IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

January 2000 Term

FILED
April 24, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 26738

RELEASED
April 24, 2000
DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

STATE OF WEST VIRGINIA EX REL. DAVID DAVIDSON, INDIVIDUALLY, AND DAVIDSON CONSTRUCTION SERVICES,
Petitioners,

V.

HONORABLE JAY M. HOKE, JUDGE OF THE CIRCUIT COURT OF LINCOLN COUNTY; MARY ELLEN LOY MABE; AND TOMMIE C. MABE,
Respondents.

PETITION FOR WRIT OF PROHIBITION

WRIT DENIED

Submitted: January 11, 2000
Filed: April 24, 2000

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The Opinion of the Court was delivered PER CURIAM.

SYLLABUS BY THE COURT

1. "'A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code,* 53-1-1.' Syllabus point 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977)." Syllabus point 1, *State ex rel. State Auto Insurance Co. v. Risovich,* 204 W. Va. 87, 511 S.E.2d 498 (1998).

2. """In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance." Syllabus Point 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979).' Syllabus point 1, *State ex rel. U.S. Fidelity & Guar. Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677 (1995)." Syllabus point 2, *State ex rel. State Auto Insurance Co. v. Risovich*, 204 W. Va. 87, 511 S.E.2d 498 (1998).

3. "'The prohibition standard set out in Syllabus Point 1 of *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), permits an original prohibition proceeding in this Court to correct

substantial legal errors where the facts are undisputed and resolution of the errors is critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources.' Syllabus point 1, *State ex rel. Allstate Ins. Co. v. Karl*, 190 W. Va. 176, 437 S.E.2d 749 (1993)." Syllabus point 3, *State ex rel. State Auto Insurance Co. v. Risovich*, 204 W. Va. 87, 511 S.E.2d 498 (1998).

Per Curiam:

The petitioners herein, David Davidson, individually, and Davidson Construction Services[1] [hereinafter collectively referred to as "Davidson" or "Petitioner Davidson"], request this Court to issue a writ of prohibition to prevent the respondent herein, the Honorable Jay M. Hoke, Judge of the Circuit Court of Lincoln County, from enforcing his August 24, 1999, declaratory judgment order. In that order, Judge Hoke determined that certain exclusions contained in Davidson's commercial general liability insurance policies precluded coverage for a contract claim asserted against Davidson by the additional respondents herein, Mary Ellen Loy Mabe and Tommie C. Mabe [hereinafter collectively referred to as "the Mabes" or "Mr. and Mrs. Mabe"], but that such exclusions did not bar recovery for their tort claim. Upon a review of the parties' arguments and the pertinent authorities, we deny the writ of prohibition. Our denial of prohibitory relief is based upon our conclusions that this case does not warrant the exercise of this Court's original jurisdiction and that the alleged errors of law do not merit the issuance of an extraordinary remedy.

I.

FACTUAL AND PROCEDURAL HISTORY

The facts communicated by the parties are as follows. Mr. and Mrs. Mabe arranged for Davidson to construct a residence upon a piece of property in Lincoln County, West Virginia. The parties represent that, at all times pertinent to the construction of the Mabes' home, Davidson was insured by

[1]Davidson Construction Services is a West Virginia licensed construction contractor that specializes in the construction of single family dwellings.

policies of commercial general liability insurance.[2] At some unidentified point in time,[3] the Mabes became dissatisfied with Davidson, and filed a complaint in the Circuit Court of Lincoln County, charging Davidson with breach of contract and intentional infliction of emotional distress.

During the pendency of the circuit court proceedings, Davidson filed a petition for Chapter 7 bankruptcy,[4] which automatically stayed the Mabes' action against him.[5] The bankruptcy court subsequently lifted the stay of the Mabes' lawsuit to the extent that Davidson's policies of insurance provide coverage for these claims. In response to this ruling, both parties filed motions for declaratory judgment in the circuit court proceedings. By order entered August 24, 1999, the Honorable Jay M. Hoke, Judge of the Circuit Court of Lincoln County, determined that various exclusions contained in Davidson's policies of insurance did not preclude coverage for the Mabes' claim for intentional infliction of emotional distress

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[2]During the time period in question, Davidson was insured by two separate policies of insurance. From August 23, 1995, until August 23, 1996, Davidson was insured by United States Fidelity and Guaranty Insurance Company. Thereafter, from January 19, 1997, until January 3, 1998, Davidson's commercial general liability insurance coverage was provided by Nationwide Mutual Insurance Company.

[3]The absence of a record in this case and the parties' sketchy recitations of the events culminating in the instant controversy do not indicate whether the Mabes' complaints surfaced during Davidson's construction of their home or after the completion thereof.

[4]Chapter 7 bankruptcy anticipates liquidation of the debtor's estate. *See* 11 U.S.C. § 701, *et seq.*

[5]*See* 11 U.S.C. § 362 (1994 & Supp. IV 1998) (discussing automatic stay of pending or potential litigation against the debtor, which stay is activated by the commencement of the debtor's bankruptcy proceedings).

and, therefore, ordered that portion of the lawsuit to be set for trial.[6] From this ruling of the circuit court, Davidson petitions this Court for prohibitory relief to prevent the circuit court's enforcement of its declaratory judgment order and to quash the trial of the Mabes' intentional infliction of emotional distress claim.

II.

DISCUSSION[7]

The sole legal issue raised by Petitioner Davidson in this original jurisdiction proceeding involves his commercial general liability insurance policies and questions the existence of coverage for and the applicability of an intentional acts exclusion to the Mabes' intentional infliction of emotional distress claim. During our consideration of this case, however, we are troubled that, despite these potentially meritorious arguments, our ability to decide these issues is severely hampered by the procedural posture of this matter and by the lack of an adequate record to guide our analysis.[8] As a result, we recognize the

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[6]Although the circuit court's order is not a model of clarity, it appears that the court also ruled that certain policy exclusions applied to the Mabes' contractual claim, thereby thwarting recovery from Davidson's insurers for such damages.

[7]Although a separate and distinct section delineating the appropriate standard of review often precedes our discussion of the errors raised by the parties, the anomalous procedural posture of the case *sub judice* requires us to consider the applicable method of review as an integral part of our decision herein.

[8]The record in this case consists of the two insurance policies in question and the circuit court's declaratory judgment order. While we recognize, of course, that original jurisdiction proceedings generally are not accompanied by detailed factual records, further factual information by way of addenda or appendices would have been instructive to our consideration of the instant matter. *See* W. Va. R. App. P. 14(a) (indicating that a petition for a writ arising from this Court's original jurisdiction should include "an

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need to address the propriety of a petition for writ of prohibition in the instant proceeding.

Prohibition, much like its companion original jurisdiction writs of mandamus and habeas corpus, is an extraordinary remedy, the issuance of which is usually "reserved for really extraordinary causes." *State ex rel. Suriano v. Gaughan*, 198 W. Va. 339, 345, 480 S.E.2d 548, 554 (1996) (internal quotations and citations omitted). For this reason, the circumstances warranting a writ of prohibition are limited.

> "A writ of prohibition will not issue to prevent a simple abuse of discretion by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. *W. Va. Code*, 53-1-1." Syllabus point 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977).

Syl. pt. 1, *State ex rel. State Auto Ins. Co. v. Risovich*, 204 W. Va. 87, 511 S.E.2d 498 (1998) [hereinafter referred to as "*State Auto*"].

Having enunciated this standard, we first must determine whether the circuit court had jurisdiction of the underlying declaratory judgment action. Syl. pt. 1, *State Auto*, 204 W. Va. 87, 511 S.E.2d 498. Pursuant to W. Va. Code § 55-13-1 (1941), circuit courts unquestionably have jurisdiction

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[8](...continued)
attached addendum or separate appendix of any exhibits or affidavits" and directing that "[i]n any original jurisdiction proceeding which involves a matter that is presently pending in circuit court where a written order has been entered in that court relating to matters sought to be adjudicated in the original jurisdiction proceeding, a copy of such order shall be filed with the petition") and W. Va. R. App. P. 14(f) (instructing that "[t]he record [for an original jurisdiction proceeding] shall consist of the pleadings, the addenda, the appendices, depositions filed under [W. Va. R. App. P.] Rule 14(d), and findings of fact made under [W. Va. R. App. P.] Rule 14(e)").

of declaratory judgment proceedings: "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. . . ." With specific regard to the type of lawsuit involved in the instant controversy, we previously have held that "[a]n injured plaintiff may bring a declaratory judgment action against the defendant's insurance carrier to determine if there is policy coverage before obtaining a judgment against the defendant in the personal injury action where the defendant's insurer has denied coverage." Syl. pt. 3, *Christian v. Sizemore*, 181 W. Va. 628, 383 S.E.2d 810 (1989). *See also* W. Va. Code § 55-13-2 (1941) ("Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."). Because the circuit court clearly had jurisdiction of the matter complained of herein, prohibition is not appropriate on jurisdictional grounds.

The second factor to consider in assessing the propriety of prohibitory relief is whether the circuit court exceeded its legitimate powers by rendering its declaratory ruling. Syl. pt. 1, *State Auto*, 204 W. Va. 87, 511 S.E.2d 498.

> "'In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money among litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut, legal errors plainly in contravention of a clear statutory, constitutional, or common law mandate

> which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance.' Syllabus Point 1, *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979)." Syllabus point 1, *State ex rel. U.S. Fidelity & Guar. Co. v. Canady*, 194 W. Va. 431, 460 S.E.2d 677 (1995).

Syl. pt. 2, *State Auto*, 204 W. Va. 87, 511 S.E.2d 498.[9] Stated otherwise,

> "[t]he prohibition standard set out in Syllabus Point 1 of *Hinkle v. Black*, 164 W. Va. 112, 262 S.E.2d 744 (1979), permits an original prohibition proceeding in this Court to correct substantial legal errors where the facts are undisputed and resolution of the errors is critical to the proper disposition of the case, thereby conserving costs to the parties and economizing judicial resources." Syllabus point 1, *State ex rel. Allstate Ins. Co. v. Karl*, 190 W. Va. 176, 437 S.E.2d 749 (1993).

Syl. pt. 3, *State Auto*, 204 W. Va. 87, 511 S.E.2d 498. *See also* Syl. pt. 1, *State ex rel. Williams*

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[9]A similar recitation of the factors to consider in reviewing a prohibition petition is set forth in Syllabus point 4 of *State ex rel. Hoover v. Berger*:

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

199 W. Va. 12, 483 S.E.2d 12 (1996).

v. Narick, 164 W. Va. 632, 264 S.E.2d 851 (1980) ("'Where prohibition is sought to restrain a trial court from the abuse of its legitimate powers, rather than to challenge its jurisdiction, the appellate court will review each case on its own particular facts to determine whether a remedy by appeal is both available and adequate, and only if the appellate court determines that the abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate, will a writ of prohibition issue.' Syl. pt. 2, *Woodall v. Laurita*, 156 W. Va. 707, 195 S.E.2d 717 (1973)."). Thus, it is apparent that prohibition generally lies to correct only clear-cut or substantial errors of law, which violate a constitutional, statutory, or common law mandate. Syl. pts. 2 & 3, *State Auto*, 204 W. Va. 87, 511 S.E.2d 498.

Applying this standard to the instant proceeding, we conclude that the legal issues raised herein do not come within this rubric of readily-apparent errors of law. Petitioner Davidson has not based his request for relief upon either a constitutional mandate or a statutory provision to demonstrate the wrongfulness of the circuit court's ruling. Neither can it be argued that this controversy is governed by a controlling common law precedent. The primary case upon which the petitioner relies, *State Bancorp, Inc. v. United States Fidelity & Guar. Ins. Co.*, 199 W. Va. 99, 483 S.E.2d 228 (1997) (per curiam), was rendered by this Court as a per curiam decision. As such, it is not binding authority so as to necessitate the issuance of a writ of prohibition to halt a circuit court's deviation therefrom. *See State v. Myers*, 204 W. Va. 449, 464 n.13, 513 S.E.2d 676, 691 n.13 (1998) ("remind[ing] counsel that per curiam opinions stand alone factually and are not to be cited as precedent"); *Weaver v. Ritchie*, 197 W. Va. 690, 693 n.10, 478 S.E.2d 363, 366 n.10 (1996) (noting "lack of any precedential value of . . . per curiam opinion[s]" (citations omitted)); *Board of Educ. of Mercer County v. Wirt*, 192 W. Va.

568, 575 n.10, 453 S.E.2d 402, 409 n.10 (1994) (observing that per curiam opinion "is not binding upon this Court" (citations omitted)); *Lieving v. Hadley*, 188 W. Va. 197, 201 n.4, 423 S.E.2d 600, 604 n.4 (1992) (explaining that "if rules of law or accepted ways of doing things are to be changed, then this Court will do so in a signed opinion, not a *per curiam* opinion"). *Cf.* Syl. pt. 3, in part, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996) (counseling that prohibition does not lie as a substitute for appeal); *State ex rel. Maynard v. Bronson*, 167 W. Va. 35, 41, 277 S.E.2d 718, 722 (1981) (same); *Handley v. Cook*, 162 W. Va. 629, 631, 252 S.E.2d 147, 148 (1979) (same). Accordingly, we do not find that the errors of law alleged by Davidson are so egregious as to require correction through the extraordinary remedy of prohibition.[10]

Moreover, we conclude that the remaining criteria involved in our decision to grant prohibitory relief do not warrant the issuance of a writ in this case. As we noted above, the errors of law alleged in this case do not rise to the level of substantial issues of constitutional, statutory, or common law. Syl. pts. 2 & 3, *State Auto*, 204 W. Va. 87, 511 S.E.2d 498. Thus, the issues which Petitioner Davidson would have us resolve amount to little more than ordinary legal errors, which we typically review by way

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[10]In presenting this matter to this Court as a request for prohibitory relief, Davidson also relies heavily upon this Court's prior decision in *State ex rel. State Auto Insurance Co. v. Risovich*, 204 W. Va. 87, 511 S.E.2d 498 (1998), as support for his position that "[t]his Court has previously indicated that prohibition is proper with respect to resolving a threshold legal issue regarding insurance coverage." (Citation omitted). While we did exercise our original jurisdiction in that case, which involved a question of insurance law, the facts of *State Auto* are distinguishable from those known to be involved in the instant proceeding. 204 W. Va. at 88-90, 511 S.E.2d at 499-501. Furthermore, our decision to examine the merits of the writ in that case was strongly motivated by the existence of a clear split of authority among the circuit courts of this State with respect to the legal issues raised therein. 204 W. Va. at 91 & n.8, 511 S.E.2d at 502 & n.8.

of appeal, and not in the context of prohibition proceedings: "[i]t is well established that prohibition does not lie to correct mere errors and cannot be allowed to usurp the functions of appeal, writ of error, or certiorari . . . ." *Handley v. Cook*, 162 W. Va. at 631, 252 S.E.2d at 148 (citations omitted).[11] *See also* Syl. pt. 3, in part, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 ("Prohibition . . . may not be used as a substitute for [a petition for appeal] or certiorari." (internal quotations and citation omitted)); *State ex rel. Maynard v. Bronson*, 167 W. Va. at 41, 277 S.E.2d at 722 ("[P]rohibition cannot be substituted for a writ of error or appeal unless a writ of error or appeal would be an inadequate remedy." (citations omitted)); *State ex rel. Casey v. Wood*, 156 W. Va. 329, 334-35, 193 S.E.2d 143, 146 (1972) (same); *Fisher v. Bouchelle*, 134 W. Va. 333, 335, 61 S.E.2d 305, 306 (1950) (same).[12]

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[11]Where, however, a circuit court's jurisdiction has been challenged,

> [o]ne seeking relief by prohibition in a proper case is not required, as a prerequisite to his right to resort to such remedy, to wait until the inferior court or tribunal has determined the question of its jurisdiction, or to wait until the inferior court or tribunal has taken final action in the matter in which it is proceeding or about to proceed.

Syl. pt. 5, in part, *State ex rel. City of Huntington v. Lombardo*, 149 W. Va. 671, 143 S.E.2d 535 (1965). This precedent has no application to the instant petition, however, as we have determined that the circuit court had jurisdiction to render the declaratory judgment challenged herein.

[12]Although we have also held that a party may obtain prohibitory relief from a non-appealable interlocutory order in certain, limited instances, we do not find that the present proceeding requires such a remedy or that the circuit court's declaratory judgment order sufficiently sets forth the requisite findings of fact. *See* Syl. pt. 6, *State ex rel. Allstate Ins. Co. v. Gaughan*, 203 W. Va. 358, 508 S.E.2d 75 (1998) ("A party seeking to petition this Court for an extraordinary writ based upon a non-appealable interlocutory decision of a trial court, must request the trial court set out in an order findings of fact and conclusions of law that support and form the basis of its decision. In making the request to the trial court, counsel must inform the trial court specifically that the request is being made because counsel intends to seek an extraordinary writ to challenge the court's ruling. When such a request is made, trial courts are obligated to enter an order containing findings of fact and conclusions of law. Absent a request by the

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Likewise, we do not find that "the over-all economy of effort and money" warrant extraordinary relief in this case, or that the alleged errors of law would necessarily result in the subsequent reversal of this case so as to require an expedited remedy. Syl. pt. 2, in part, *State Auto*, 204 W. Va. 87, 511 S.E.2d 498.

III.

CONCLUSION

For the reasons expressed in the body of this opinion, we find the instant petition does not warrant the extraordinary remedy of prohibition. Accordingly, the writ requested is hereby denied.

Writ Denied.

[12](...continued)
complaining party, a trial court is under no duty to set out findings of fact and conclusions of law in non-appealable interlocutory orders.").