationwide. They have been through these discovery dances many times before and no doubt rely on such collective knowledge in assessing how to evaluate and determine such discovery issues. This is why such discretionary judgment of the Trial Court should be accorded great deference and not disturbed unless clearly erroneous as violating an established legal principle. Such is not the facts in this case.

This Court should acknowledge the Trial Court's authority to order production

of the other similar claims information including the confidential settlement agreements as any private agreement or confidentiality language in a settlement agreement does not immunize it from discovery, or make the showing of relevancy by the requesting party any greater than for any other information. The linchpin is relevancy. The settlement information requested by Plaintiffs in this case is relevant for discovery purposes even if there is "good cause" for a protective order restricting its use and dissemination.⁵

A. PARTICULAR RELEVANCY OF NATIONWIDE'S PRIOR SETTLEMENT AGREEMENTS IN BAD FAITH CASES

The settlement agreements are relevant because they are probative of an essential element of Plaintiffs' cause of action. Under Plaintiffs' statutory cause of action, Plaintiffs must prove that Nationwide's conduct in this claim or in other claims, was with "such frequency as to indicate a general business practice". W.Va. Code §33-11-4(9). This Court in Dodrill v. Nationwide Mut. Ins. Co., 201 W.Va. 1, 491 S.E.2d 1 (1996), held that evidence of bad faith conduct against other claimants may be proof of a general business practice. This Court restated in Dodrill citing Jenkins v. J.C. Penny's, supra:

"We conceive that proof of several breaches by an insurance company of W.Va. Code, §33-11-4(9), would be sufficient to establish the indication of a general business practice. It is possible that multiple violations of W.Va. Code, §33-11-4(9), occurring in the same claim would be sufficient, since the term "frequency" in the statute must relate not only to repetition of

⁵ Plaintiffs agreed to a protective order limiting the dissemination and use to this case of the requested prior claims information as a matter of expediency and to relieve the Trial Court of the burden of reviewing voluminous documents. Plaintiffs do not concede that Nationwide could sustain its burden to demonstrate good cause for most, if not all, the requested documents eventhough Nationwide refused to produce the same after a protective order was entered. See Pansy, supra.

the same violation but to the occurrence of different violations. Proof of other violations by the same insurance company to establish the frequency issue can be obtained from other claimants and attorneys who have dealt with such company and its claims agents, or from any person who is familiar with the company's general business practice in regard to claim settlement. Such information is, of course, subject to discovery, and it appears that the Legislature intended under W.Va. Code, §33-11-4(10), to require insurance companies to maintain records on complaints filed against it." (citations omitted)(emphasis added).

In Syllabus Point 3 of Jenkins, supra, this Court expressed the requirement that a general business practice must be shown, as follows:

"More than a single isolated violation of W.Va. Code, §33-11-4(9) must be shown in order to meet the statutory requirement of an indication of 'a general business practice,' which requirement must be shown in order to maintain the statutory implied cause of action."

In Jenkins, this Court recognized that to prove a violation of the Unfair Trade Practices Act the plaintiff must show more than one violation of the statute. Thus, this Court held that the plaintiff's request for information of other unfair trade practices claims against J.C. Penny's was relevant to prove the allegation of general business practice.

In State ex rel. State Farm Mut. Auto. Ins. Co. v. Stephens, 188 W.Va. 622, 425 S.E.2d 577 (1992), this Court held that the plaintiff's discovery requests were relevant, which requests sought information as to

"...every claim filed against [State Farm in every State, for a

ten year period] which involved allegations of bad faith, unfair trade practice violations, excess verdict liability, or inquiries from insurance industry regulators concerning State Farm's handling of claims" Id. 425 S.E.2d at 580.

This Court in Stephens went on to hold, again citing Jenkins, supra, that:

"In the present case, the information requested by the plaintiffs was relevant to the issues involved in the civil action below. In Jenkins v. J.C. Penney Casualty Insurance Co., 167 W.Va. 597, 280 S.E.2d 252 (1981), we recognized that to prove a violation of the Unfair Trade Practices Act, W.Va. Code, §33-11-1, *et seq.*, the plaintiff must show more than one violation of the statute. Thus, the plaintiffs' request for information of other unfair trade practices claims against State Farm was relevant to prove their own allegations in that regard. Likewise, the plaintiffs' interrogatories sought information relevant to their bad faith claim which carried with it the potential for punitive damages. Other courts have recognized that in a bad faith claim against an insurance carrier, previous similar acts can be shown to demonstrate that the conduct was intentional." Id. 425 S.E.2d at 583-84.

Accord, State ex rel. Allstate Ins. Co. v. Gaughan, supra.

The settlement agreements sought in this case are particularly relevant as they are likely to have the parties full identities including the name and address of the attorneys representing the claimants. This information was requested from Nationwide in

Request No. 8 but Nationwide refused to provide it.⁶ Instead Nationwide produced an incomplete summary document of past claims resulting in litigation, which it characterized as not being from Nationwide's regularly kept business records, but rather was a compilation by its attorneys. [See **R. App., Ex. 3**] This summary document did not provide all of the information requested in Plaintiffs' discovery including failing to provide the address or telephone number of any claimant, the name, address or telephone number of any of the claimants attorneys,⁷ name, address and telephone number of any Nationwide claim representative whose conduct was at issue, and a brief description of the allegations against Nationwide and/or its employees or agents. All of this requested information, which has not been provided, is likely to be contained in the settlement agreements. Thus they are highly relevant and discoverable as they may lead to the discovery of admissible evidence.

⁶ Although Nationwide stated in its discovery response that it did not maintain the prior claims information as sought by Plaintiffs, there is substantial evidence that this is not true; certain Affidavits of former employees of Nationwide filed in other cases contradict Nationwide's answers (See **R. App., Ex. 1**) and in fact, affirmatively state that Nationwide, as common sense would indicate, kept scrupulous records whenever it was sued for bad faith; [See **R. App., "Ex. 2"**]; this, of course, is consistent with the statutory requirement to maintain a complete record of all complaints made against it. W.Va. Code §33-11-4(10).

⁷ This information is particularly important, some of which would be contained in the settlement agreements as it would permit Plaintiffs to discover further evidence likely to be admissible from the attorney who handled the bad faith claim against Nationwide. Nationwide well knows that without this information, Plaintiffs counsel in this case, is somewhat hamstrung in trying to determine the claimant's counsel's identity as Nationwide, by its own admission, did not provide the civil action number with any accuracy which would enable Plaintiffs' counsel to readily seek that information; however, this information is within Nationwide's regularly kept business records and was properly ordered produced by the Trial Court; Nationwide's deliberate failure to produce this information, but instead producing an admittedly inaccurate summary document, is tantamount to obstruction of justice as it defies common sense that Nationwide would not have regularly maintained information regarding when it gets sued for bad faith, by whom, the civil action number, the attorney representing the Plaintiff and the results of the litigation; in fact, Nationwide's credibility in asserting under oath (See **R. App., Ex. 1**) that it does not have available to it such information is highly suspect, especially in view of the Affidavits of three of its former area claims representatives which are attached hereto. [See **R. App., Ex. 2**].

Additionally, the amount of settlement is very relevant and not a trade secret or otherwise shielded from discovery. It is relevant because contrary to Nationwide's assertion that the amount of settlement has no probative value, the fact that Nationwide settled an alleged bad faith claim for 2.5 million dollars is probative concerning the egregiousness of Nationwide's conduct in that claim. It is probative to Plaintiffs' expert in forming his or her opinions and in rebuttal regarding any attempted trial testimony by Nationwide's expert or managers that Nationwide's claims handling complaints have been small or minor. It may also furnish evidence of pattern and practice, or investigative leads for other evidence, as to which type of claims conduct, or which claims agents conduct is particularly willful and deliberate. More importantly, it will serve as a guidepost for Plaintiffs' counsel as to which bad faith claims to investigate more thoroughly and which to invest more time and expense due to the size of the settlement. This is very important, for instance, Nationwide's compilation partially identifies over 330 civil actions presumably alleging some type of bad faith, while the Insurance Commissioner complaints number over 841. Obviously, some grievances involve more serious conduct than others. By knowing the amount of settlement for each insurance commissioner claim or civil action, Plaintiffs counsel can concentrate scarce trial resources on those matters worthy of such expenditure. This is of course what Nationwide wants to prevent. Regardless of whether the settlement information is admissible at trial, although it very well could be as impeachment, it is definitely relevant because it could possibly lead to the discovery of admissible evidence, i.e. testimony by the claimant or his attorney as their identities will be discovered through the settlement agreements themselves, as well as the basis of the allegations against Nationwide and the other areas of inquiry outlined above. DIRECTV, supra at 684. By knowing which claims to investigate first due to the amount of payment by Nationwide, and because of Nationwide's desire to keep the information secret which is instructive itself, the Plaintiffs can pursue investigation and prosecution of their claims

with less expense and time, all of which may contribute to a fair settlement. As such the discovery of this information promotes settlement of this case and others like it.

Finally many claimants incorrectly believe that they cannot even discuss facts of their claim against Nationwide because of the confidential clause in the settlement agreement. By requiring disclosure of the settlement agreements, the Trial Court promotes the finding of the entire truth in this case as those prior bad claimants will realize that the Trial Court has required evidence of such prior conduct to be discovered in this case. Those claimants will be able to be told that while their agreement of confidentiality is still binding on them it does not prevent disclosure of their claim facts for purposes of this case. This is likewise very important so that Plaintiffs will be able to discover all necessary information to prosecute their claims in this case.

B. DISCOVERY OF THE SETTLEMENT AGREEMENTS DO NOT VIOLATE ANY PUBLIC POLICY OF THIS STATE BUT THE ATTEMPT BY NATIONWIDE TO SHIELD SUCH INFORMATION IN VIOLATION OF W. Va. CODE §33-11-4(10) IS A VIOLATION OF THIS STATE'S PUBLIC POLICY

Nationwide also argues that the production of the settlement agreements would violate the public policy of this State which promotes settlement of disputes. This is an argument often tendered by the insurance industry, the defense bar on their behalf and some commentators, but it is without merit and has been rejected by the courts, legislatures and recent commentators. [See **R. App., "Ex. 4"**] The Duke Law Journal article sets forth all of the relevant arguments and cases both pro and con concerning the secrecy of discovery and its effect on litigation. It rejects the notion as proffered by Arthur Miller in his article relied upon by Nationwide, that the courts should seal discovery and

settlement agreements as a matter of routine.⁸ However, what is not generally known is that Mr. Miller's article was funded by the defense trade organization, the Product Liability Advisory Council Foundation.⁹ This was not hidden by Mr. Miller as it was part of a biographical footnote to his article, but apparently many attorneys quote the article without perceiving this important fact, or just ignore it. It does call into question the *bona fides* of the article, in a similar manner that studies for new drugs that are funded by the manufacturer of the drug are often met with skepticism. Such studies may be perfectly unbiased but the specter of bias is present due to the funding.

Unfortunately for Nationwide the public policy considerations fall squarely in favor of prohibiting agreements that shield relevant information and documents from discovery which may demonstrate the wrongful conduct of an insurer when that insurer violates the statutory or common law of this State as expressed in the Unfair Trade [Claims] Practice Act, W.Va. Code §33-11-1, et seq. Those statutory provisions establish the public policy of this State and define unfair and deceptive conduct of insurers which creates both administrative and civil liability.

To allow insurers to hide or restrict access of litigants to evidence that may prove the insurance carriers liability for violations of the Act violates the public policy of this State. One court in this State has so found. Forshey v Allstate Insurance Company, CA 5:98CV85 (N.D.W.Va 1999) [See **R. App.**, "Ex. 5"]. In Forshey, the Magistrate Judge rejected the same public policy arguments by Allstate as those asserted by Nationwide in this case. Instead, the District Court found that West Virginia had a strong public policy as established by the Act prohibiting confidential settlements or confidential agreements

⁸ Arther R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427 (1991).

⁹ "The Assault Upon The Citadel", James E. Rooks, Jr. TRIAL, (December, 2007, p.28, fn 4).

to keep from disclosure in other cases evidence of Allstate's or any other insurer's wrongful conduct which violates the Act. Allstate appealed the Magistrate Judge's ruling to Judge Stamp and he affirmed the Magistrate Judge's ruling on this very issue proclaiming it well reasoned. Judge Stamp also recognized that this State's public policy as expressed in the Act would override the effect of any private contractual agreement like the one Allstate demanded of the settling plaintiff in that case. See also, Anchorage Sch. Dist v. Anchorage Daily News, 779 P2d 1191, 1193 (Alaska 1989) [holding confidentiality provision unenforceable to shield settlement from public dissemination as violation of public records law] In essence, contrary to what Nationwide now asserts to be a public policy protecting its settlement agreements, was found in Forshey to be the public policy of this State requiring production of such materials, in that case discovery produced in another case against Allstate which the parties had agreed to keep confidential, not shielding it as Nationwide seeks here. Similarly as in the case at Bar the confidential settlement agreements, if made by Nationwide to hide evidence of its past wrongdoing, would be a violation of West Virginia public policy as established in the Act .

Interestingly however, the Court in Forshey did not mention a specific requirement of the Act which would also direct that prior bad faith claim information, including settlements, be discoverable. Section 10 of the Act [33-11-4(10)] requires that "No insurer shall fail to maintain a complete record of all the complaints which it has received since the date of its last examination under section nine, article two of this chapter. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition [payment or other consideration] of these complaints, and the time it took to process each complaint. For purposes of this subsection, 'complaint' shall mean any written communication primarily expressing a grievance." (emphasis added) Surely a lawsuit, by anyone's interpretation is a "written communication primarily expressing a grievance". Jenkins, supra. Also

merely because an insurance carrier is only required to keep the record from examination to examination, such does not mean that if past records are available they are not discoverable with a proper discovery request in a civil action. No doubt this subsection [33-11-4(10)] evidences a strong public policy, in fact a mandatory requirement, that past bad faith claims including civil actions be available for inspection and review and may be used as proof of an insurance company's business frequency as required by the Act. Jenkins, supra. Nationwide's argument to this Court that such information is not discoverable based on a contrary public policy borders on the absurd.¹⁰

C. PRIVACY INTERESTS OF NON-PARTIES ARE NOT UNDULY AFFECTED BY PRODUCING FACTS OF PRIOR CLAIMS

Nationwide also asserts that the settlement agreements are not discoverable as they violate the privacy interests of non parties. While this may satisfy the "good cause" requirement for a protective order pursuant to Rule 26, it does not prevent the discovery of such information or documents. Almost any prior case or claim information regarding other similar incidents will necessarily involve other persons or parties, all of whom are non parties to the pending action. This is true whenever prior injury or incident information is requested in any case be it a product liability case, discrimination case, insurance bad faith

¹⁰ Nationwide cites as contrary legal authority to Forshey, a portion of a telephonic call with the late Judge Craig Broadwater where he commented that Judge Stamp didn't believe Forshey was precedent; however, Judge Broadwater's off the hand comment during a conference call that primarily related to a fight between the attorneys over scheduling of a deposition and which from Judge Broadwater's standpoint focused on what he was going to admit by way of trial testimony, not discovery, has no bearing on the precedential value of Forshey; Forshey is well reasoned and was rendered after full briefing and a complete review of the law and it was upheld by Judge Stamp for the same reasons; the telephonic transcript of Judge Broadwater's phone conference is a thin reed upon which Nationwide argues that Forshey has no persuasive value to this Court; it merely demonstrates the desperation of Nationwide in attempting to shield from discovery the settlement agreements which no one but Nationwide and its counsel have ever seen, at least in this case.

case or any other type of case. See, Chicago Cutlery Co, *supra*, Josephs, *supra*, Allstate, *supra*, and Virmani, *supra*. Virmani especially implicated the privacy interests of non parties as it involved requested disclosure of confidential peer review files of non party physicians in Virmani's race discrimination suit against the defendant hospital. Nothing could be more private than perhaps the proceedings of a doctor's competency as reviewed by his or her peers. However, the Fourth Circuit held, as have the vast majority of courts considering this issue, that such privacy concerns must yield to the need for evidence in court. This is true because many times the implements of wrongful conduct is attempted to be hidden through claims of confidentiality or even attorney client privilege. This is why long ago it was determined that even the attorney client privilege must yield if used to conceal wrongdoing. see generally, State ex rel Medical Assurance v. Recht, 213 W.Va. 457, 583 S.E.2d 80 (2003)[Davis, concurring]. The proper manner of protecting such confidentiality is to grant a protective order, not to deny discovery altogether.

If the presence of non party information is all that's required to preclude discovery, a party to litigation could never discover such other similar incident materials. Such is not the law nor should it be. Often times, the information sought is not embarrassing or sensitive, nor expected to be maintained as confidential by the non party if needed in a court proceeding. After all, in the insurance bad faith context they have made some type of claim, either informal, administratively, or in a court of law. Also, if the information is sensitive, the trial court can protect it in many different ways while still allowing its production and use in the case. That's why courts have broad powers under the discovery rules to conform their orders to do what is necessary as the circumstances demand. However, immunity from discovery is not the law in any jurisdiction if the information is relevant.

The Trial Court below entered a Martino type protective order in this case, in addition to a Rule 26 protective order, all without Nationwide ever making a "good cause"

showing that the documents were entitled to such protection, or without the Trial Court ever seeing the documents being withheld. [See **R. App., "Ex. 6"**] Martino v Barnett, 215 W.Va. 123, 595 S.E. 2d 65 (2004). The interests of Nationwide in protecting whatever information it may have to protect in the requested discovery was carefully considered by the Trial Court. However, Nationwide doesn't want protection, they want total shielding of probative evidence.

D. NATIONWIDE HAS WAIVED ANY OBJECTIONS TO PRODUCING THE REQUESTED DISCOVERY INFORMATION

Nationwide, in an effort to delay and obstruct discovery, initially responded to Plaintiffs' discovery Request No. 8 by providing a "Compilation of Litigation" filed against Nationwide apparently prepared by Nationwide's outside counsel and not from Nationwide's corporate records, but purportedly from public records in the circuit clerk's offices in this State. [See **R. App., Ex. 3**]. As part of the Compilation, Nationwide, through its counsel Martin & Seibert, added a Disclaimer as follows:

"DISCLAIMER: These lists have been prepared by counsel employed by Nationwide to compile said lists for litigation purposes only. The above lists are historically incomplete, and are based upon the quality of judicial indexes, the availability of data, and the limited ability to identify litigation and complaints within the parameters provided, including but not limited to Plaintiffs' requested date requirements. The identification of individual Nationwide entities or lines of insurance is also inexact as much of the data is identified only as Nationwide, and judicial indexes often identify the entity or line of insurance by the misnomer of Nationwide Insurance and, more frequently, the litigation has been filed against either

the wrong entity or an inaccurately identified company." [See **R. App., Ex. 1**].

Of course there is no authority for a corporate defendant like Nationwide to escape its duty to provide accurate, truthful responses to discovery by substituting an admittedly inaccurate and unsworn responses that will be of little or no use in the litigation. The Trial Court had no alternative but to compel Nationwide to produce accurate, sworn responses as required by Rule 33(b) which requires "Each interrogatory shall be answered separately and fully in writing under oath....." Apparently, Nationwide would rather pay outside counsel in an attempt to avoid proper discovery rather than comply with its legal obligations under the Rules. There must be a reason for such maneuvering and procedural fencing. However, it is wrong, and this Court should not condone it by second guessing the Trial Court's discretionary discovery ruling compelling full answers by Nationwide.

The more significant import of Nationwide's maneuvering is that Nationwide has waived any objections it may legitimately have had because Nationwide attempted to evade discovery by intentionally producing a bogus document which absolutely fails to comply with Rule 33(b). [Rule 33(b)(4) states failure to make specific timely objection constitutes waiver and Rule 37(a)(3) states that evasive or incomplete answers or responses are treated as a failure to answer or respond]

How can this Court be asked by Nationwide to correct a supposedly clear legal error by the Trial Court in the face of such improper discovery conduct by Nationwide. The Trial Court should have done more than merely compelled proper responses, it should have sanctioned Nationwide.¹¹

¹¹ This Court is not fully aware of the obstructive discovery conduct by Nationwide in this case as the full record is not before the Court; for instance, just in the litigation compilation alone Nationwide has knowingly provided, or condoned the providing, of inaccurate information designed to mislead the Plaintiffs from being able to

E. DISCOVERY OF SETTLEMENT AGREEMENTS THAT ARE SUBJECT TO A PROTECTIVE ORDER FROM ANOTHER COURT IS PROPER

Discovery documents, like the requested settlement agreements or other requested information, that may have been subject to a protective order in another court are nonetheless discoverable in a pending action as the court in the pending action will be cognizant of the prior protective order and give consideration to any restrictions necessitated thereby. Courts have regularly required production of discovery materials in a pending case where those same documents were subject to a protective order in the other case. Wauchop v. Domino's Pizza, Inc., 138 FRD 539, 544 & 549, (N.D. Ind. 1991)[merely because discoverable information was subject to a protective order in another case does not render it non discoverable in present case]; Carter-Wallace, Inc. v Hartz Mountain Indus., 92 FRD 67, 69 (S.D.N.Y. 1981)[holding that documents produced in another case subject to a confidentiality order were nonetheless discoverable in pending case]¹² Accordingly, Nationwide's argument in this regard has been rejected, and should

discover other relevant information necessary to prosecute and prove their claims; as an example, Nationwide purportedly identifies in the sixth column of the compilation the civil action number for bad faith cases against it; however, at least for Harrison County cases, those numbers are totally inaccurate and not even close to the civil action number for the cases identified therein; for instance the bad faith cases listed by Nationwide identified as Candace F. Brake which Nationwide represents bears civil action number 91-53591 is actually 98-C-267-2 in the official Harrison County Circuit Clerk record; Frank S. Martino which Nationwide represents as 92-70422 is actually 01-C-414-1 in the official Harrison County Circuit Clerk record and the Estate of Cheryl Groover which Nationwide represents bears civil action number 92-53550 is actually 99-C-412-2 in the official Harrison County Circuit Clerk record; additionally, Plaintiffs' discovery requests sought this information for ten (10) years preceding the date of the request which was filed on 03/19/07; Nationwide's compilation arbitrarily terminates as of March 1, 2004 with no explanation or justification.

¹² The same result may not occur if a court actually enjoins the parties from disseminating the requested document rather than merely protecting it from public view or restricting the unlimited dissemination by the parties of the protected document. Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994); however the Third Circuit Court of Appeals reversed the federal district court judge in the Pansy case for entering such a restrictive injunctive type protective order against the parties with regard to a settlement agreement that the parties had agreed to keep confidential; the Court of Appeals determined that the settlement agreement was not worthy of Rule 26

be rejected by this Court based upon the Trial Court not being clearly wrong in this discretionary discovery ruling, as relevant information necessary to prosecute or defend a claim cannot be made permanently unavailable, or prohibitively costly to obtain, due to another court's protective order. However, in the instant matter, Nationwide has never demonstrated that any of the settlement agreements are subject to any kind of protective order as the Trial Court never had the opportunity to consider such argument as Nationwide never produced them for in camera review. Nationwide's objection on this ground should be denied for either or both reasons.

protection as the parties had failed to establish "good cause" as required by Rule 26 and certainly not worthy of an injunctive type order; those various considerations required by Rule 26 include, but are not limited to, (1) the degree in interest of maintaining privacy, (2) whether information is being sought for legitimate purpose or improper purpose, (3) whether there is threat of particularly serious embarrassment to any party, (4) whether information is important to public health and safety, (5) whether sharing of information among the litigants would promote fairness and efficiency, (6) whether party benefitting from confidentiality order is public entity or official and (7) whether case involves issues important to public; the Third Circuit's decision in Pansy set forth the general rule regarding the attempt by defendants to restrict and shroud in secrecy information that is not worthy of confidentiality or trade secret protection that would unnecessarily restrict access by legitimate interested parties including the public; this was further elaborated upon by the Third Circuit in Shingara v. Skiles, 425 3d 301 (3d Cir. 2005), wherein the Court of Appeals quoted the Pansy Court's finding that "Nevertheless, simply because courts have the power to grant orders of confidentiality does not mean that such orders may be granted arbitrarily. Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interest which are sacrificed by the orders." Shingara at 308 citing Pansy 23 F.3d at 785-86; the Pansy Court also cited at length Judge Pratt in City of Hartford v. Chase, 942 F.2d 130 (2d Cir. 1991) where Judge Pratt noted that many private confidentiality agreements, like the ones which this Court is being asked to immunize from discovery, are improper and pose a "great potential for abuse" ; Judge Pratt was arguing for restricting the use of such confidentiality orders which would make such materials non-discoverable and remove them from public access; in the present case, no such known restrictive orders have been entered regarding the confidential settlement agreements and yet Nationwide asserts they are completely non-discoverable; accord, Dailey Gazette Co v. Withrow, 177 W. Va. 110, 350 S.E. 2d 758 (1986).

II. PETITIONER'S REQUEST FOR THE EXTRAORDINARY REMEDY OF PROHIBITION IS UNWARRANTED AND SHOULD BE DENIED

This Court also should deny the Petitioner's request for Writ of Prohibition as the same is not appropriate considering this Court's standards for granting such extraordinary relief. As the above legal argument demonstrates the Trial Court was acting well within its jurisdiction when it compelled Nationwide to provide the requested discovery and the alleged transgression of the Trial Court unquestionably involved a discretionary discovery matter which is not appropriate for the original jurisdiction of this Court. The "writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W.Va Code §53-1-1. This Court has held that "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 [a petition for appeal] or certiorari." State ex rel. Shelton v. Burnside, 212 W.Va. 514, 575 S.E. 2d 124 (2002) citing, Syllabus Point 1, Crawford v. Taylor, 138 W.Va. 207, 75 S.E.2d 370 (1953).

This Court has reiterated that legal standard on numerous occasions including cases with factual circumstances very similar to the one at Bar. Weikle v. Hey, 179 W.Va. 458, 369 S.E.2d 893 (1988).

In Weikle, this Court held that: "the Writ of Prohibition is normally used as a remedy for jurisdictional defects and not as an interlocutory challenge to discretionary rulings." (citations omitted) Weikle is particularly instructive as in that case the trial court refused to grant plaintiffs discovery requests seeking information concerning other similar suits, believing such request under those circumstances to be unduly burdensome and costly and consequently this Court denied the plaintiffs a Writ of Prohibition on the grounds that the ruling was discretionary and not subject to the original jurisdiction of this Court.

Id. at 460 & 895. In the current case before this Court, the Trial judge exercised his discretion involving a preliminary discovery matter, not involving attorney-client privilege or work product protected documents, and therefore, the same standard should apply regarding the original jurisdiction of this Court.

Even though this Court recognized that in "rare instances" prohibition might be a proper remedy for adverse discretionary rulings regarding discovery, this Court emphasized that:

"absent 'substantial, clear-cut, legal errors, plainly in contravention of a clear statutory or constitutional or common law mandate which may be resolved independently of any disputed facts' a writ is not warranted under the flagrant abuse of discretion theory of prohibition." Id.

This Court has stated that prior to issuing a writ, "we must apply the aforementioned standards and ascertain whether there is clear-cut error that needs resolution where alternate remedies are inadequate and judicial economy demands resolution." State ex rel. Doe v. Troisi, 194 W.Va. 28, 459 S.E.2d 139 (1995). Orders granting discovery requests over timely objections, like other discovery orders, are interlocutory. They do not finally end the litigation and are generally reviewable only after the final judgment. Furthermore, this Court has stated,

"Thus, for reasons predicated partly on judicial economy, our general rule necessarily must be that discovery orders are not appealable until the litigation is finally ended." State ex rel. United States Fidelity and Guaranty Company v. Canady, 194 W.Va. 431(at 437), 460 S.E.2d 677(at 683)(1995).

In the seminal case involving discovery of trade secrets, this Court held in State ex rel Arrow Concrete Co. v. Hill, 194 W.Va. 239, 460 S.E.2d 54 (1995) that "We are

mindful that a writ of prohibition is rarely granted as a means to resolve discovery disputes: 'a writ of prohibition is available to correct a clear legal error resulting from a trial court's substantial abuse of its discretion in regard to discovery orders.' "(citations omitted)] This Court has set forth a five factor test in determining whether a writ of prohibition is proper regarding an issue that does not involve an absence of jurisdiction, but rather involves a claim that the lower court clearly exceeded its legitimate powers. Those five factors, with the third factor being of primary importance, are:

- "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;
5. Whether the lower tribunal's order raises new and important problems or issues of law as first impression."

State ex rel Nationwide Mutual Insurance Co. v Kaufman, 222 W.Va. 37, 658 S.E.2d 728 (2008)[Syl. pt 1]; see also, State ex rel National Auto Insurance v. Bedell, ___S.E.2d___, 2008 WL 5194724 (W.Va. 2008), [holding that dismissal of one defendant for lack of personal jurisdiction not amenable for review by way of extraordinary writ of prohibition as record incomplete and matter better suited for direct appeal so as not to leave this Court "at sea without a chart or compass" in attempting to determine the factual issues confronting the trial court]; Surely an issue of lack of personal jurisdiction resulting

in the final dismissal of a party better meets the five factors referenced in Kaufman than a discretionary discovery ruling as presented in the case.]

The Petitioner has failed to provide an adequate basis to satisfy the five factor test established by this Court for a Writ of Prohibition regarding a discretionary discovery matter. Moreover, the Petitioner seeks relief on an incomplete record and without first having complied with the Trial Court's Order to submit any questioned documents for in camera review (See Petitioner's Appendix, Exhibit A, Order 10/09/08 at p. 7). The Trial Court did not have the opportunity to review the settlement documents which the Petitioner has characterized variously throughout its Petition as private confidential agreements regarding settlement. Neither the Trial Court nor this Court, will have the opportunity to verify those assertions as the Record is incomplete because Nationwide failed to provide them to the Trial Court for review as instructed.¹³ It may very well be that the provisions asserted by Nationwide do not exist in the context as described in its Petition. Nationwide has now waived its right to such *in camera* review by failing to follow the Trial Court's directive. Surely under the criteria set forth in the Statute and as established by this Court, original jurisdiction is unwarranted. There is no basis to find that Judge Marks usurped his legitimate powers in ruling on a discretionary discovery matter, especially in view of Nationwide's overall discovery conduct, nor did he ignore well established law in this State or anywhere else. Nationwide has an absolute remedy by way of appeal if the same becomes necessary and Nationwide is not prejudiced beforehand as the Trial Court has taken extraordinary measures to protect the prior claims documents,

¹³ Although Respondent does vigorously disagree with Nationwide that a review of the alleged confidential Settlement Agreements would demonstrate their being totally immune from discovery, nonetheless, the Trial Court should have had the opportunity to review them to make a decision as to the nature of the document and the scope of the private agreement to keep the documents confidential from public disclosure; this is true because many times only the claimant is bound to confidentiality and is relieved from such private contractual obligation if subpoenaed or directed by other court process in a pending proceeding.

including the settlement agreements, by entering two protective orders regarding these materials. This Court should deny the Rule to Show Cause on this basis alone, as to do otherwise will continue the slide down the slippery slope where litigants, especially insurance company defendants, believe that neither judicial economy, nor prompt remedy (justice delayed is justice denied) are important, and that multiple interlocutory appeals are the norm not the "rare exception as this Court has declared. The Court should not allow Nationwide to circumvent the normal appeal process and present an important issue on less than a full record by way of interlocutory appeal. This Court should be wary of accepting discretionary discovery issues like this one by way of extraordinary remedy and it should deny Nationwide's Petition to begin the process of curtailing this piecemeal litigation by some litigants such as Nationwide.

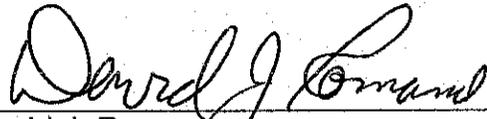
III. CONCLUSION

The Trial Court was entirely within its discretion to order Nationwide to fully and completely answer Plaintiffs' discovery requests, including production of the settlement agreements. This is especially true in view of Nationwide's obstructive conduct regarding discovery. However, the standard to be applied by this Court is not whether it agrees with the Trial Court but whether the Trial Court's ruling was clearly erroneous. It absolutely was not and when this Court considers the broad discretion allowed a trial court in ruling upon discretionary discovery matters such as this, this Court should deny the Writ of Prohibition being sought by Nationwide. Plaintiffs clearly demonstrated to the Trial Court the possibility that the requested information would be admissible at trial, or lead to the possible discovery of other admissible evidence. Thus, the Requests were relevant for discovery purposes. Any need for protection has been adequately addressed by the Trial Court's two protective orders and nothing further is needed.

Finally, this Court should again restate that extraordinary writs are not to be

used in place of appeals. Sometimes their use is a trial strategy to wear down an opposing party or to make the litigation so expensive that it is no longer worth pursuing. Such strategy is wrong, causes undo delay and expense and wastes scarce judicial resources and must not be condoned. For all of the above reasons the Petition of Nationwide should be denied with costs.

Respectfully submitted,
Respondent, By Plaintiffs' Counsel

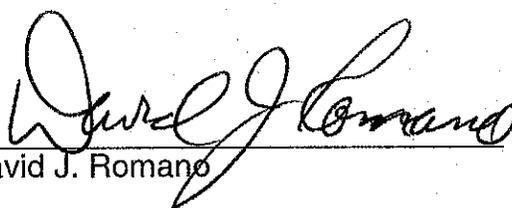


David J. Romano
W.Va. State Bar ID No. 3166
Rachel E. Romano
W.Va. State Bar ID No. 10688
ROMANO LAW OFFICE
363 Washington Avenue
Clarksburg, West Virginia 26301
(304) 624-5600

CERTIFICATE OF SERVICE

I, David J. Romano, do hereby certify that on the **20th** day of January, 2009, I served the foregoing **"RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF A WRIT OF PROHIBITION"** and **"RESPONDENT'S APPENDIX A"** upon the below listed counsel of record by depositing a true copy thereof in the United States Mail, postage prepaid, in an envelope addressed to them at their office address:

Walter M. Jones, III, Esquire
W.Va. State Bar ID No. 1928
Susan R. Snowden, Esquire
W.Va. State Bar ID No. 3644
Martin & Seibert, L.C.
1453 Winchester Avenue
P. O. Box 1286
Martinsburg, WV 25402-1286
[Phone No. 1-304-262-3210]
[Fax No. 1-304-267-0731]
Counsel for Nationwide Mutual Insurance Company



David J. Romano

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE