

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AMOS MARTIN AND TAMMY MARTIN, HIS SPOUSE

Petitioners,

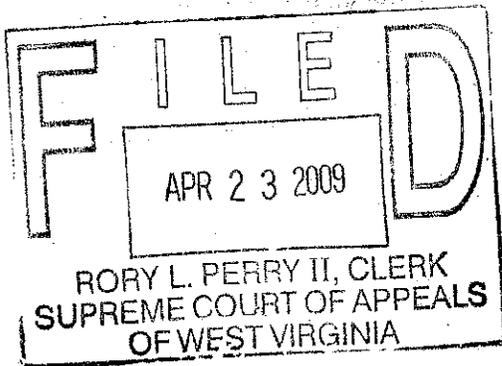
v.

No. _____

THE HONORABLE JAMES STUCKY,
Judge of the Circuit Court of Kanawha County,
West Virginia, and BASSAM HAFFAR, M.D.,

Respondents

PETITION OF AMOS MARTIN AND TAMMY MARTIN, HIS SPOUSE, FOR A WRIT
OF PROHIBITION SO AS TO CORRECT SUBSTANTIAL, CLEAR CUT LEGAL
ERROR IN A LOWER COURT ORDER WHICH GRANTED THE DEFENDANT,
BASSAM HAFFAR, M.D.'S MOTION FOR LEAVE TO FILE A THIRD PARTY
COMPLAINT AND MOTION FOR CONTINUANCE



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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston**

AMOS MARTIN and TAMMY MARTIN, his spouse,

Petitioners,

vs.

Upon original jurisdiction

BASSAM HAFFAR, M.D.,

Respondent.

PETITION FOR THE ISSUANCE OF A WRIT OF PROHIBITION

NOW COME petitioners, Amos Martin and Tammy Martin, by counsel, Ronald M. Wilt and Arden J. Curry, II, and respectfully submit this petition for a Writ of Prohibition to correct substantial, clear cut legal error in the lower court order that granted the Defendant, Bassam Haffar, M.D.'s Motion for Leave to File a Third Party Complaint and Motion for Continuance allowing the Defendant to implead The Cleveland Clinic Foundation.

This case presents the unique factual scenario in which the granting of the defendant's Motion to File a Third Party Complaint and a continuance of the underlying trial will, for all practical purposes, assure that Amos Martin will be dead before he ever has an opportunity to have his case presented to a jury. The original complaint in this matter was filed on June 27, 2008. An agreed Scheduling Order was entered on September 24, 2008. That Scheduling Order contained several litigation deadlines, most importantly, an agreed to deadline which required the defendant to file and serve any third party complaints by October 31, 2008 and a trial date of April 20, 2009. The underlying litigation involves a malpractice claim regarding a failure to timely diagnose cancer. At the time of the agreed Scheduling Order, the defendant's counsel was aware that Mr. Martin's cancer was terminal. (April 8, 2009 Hearing Transcript, p. 13) There is no question but that Mr. Martin is

going to die, and die soon. All of the experts, both plaintiffs and defendants, are in unanimous agreement that he has already outlived his life expectancy and as soon as his chemotherapy begins to fail, death is imminent.

On March 25, 2009, almost five months after the deadline for the filing and serving of third party complaints had expired, and just three weeks before trial, the defendant noticed a motion seeking authority to file a third party complaint against the Cleveland Clinic Foundation together with a request that the case be continued. On the 8th day of April, 2009, the Circuit Court granted the defendant's motion and vacated the Scheduling Order. The practical effect of that Order is to virtually assure that Mr. Martin will be dead by the time his trial is ultimately scheduled. The defendant has already noted that it intends to send a Screening Certificate to the Cleveland Clinic which gives it thirty days to respond before the third party complaint will ever be filed. By the time the third party complaint is ultimately filed, an answer is entered, the Cleveland Clinic is given the opportunity to find and disclose experts, all of the new expert's depositions are taken, and a repeat of virtually all discovery that has already occurred is permitted to the Cleveland Clinic, countless months will pass before this case ever has any chance of getting back on the trial docket.

Mr. Martin faces the ultimate prejudice by the Court's Order. It is a virtual certainty that he will be dead by the time this case ever gets re-scheduled for trial. In addition to the obvious prejudice of not being alive at the time of trial, in this case, as will be more fully explained in the attached memorandum, Mr. Martin's claim rises and falls upon an irreconcilable factual dispute regarding alleged communications that occurred between himself and the defendant. If Mr. Martin's testimony can only be presented through a video tape, the jury will be deprived of the critical ability to see and hear Mr. Martin's live testimony and consider his truth, candor, and demeanor before making the determination as to who they should believe.

This Honorable Court should issue a writ of prohibition under the five factor test set forth in syllabus point 4 of *State ex. rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1997), providing: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. As this Court has repeatedly recognized and as is the situation here, the existence of clear error as a matter of law should be given substantial weight. (*Id.*)

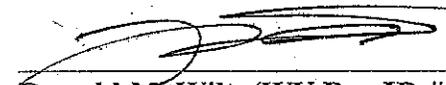
Here, there is clear legal error because the trial court ignored the factors this Court has held must be considered in ruling upon a defendant's motion to file a third party complaint. *Shamblin v. Nationwide Mutual Insurance Co.*, 183 W.Va. 585, 346 S.E.2d 766, 788 (1990). Had the trial court considered those factors, the motion could not have been granted. If allowed to stand, the trial court's Order will substantially and irrevocably prejudice the Martins, which prejudice will not be correctable on appeal. In addition, the granting or denial of a motion for leave to file a third party complaint is a decision that has significant impact on the parties' rights and interests, and thus is the type of decision this Court has consistently reviewed in the context of a writ of prohibition. (See *State of West Virginia ex. rel. Thrasher Engineering, Inc. v. Fox*, 218 W.Va. 134, 624 S.E.2d 481 (2005); *State of West Virginia ex. rel. Leung v. Sanders*, 213 W.Va. 569, 584 S.E.2d 203 (2003)).

In short, the trial court committed substantial, clear cut legal error in granting defendant, Dr. Haffar's, motion to implead the Cleveland Clinic Foundation without an analysis of

the crucial factors - most significantly the prejudice the decision will cause the Martins - which mandated a denial of the motion. This Honorable Court should issue a writ enjoining the trial court's order and denying Dr. Haffar's motion to file a third party complaint and his request for a continuance.

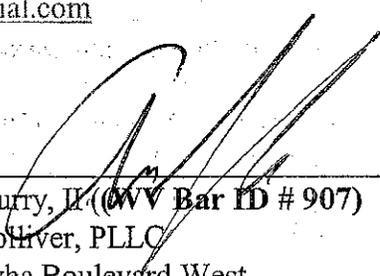
Respectfully submitted,

AMOS MARTIN AND TAMMY MARTIN, his spouse
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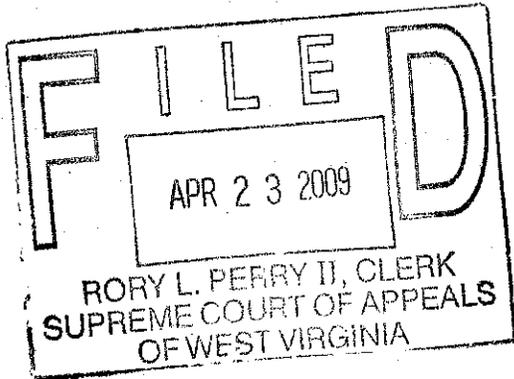
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I. FACTUAL AND PROCEDURAL HISTORY

I.
FACTUAL HISTORY

In October of 2005, Dr. Haffar referred Amos Martin to The Cleveland Clinic Foundation (CCF) for treatment of colorectal cancer. Before he was referred to CCF, however, Dr. Haffar ordered a CT scan, taken on September 22, 2005, to evaluate Mr. Martin for evidence of metastatic disease. (See Radiology Report attached as Exhibit A). The CT scan did not reveal any metastatic disease. On October 13, 2005, while at CCF, Mr. Martin underwent a pre-operative CT scan of the chest. The radiologist, who was aware of Mr. Martin's history of cancer, noted two hypodense lesions in the liver and commented on indeterminate subcentimeter nodules in the left apex and right lower lobe of the lung that were consistent with granulomas (benign lesions). (See Radiology Report attached as Exhibit B). The radiologist suggested follow-up in four to six months.

On October 14, 2005, Dr. Victor Fazio resected Mr. Martin's rectal cancer. (See Dr. Fazio's Operative Report attached as Exhibit C). On January 10, 2006, Mr. Martin returned to CCF for laparotomy and closure of his ileostomy.

Dr. Haffar next saw Mr. Martin on February 2, 2006 and performed a complete exam. (See Dr. Haffar's February 2, 2006 office note attached as Exhibit D). Mr. Martin was next seen on February 23, 2006, and then again on May 2, 2006, at CCF. At the May visit, Mr. Martin underwent a flexible sigmoidoscopy and his CEA level (carcinoembryonic antigen) was checked.¹ Mr. Martin's CEA was slightly elevated at 4.4.² CCF recommended that Mr. Martin undergo a full colonoscopy in three months and have his CEA rechecked. (See CCF office note attached as Exhibit F).

Two and one-half months later on July 20, 2006, Mr. Martin presented to Dr. Haffar for a full colonoscopy and physical exam. (See Dr. Haffar's office note of July 20, 2006 attached as Exhibit G). Dr. Haffar noted in the plan section of his office note that he was also going to check Mr. Martin's CBC (complete blood count), CMP (complete metabolic profile), and CEA levels.

Following the colonoscopy evaluation on July 26, 2006, Dr. Haffar ordered a CT scan of Mr. Martin's abdomen and pelvis. It was performed on July 31, 2006. The radiologist at St. Francis Hospital noted interval development of three metastatic lesions of the liver. (See Radiology Report attached as Exhibit I). No action was taken by Dr. Haffar after receiving this report. He did not: (1) make any attempt to refer Mr. Martin for further treatment of his disease; (2) contact any physician such as an oncologist to arrange an appointment for Mr. Martin to be seen and treated; (3) forward the CT scan and/or its report to appropriate specialists for evaluation and treatment; or (4) document anywhere, including Mr. Martin's medical chart, that he advised Mr. Martin that his cancer had returned.

¹Elevations of a cancer patient's CEA level can be indicative of active disease.

² Normal CEA levels are 0-2.3.

In October of 2007, Mr. Martin was referred by Dr. Sheikh (Mr. Martin's allergist) to Dr. Haffar for evaluation of possible recurrence of his cancer. A CT scan performed on October 29, 2007 revealed extensive disease throughout Mr. Martin's lungs and liver. (See Radiology Report attached as Exhibit L). Dr. Haffar's office promptly called Dr. Jogenpally (an oncologist) and arranged for Mr. Martin to be seen.

As a result of Dr. Haffar's gross negligence, Mr. Martin can only survive for as long as he is able to tolerate chemotherapy. Once Mr. Martin stops responding to chemotherapy, or can no longer tolerate it, the disease will quickly overwhelm him.

II. PROCEDURAL HISTORY

The Complaint in this case was filed on June 27, 2008. Defendant Haffar filed his Answer on August 15, 2008. An Agreed Scheduling Order was reached on September 24, 2008. Included in it were several litigation deadlines, but most importantly, it included an agreed deadline to file and serve third party complaints by October 31, 2008 and a April 20, 2009 trial date.³ (See Scheduling Order attached as Exhibit 1). Trial was scheduled for April 20, 2009.

Defendant Dr. Haffar's deposition was taken on October 10, 2008. His assistant Debbie Quintrell's deposition was taken on October 15, 2008. The Martins' depositions were taken on October 16, 2008. The Martins disclosed expert witnesses on December 15, 2008, and defendant disclosed expert witnesses on January 20, 2009. On February 16, 2009, defendant filed a supplemental disclosure of witnesses that included a life care planner as well as new standard of care opinions by Dr. Stark, defendant's medical oncology expert, who had been previously disclosed.

³ At the time of the agreed scheduling order, defendant was aware that Mr. Martin's cancer was terminal. (April 8, 2009 Hearing Transcript, Mr. Robinson's argument, p. 13, Exhibit 2).

Initially, Dr. Stark's disclosure did not contain any standard of care opinions.⁴ Likewise, neither of defendant's two disclosures rendered any opinions about the CCF.

On March 25, 2009, five months after the third party deadline had passed and three weeks before trial, defendant filed his Motion for Leave to File Third Party Complaint, and in that motion, stated for the first time that Dr. Stark would offer criticisms of the CCF. Dr. Stark's deposition was taken on March 31, 2009. Dr. Stark admitted that the first time he was ever asked to render opinions about the CCF was on the 19th day of March, 2009, which was on the same afternoon that the Court ordered mediation between the parties occurred and failed.

III. THE THIRD PARTY COMPLAINT CAUSES SIGNIFICANT AND IRREVOCABLE PREJUDICE TO THE MARTINS.

In *Shamblin v. Nationwide Mut. Ins. Co.*, 183 W.Va. 585, 597, 396 S.E.2d 766, 778 (1990), the court held a defendant should not have the right to implead a third party under West Virginia Rule of Procedure 14 "if there is a possibility of prejudice to the original plaintiff or the third party defendant." (emphasis added) (quoting Syl. Pt. 3, in part, *Bluefield Sash & Door Co.*, 158 W.Va. 802, 216 S.E.2d 216, 217 (1975) (overruled on other grounds by *Haynes v. City of Nitro*, 161 W.Va. 230, 240 S.E.2d 544 (1977))). *Shamblin* involved the defendant's attempt to file a third party complaint two months before trial. The trial court denied defendant's motion, and *Shamblin* affirmed: "The appellant's unexplained delay in filing the motion until shortly prior to trial would have prejudiced the plaintiff had it been granted." (*Id.*).

⁴ None of defendant's expert witnesses disclosures initially contained an opinion that Dr. Haffar met the standard of care.

State of West Virginia ex. rel. Thrasher v. Fox, 218 W.Va. 134, 139, 624 S.E.2d 481, 486 (2005), also held “[i]mpleader under Rule 14(a), West Virginia Rules of Civil Procedure, should not be allowed if there is a possibility of prejudice to the original plaintiff or the third party defendant.” (quoting Syl. Pt. 3, *Bluefield Sash & Door Co., Inc.*, *supra*). *Thrasher* upheld the trial court’s decision to deny the defendant’s attempt to bring in a third party defendant, where the third party complaint would have caused substantial delay and prejudice to the plaintiff as well as the proposed third party defendants. Here, as in *Thrasher*, the third party complaint will undeniably cause extreme prejudice to the Martins.

There is not just a “possibility” of prejudice to the Martins, but in fact, there exists the likelihood of the worst prejudice possible – the plaintiff will die before he is afforded his right to a jury trial. Mr. Martin’s cancer is currently still responsive to chemotherapy, however, he has already far outlived his life expectancy. The trial court’s granting defendant’s motion to implead the CCF will effectively rob Mr. Martin’s chance to testify at trial and present his case to the jury.

Furthermore, this case centers upon a factual dispute between Dr. Haffar and Mr. Martin, *i.e.* whether Dr. Haffar ever told Mr. Martin the results of a July 31, 2006 CT scan. Thus the case turns upon the jury’s assessment of the parties’ credibility. As it stands, Mr. Martin will likely never have the opportunity to look his jurors in the eye and explain why Dr. Haffar’s perjurious testimony that he ignored a diagnosis of cancer is ludicrous, that he would have done everything or anything a doctor would have suggested in 2006, and that he has done everything and anything the doctors have recommended since his diagnosis in 2007 to preserve his most valuable asset, his life. The delay of this case, which will be substantial should the trial court’s order survive, will effectively eliminate the Martins’ star witness from trial.

Still worse, the trial court never engaged in any analysis of the prejudice the third party complaint would cause the Martins. In fact, the only prejudice the Court considered was what prejudice it might cause defendant if it enforced its Scheduling Order. Such a blatant disregard of the seminal factor to be considered, a possibility of prejudice to the Martins, is a clear violation of long established West Virginia law.

Finally, none of this begins to account for the additional expenses and stress the Court's order, if allowed to stand, will put on Mr. Martin, whose health is already fragile at best. *Shamblin* and *Thrasher* are clear that a defendant's last minute attempts to implead other parties should not be allowed if prejudice results. Given the irreparable prejudice that will result if the trial court's order stands, West Virginia law, as created by this Court, requires issuance of a writ to prohibit enforcement of the trial court's order.

IV.

THE TRIAL COURT ABUSED ITS DISCRETION BY NOT BALANCING THE MINIMAL PREJUDICE TO THE DEFENDANT AGAINST THE EXTREME PREJUDICE ITS ORDER WILL CAUSE THE MARTINS.

Dr. Haffar filed his motion for leave to file the third party complaint nearly five months after the agreed upon deadline and only three weeks before the trial date. In granting the motion, the trial court failed to engage in any analysis of the most important factor governing whether impleader is appropriate - whether there is a possibility of prejudice to the Martins or the third party defendant, CCF. (*Thrasher*, 624 S.E.2d at 486; *Shamblin*, 396 S.E.2d at 778 (1990); and Syl Pt. 3, *Bluefield Sash & Door Co., Inc.*).

The Court's only reference to considering the prejudice to any party was its concern for "unfairly restrict[ing] a defendant's right to defend themselves." (p. 30 of Hearing Transcript

attached as Exhibit 2). The failure to conduct even the most minimal balancing of the prejudice to the plaintiff was an abuse of discretion, and requires this Court to restrain enforcement of the trial court's order.

V.

THERE WAS NO EXCUSABLE REASON FOR DR. HAFFAR'S DELAY IN FILING HIS MOTION FOR LEAVE TO FILE THE THIRD PARTY COMPLAINT.

Pursuant to West Virginia Rule of Civil Procedure 16(b), the trial court entered a Scheduling Order on September 24, 2008. It mandated third party complaints to be filed and served on or before October 31, 2008. (See Scheduling Order attached as Exhibit 1). Dr. Haffar filed his motion for leave to file the third party complaint some five months after the deadline.

There was no legitimate reason to justify this significant delay. Putting aside the Scheduling Order, a motion to implead a third party nevertheless must occur timely and "after a basis for impleader becomes clear." (*State of West Virginia ex. rel. Leung v. Sanders*, 213 W.Va. 569, 584 S.E.2d 203 (2003), quoting 3 *Moore's Federal Practice* § 14.21[3], at 14-58 (3d ed. 2003)).

Here, Dr. Haffar focused his defense on the care provided at the CCF at his deposition on October 10, 2008, well in advance of the trial court's deadline for adding third parties and certainly well before Dr. Haffar finally filed his motion. By way of example, Dr. Haffar testified at his deposition on October 10, 2008, that as early as February 2006, when he was treating Mr. Martin, he believed that the CCF deviated from the standard of care. In fact, Dr. Haffar obtained and had in his possession, all of Mr. Martin's CCF records as early as October 2007 when he referred Mr. Martin to Dr. Jogenpally who was an oncologist. Given Dr. Haffar's testimony, and the fact that he had all of the CCF's records since 2007, there is no reasonable explanation or excuse as to why Dr. Haffar should not have investigated thoroughly the CCF's care and filed a third party complaint prior to the

scheduling deadline of October 31, 2008.

Moreover, Dr. Haffar's expert witnesses, one would hope, would have carefully reviewed the CCF records, as well as Dr. Haffar's testimony, before disclosing their opinions on January 20, 2009. Yet none of his experts offered any opinions critical of the CCF. It was only on March 19, 2009, the very day the parties were unsuccessful at mediation, that Dr. Haffar's counsel first called and discussed the CCF issues (CEA/follow-up CT scan) with Dr. Stark, an expert who has testified in several hundred medical malpractice cases who had been already retained by the defendant and who had already disclosed his opinions which had previously made no mention of the CCF. (p. 19 of Dr. Stark's testimony attached as Exhibit T).

There is no legitimate reason as to why the defendant waited until three weeks before trial before filing his motion, other than to seek delay in this case. More than two years prior to the filing of suit, the defendant himself had formed the opinion that the CCF had deviated from the standard of care. (p. 51 of Dr. Haffar's testimony attached as Exhibit E) By October 2007, the defendant had in his possession, all of the CCF records which could be reviewed and investigated to determine if any legitimate claim existed against them. Defendant's counsel had access to these records as soon as Dr. Haffar was placed on notice of the plaintiff's claims when he was served with the Screening Certificate of Merit in July 2008. Remarkably, Dr. Haffar, regarding the very issue about which he is now critical, testified that the standard of care did not require follow-up of the CCF CT scan. (p. 54, 55 of Dr. Haffar's testimony attached as Exhibit P) However, six months later Dr. Haffar's opinion, even though no new information has been obtained, has conveniently changed. Worse still, the trial court never even considered whether a legitimate reason existed to justify filing the motion three weeks before the trial. (April 8, 2009 Hearing Transcript, p. 26-28, Exhibit 2) The

hearing transcript does not reveal any analysis by the trial court regarding why Dr. Haffar waited until three weeks before the trial to file his motion. That omission alone justifies this Writ of Prohibition.

**VI.
DEFENDANT'S RELIANCE ON LEUNG v. SANDERS IN
THE COURT BELOW WAS MISGUIDED.**

At the hearing below, Dr. Haffar relied upon *State of West Virginia ex. rel. Leung v. Sanders*, 213 W.Va. 569, 584 S.E.2d 203 (2003) as supporting his motion for leave to implead the Cleveland Clinic. In *Leung*, the defendant doctor sought to implead a third party shortly before trial. The trial court denied the motion, and the defendant sought relief via a writ of prohibition. In the absence of a scheduling order deadline for filing the third party complaint, as well as a lack of prejudice to the plaintiff caused by allowing the third party complaint, *Leung* granted the writ.

Leung, however, has two critical distinctions with this case. First, there was no deadline issued by the trial court for filing third party claims. Thus, “[i]n the absence of a scheduling order containing a deadline to join the additional parties,” *Leung* evaluated the issue under West Virginia Rule of Civil Procedure 14 – which nevertheless requires an analysis of both whether the reason for delay is excusable, and the prejudice to the plaintiff. (*Id.* at 208-209). *Leung* noted that if trial courts issue a deadline for joining additional parties, as it should pursuant to West Virginia Rule of Civil Procedure 16(b), “we do not believe the situation currently before us will be repeated.” (*Id.* at 208). Thus, Rule 16 scheduling orders are meant to avoid delayed attempts to join additional parties, and had there been a deadline in *Leung*, as there was in this case, the result would have been different.

What's more, the Scheduling Order in this case was agreed upon by both parties with the expectation the case would be tried as soon as possible precisely because everyone knew Mr. Martin was terminally ill. (April 8, 2009 Hearing Transcript, p. 13, attached as Exhibit W). Dr. Haffar only filed his third party complaint after mediation failed, and it was apparent that the merits of the case might reach a jury.

Second, *Leung* premised its decision on its finding that the third party complaint would not cause prejudice to the plaintiff. (*Id.* at 209-10). *Leung* concluded substantial outstanding discovery would require a continuance of the trial date anyway and plaintiffs were unable to demonstrate any prejudice. Even in the absence of a showing of prejudice, this Court still held, however, that had there not been independent reasons for a delay in the trial, "we would be hard pressed to find Dr. Leung's impleader motion timely when it was served only two months before trial." (*Id.* at 210 n. 8).

Defendant likened this case to *Leung* in his arguments below, because the Martins' trial date was already in jeopardy due to older cases having been set for trial on the same date. Therefore, the Martins were not prejudiced. This argument misses the point. A short month or two delay makes the chances of Mr. Martin's death occurring before trial far less likely than the inevitable delay associated with allowing the defendant to implead a party who has not participated in any part of the litigation and whose care was provided entirely in another state. The motion practice alone, to secure them as a third party defendant, will take countless months.

VI. DRS. LAHERU AND JOGENPALLY'S TESTIMONY WAS NOT AN UNANTICIPATED SURPRISE TO DEFENDANT

Dr. Haffar had the audacity to argue to the trial court that his claim against CCF could

not have been discovered until he deposed Drs. Jogenpally and Laheru, experts disclosed by the Martins. The Martins disclosed Dr. Jogenpally as a treating physician to testify regarding his care and treatment of Mr. Martin. Dr. Laheru, the Director of Clinical Oncology at Johns Hopkins University, was disclosed as a retained expert witness to testify regarding Dr. Haffar's reprehensible care and that because of it, Mr. Martin lost a likely opportunity for cure. These witnesses' testimony was not based on any information that Dr. Haffar did not already have, and further contrary to defendant's representations to the Court below, did not criticize CCF. In fact, the witnesses merely testified Mr. Martin needed follow up treatment after his visit to CCF in May 2006, **which he received at Dr. Haffar's office on July 20, 2006.** (See Dr. Jogenpally's evidentiary testimony pp. 69-70 attached as Exhibit Q; Dr. Laheru's testimony pp. 39-40 attached as Exhibit R).

Indeed, the evidence is unequivocal that Mr. Martin's care was transferred to Dr. Haffar following his treatment at CCF. In July of 2006, Dr. Haffar performed a physical exam and a full colonoscopy, ordered a CT scan to evaluate for metastatic disease, and planned to get extensive bloodwork including the CEA level. Thus, Dr. Haffar did exactly what CCF had recommended, only somehow the critical follow-up on the results was lost. Any claim by Dr. Haffar that he had not assumed Mr. Martin's care in July of 2006 is a farce.

Because there was no legitimate reason for the delay, the trial court committed clear legal error in issuing its order allowing the third party complaint.

VII. CONCLUSION

For all the foregoing reasons, but most importantly because of the severe irreparable prejudice to the plaintiffs, plaintiffs request this Court issue a writ of prohibition to prevent the trial

court from enforcing its order and for an order directing the trial court to reinstate this case to its active docket so that a new trial date can be obtained as expeditiously as possible.

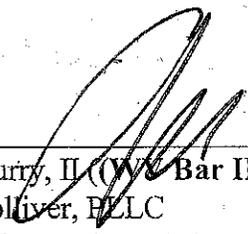
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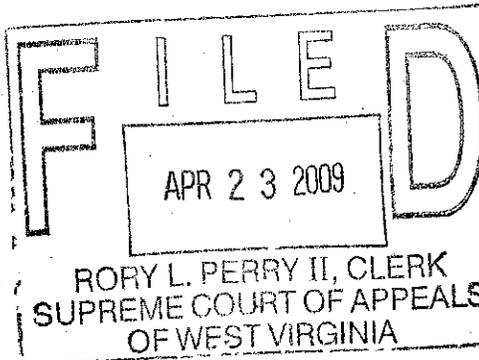
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TABLE OF AUTHORITIES

CASES

<i>Shamblin v. Nationwide Mut. Ins. Co.</i> , 183 W.Va. 585, 597, 396 S.E.2d 766, 778 (1990)	5, 7
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<i>Bluefield Sash & Door Co., Inc. v. Corte Constr. Co.</i> , 158 W.Va. 802, 216 S.E.2d 216 (1975) (overruled on other grounds by <i>Haynes v. City of Nitro</i> , 161 W.Va. 230, 240 S.E.2d 544 (1977))	5, 7
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OTHER AUTHORITIES

<i>Moore's Federal Practice</i> § 14.21[3], at 14-58 (3d ed. 2003)	8
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Amos Martin and Tammy Martin, His Spouse v. Hon. James Stuckey
Supreme Court No. _____

Account No. _____

1. A. Petition of Amos Martin and Tammy Martin, His Spouse for a Writ of Prohibition
- B. Memorandum in support thereof
- C. Memorandum Listing the Names and Addresses of Those Persons Upon Whom the Writ of Prohibition is to be Served, if Granted
- D. Appendix of Exhibits
- E. Certificate of Service

EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE