

No. 34858

COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

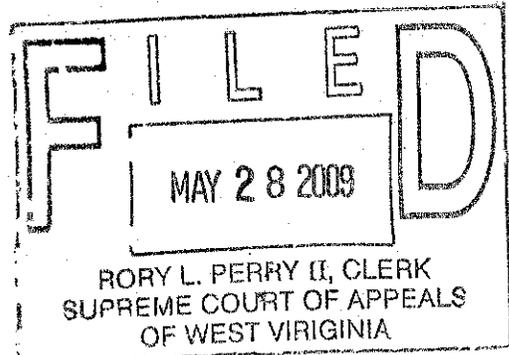
PROGRESSIVE CLASSIC INSURANCE COMPANY,

Petitioner,

vs.

HONORABLE THOMAS A. BEDELL,
JUDGE OF THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA,

Respondent.



From the Circuit Court of
Harrison County, West Virginia
Civil Action No. 08-C-330-2

**RESPONSE BY THE HONORABLE THOMAS A. BEDELL
TO THIS COURT'S RULE TO SHOW CAUSE PURSUANT TO RULE 14(d)**

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

Counsel for Plaintiff, Judith A. Swoger

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii.
ISSUES	2
SERVICE OF A SUBPOENA ON A CORPORATION'S APPOINTED AGENT FOR SERVICE OF PROCESS SATISFIES RULE 45	3
CONCLUSION	7

TABLE OF AUTHORITIES

Cases from Other Jurisdictions

<u>A.O. Smith Corp. v. Perfection Corporation,</u> 2004 WL 1728615 (Ohio App. 10 Dist.)	4, 5
<u>In Re: Falcon Air Express, Inc.,</u> 2008 WL 2038799 (Bankr. S.D. Fla.)	6
<u>Concord Boat Corp. et al v. Brunswick Corp.,</u> 169 F.R.D. 44 (S.D. NY 1996)	2
<u>In Re: Motorsports Merchandise Antitrust Litigation,</u> 186 F.R.D. 44 (W.D. VA 1999)	2, 4
<u>In Re: Shur,</u> 184 B.R. 640 (E.D. NY 1995)	6
<u>Khachikian v. BASF Corp.,</u> 1994 WL 86702 (N.D. NY)	4

Statutory Provisions

W.Va. Code §31D-5-504 (2008)	7
W.Va. Code §33-4-12 (2001)	7

Rules

Fed. R. Civ. Proc., Rule 45	4, 6
Ohio R. Civ. Proc., Rule 4.2	4
Ohio R. Civ. Proc., Rule 45	4
W.Va. R. App. Proc., Rule 14(d)	1
W.Va. R. Civ. Proc., Rule 1	3
W.Va. R. Civ. Proc., Rule 4	4, 7
W.Va. R. Civ. Proc., Rule 4(d)(3)	4
W.Va. R. Civ. Proc., Rule 45	3
W.Va. R. Civ. Proc., Rule 45(d)	5

No. 34858

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

At Charleston

PROGRESSIVE CLASSIC INSURANCE COMPANY,

Petitioner,

vs.

HONORABLE THOMAS A. BEDELL,
JUDGE OF THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA,

Respondent.

From the Circuit Court of
Harrison County, West Virginia
Civil Action No. 08-C-330-2

**RESPONSE BY THE HONORABLE THOMAS A. BEDELL
TO THIS COURT'S RULE TO SHOW CAUSE PURSUANT TO RULE 14(d)**

The Plaintiff below, Judith A. Swoger, on behalf of the Respondent, The Honorable Thomas A. Bedell, makes the following response as required by Rule 14(d) of the West Virginia Rules of Appellate Procedure.

Because the Respondent's initial Response filed with this Court pursuant to Rule 14(b) on April 14, 2009, along with its attachments, is complete and clarifies the Record below, the Respondent will rely upon that document and its attachments and will make it part of this Response as the Appendix, all pursuant to Rule 14(d). Therefore, this Response will be succinct and generally refer to those relevant portions of the Appendix as set forth above.

ISSUES:

The sole issue before this Court is whether service of a subpoena duces tecum upon the appointed agent for the receipt of service of process of a foreign corporation doing business in this State is sufficient for enforcement of that subpoena.

What this case is not about is the following:

a) It is not about lack of due process as the subpoenaed corporation, Progressive Classic Insurance Company [hereinafter "Progressive"], did receive actual notice of the subpoena through its appointed agent for service of process and there has been no claim to the contrary in the Trial Court below or in the proceedings before this Court;

b) Nor is there any issue regarding whether Progressive had an actual presence in this State as it is registered here, does business in every County through the issuance and handling of claims for automobile liability insurance policies, and has an office in Harrison County; **[See Respondent's Appendix [hereinafter "App."]¹ pp. 14-15, and attached "Exhibit 1", excerpt from hearing on Progressive's Motion to set aside contempt, pp. 8-9];**

c) Nor does it concern the amount or propriety of the civil contempt penalty assessed by the Trial Court, as no objection was raised before the Trial Court below, nor was it raised in Progressive's Petition for Writ of Prohibition, nor did Progressive ever provide to the Trial Court any justification for its refusal to comply with the subpoena or the Trial Court's subsequent Orders to show cause or to appear for a deposition;

¹ Respondent's original Response contains two typographical citation errors in the citation of Concord Boat Corp. et al v. Brunswick Corp., 169 F.R.D. 44 (S.D. NY 1996) and In Re: Motorsports Merchandise Antitrust Litigation, 186 F.R.D. 44 (W.D. VA 1999), both of which were inadvertently cited as "F.R.G." The undersigned apologizes for this citation error.

d) Finally it does not involve any rejection of Progressive's assertion of attorney-client privilege or work product protected information subpoenaed for the deposition as no such objections were ever made by Progressive at any time.

Progressive's sole defense for its repeated and contumacious refusal to comply with the subpoena and the Trial Court's subsequent Orders enforcing the subpoena, and findings of civil contempt, is based on Progressive's belief that it could ignore all of the Trial Court's process because it was entitled to personal service as set forth in Rule 45 for service upon an individual, even though Progressive is a corporation. Progressive also asserts it had no duty to contest the service of the subpoena, if it believed it was defective, or to take any other action regarding the Trial Court's numerous Orders other than repeatedly refusing to respond to the Trial Court in any manner. Nothing could be more offensive to the orderly operation of a judicial system than such an attitude as displayed by Progressive in this case. Only a large corporation with unlimited funds would adopt such an untenable position. Such conduct flouts the authority of the Trial Court and violates the very purpose of the Rules of Civil Procedure, especially Rule 1 which requires that the Rules be "construed and administered to secure the just, speedy, and inexpensive determination of every action." These principles were deliberately violated by Progressive in this case, and the Trial Court's finding of contempt under these facts was well within its discretion.

SERVICE OF A SUBPOENA ON A CORPORATION'S APPOINTED AGENT FOR SERVICE OF PROCESS SATISFIES RULE 45

The Respondent relies upon his argument set forth in the original Response to Progressive's Petition, filed with this Court on April 14, 2009. Respondent refers to the Appendix which is that original Response with all attachments. [App. pp. 8-11]. There are also several other cases which support Respondent's position that service of a subpoena

upon a corporation complies with the Rule if the subpoena is served upon "an officer, a managing or general agent, or [] any other agent authorized by appointment or by law to receive service ..." A.O. Smith Corp. v. Perfection Corporation, 2004 WL 1728615 (Ohio App. 10 Dist.) [not reported in N.E.2d].

The Ohio Intermediate Appellate Court in the A.O. Smith Corp case relied upon several Federal District Court cases for its rationale, including In Re: Motorsports Merchandise Antitrust Litigation, 186 F.R.D. 44 (W.D. Va. 1999). The Motorsports case held that service of a subpoena upon a corporation's designated agent for receipt of service of process complied with Rule 45 of the Federal Rules of Civil Procedure just as the Ohio court in the A.O. Smith Corp. case held that such service complied with Ohio Rules of Civil Procedure 45, and 4.2 relating to service of process. Id. at pp. 4-5. Both of these Courts held that such service constitutes proper service as the designated agent for service actually received the subpoena, similar to when a summons and complaint is served on a corporation. The Courts opined that such is the very purpose of having a designated corporate agent for the receipt of service of process so that notice and an opportunity to respond by the corporation is afforded. **[App pp. 8-11]**

Thus, the Ohio Intermediate Court of Appeal came to the same conclusion as Judge Bedell in this case by finding that service upon a corporation pursuant to Rule 4 is appropriate and complies with the requirements of serving a subpoena on a fictitious entity like a corporation. However, the Ohio Court in the A.O. Smith Corp case also relied on other cases which reached the same conclusion, in addition to In Re: Motorsports Merchandise Antitrust Litigation, supra. The Ohio Appellate Court also relied upon Khachikian v. BASF Corp., 1994 WL 86702 (N.D. NY), which held that service of a subpoena on a corporation was proper if served pursuant to Rule 4(d)(3) on "an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service...". This is precisely what occurred in the case at Bar and is identical to the

facts in the A.O. Smith Corp case. In the Ohio case a non-party, ATOFINA was served with a 30(b)(5) [30(b)(7) in West Virginia] subpoena for deposition with production of documents to which ATOFINA objected on several grounds, including that service on its appointed agent for service of process, CT Corporation, was ineffective. The Ohio court rejected this argument holding that such service was proper by delivering the subpoena to the corporate agent specifically designated to receive service of process. Id at 4-5. Such a holding is really just common sense. Why else would a corporation appoint an agent for service of process if the process could not be delivered to such agent and constitute completed service?

One important fact is crystal clear in the cases cited herein, and that is all of the recipients of a subpoena who contested its service or other alleged defect, did so by filing a motion to quash with the trial court rather than ignoring the subpoena, and none of the recipients ignored subsequent trial court orders. [But see In re Shur, infra]. In almost all of those cases the recipient of the subpoena made his or her objection known to the trial court and raised the issue in an appropriate manner unlike Progressive's conduct in this case. What makes Progressive's conduct even more egregious is that Progressive is not a layperson untrained in the law, but rather a sophisticated entity with a staff of lawyers, a general counsel's office, and numerous outside attorneys on retainer or other continuous relationships who did or could have done the legal research which clearly demonstrates that compliance or objection was necessary rather than flouting the authority of the Trial Court. [App. Ex. A-7B, 9-D, 9-E, & 9-F] That same legal support as relied upon by the Trial Court in this case is before this Court clearly highlighting Progressive's unsupported legal position. Instead of addressing its concerns with the Trial Court by way of an objection pursuant to Rule 45(d), Progressive instead chose to ignore the judicial process altogether, thereby wasting everyone's time and money, including the Trial Court and this Court.

Recently, courts have even more broadly construed the type of service that will be accepted for service of a subpoena upon an individual. Although not implicated in this case now before the Court, as Progressive is a corporation, the Federal Bankruptcy Court in In Re: Shur, 184 B.R. 640 (E.D. NY 1995), and more recently in In Re: Falcon Air Express, Inc., 2008 WL 2038799 (Bankr. S.D. Fla.), both held that personal service of a subpoena on an individual under Federal Rule 45 does not mean personal delivery to the individual commanded to respond to the subpoena. Both Bankruptcy Courts recognized that the majority of courts interpreting Federal Rule 45 construed it to mean personal service as the Rule specifies service on an individual is to be accomplished by "delivering a copy to the named person...." However, the two Bankruptcy Courts analyzed the history of Federal Rule 45 as well as the minimum notice requirements to satisfy due process for purposes of obtaining a default judgment against a defendant in a civil action. Those Courts determined that there could be no rational reason for a distinction in the type of service for subpoena on an individual and the service on an individual of a summons and complaint which could result in a default causing the loss of money or property. Had Progressive looked it would have also found these cases and realized that its legal position was unsound. Perhaps Progressive did look and found these cases and the others relied upon by the Trial Court.

However, this Court need not address this issue as the facts of those cases involved service upon an individual and such is not implicated in the case at Bar.

The Trial Court in this case did not abuse its discretion by finding Progressive in contempt of Court, as Progressive not only ignored the lawfully served subpoena, but it also ignored numerous Court Orders requesting a reply to Plaintiff's Motion to compel discovery and the Trial Court's Order requiring attendance at a deposition at a date and time certain, and notices of hearing for contempt and sanctions, all of which were served upon Progressive's designated agent for receipt of service of process and directly to their

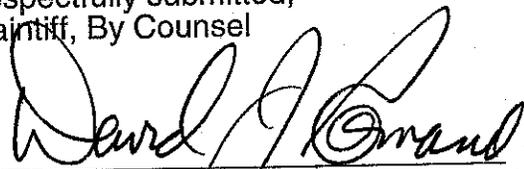
claims counsel and other individuals within the Company, including on occasion Progressive's General Counsel. [App. "Chronology and Exhibit References", and pp. 2-7 and Exhibits referenced therein].

Progressive has not provided one case that supports its contention that service of a subpoena on a corporation by means specified under Rule 4 is insufficient or defective. Nor has Progressive offered any support for its position that it could ignore the orders of the Trial Court without response or objection. Such conduct illustrates the contumaciousness of Progressive's actions in this case.

CONCLUSION:

Accordingly, this Court should find that the actions of the Trial Court below were well within its discretion and that service of a subpoena upon a corporation is proper if the corporation's appointed agent for the receipt of service of process is served pursuant to Rule 4 of the West Virginia Rules of Civil Procedure, including service through the West Virginia Secretary of State's Office in accordance with West Virginia Code §31D-5-504 (2008) and/or §33-4-12 (2001).

Respectfully submitted,
Plaintiff, By Counsel



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

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE