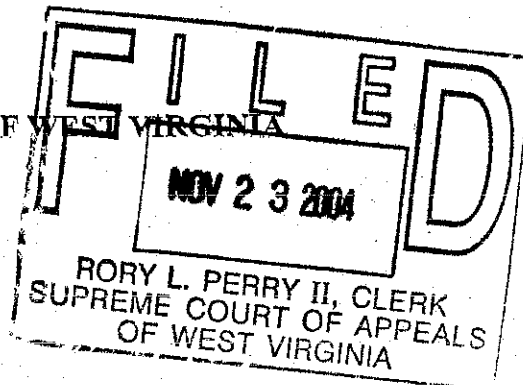


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA  
At CHARLESTON



NANCY VEDDER,

*Plaintiff,*

v.

CIVIL ACTION NO.: 03-C-534  
The Honorable Paul Zakaib, Jr.  
WV Supreme Court No. 041897

ANGELA OWENS, individually and  
as a agent for NATIONWIDE MUTUAL  
INSURANCE COMPANY; NATIONWIDE  
MUTUAL INSURANCE COMPANY,  
a foreign corporation; TOYOTA MOTORS  
SALES, U.S.A., INC., a foreign corporation;  
TOYOTA MOTORS DISTRIBUTORS, INC.,  
a foreign Corporation; and JOHN DOE,

*Defendants.*

**NATIONWIDE MUTUAL INSURANCE COMPANY AND ANGELA OWENS'  
RESPONSE TO PLAINTIFF'S PETITION FOR A WRIT OF MANDAMUS**

COME NOW, the Defendants, Nationwide Mutual Insurance Company and Angela Owens, (hereinafter collectively referred to as "Nationwide"), by and through their counsel, Michelle Roman Fox and Martin & Seibert, L.C. and hereby responds to the *Petition for a Writ of Mandamus* filed by the Plaintiff Nancy Vedder. First, the Plaintiff's Petition for the *Writ* should be denied because the Plaintiff has failed to satisfy the stringent requirements for applicability of this extraordinary relief. Second, the lower Court's Order denying the Plaintiff's Motion for leave to amend her Complaint was proper and within its sound discretion; thus, the Petition for the *Writ* should be denied.

**STATEMENT OF FACTS**

This case arises out of a single-vehicle accident which occurred on or about March 16, 2001. At the time of the accident, the Plaintiff was driving a Toyota 4-Runner, owned by her husband. The

Plaintiff contends the accident happened, in part, due to a "phantom" vehicle being in her lane of travel. She testified she swerved to avoid the "phantom" vehicle, went off the road and upon re-entry, the Toyota 4-Runner flipped several times, causing her injuries and damages. Vedder admits her vehicle did not have any contact with the "phantom" vehicle, nor was there an independent witness to corroborate her version of the accident.

The Plaintiff filed her original complaint in this matter on March 12, 2003, asserting a defective product claim against Toyota, a claim for negligence against the "John Doe" defendant, and a bad faith action against Nationwide. Importantly, the allegations against Nationwide related exclusively to its alleged failure to timely adjust the Plaintiff's uninsured motorist claim. See Plaintiff's Complaint attached hereto as **Exhibit A**. The plain language of the Complaint only alleges that Nationwide, as the Plaintiff's insurer, committed "bad faith insurance practices and unfair claim settlement practices" in the adjustment of the Plaintiff's uninsured motorist claim.<sup>1</sup> Indeed, numerous paragraphs contained within the Plaintiff's Complaint reference specifically Nationwide's and/or Owens' alleged wrongful conduct and/or failure to properly adjust the Plaintiff's uninsured motorist claim. See Complaint ¶ 22, 23, 24, 27, 30 and 31. However, conspicuously missing from the twenty-seven paragraphs of wrongdoing alleged against Nationwide and Owens by the Plaintiff is any mention or reference whatsoever of Nationwide's alleged failure to store the subject vehicle. It is undisputed, however, that at the time the Plaintiff filed her original Complaint in March, 2003, she knew that Nationwide had sold the subject vehicle for salvage. In addition, the Plaintiff should have known, at the time of filing her Complaint and before, that said vehicle was critical to proving her defective product claim against Toyota.

Nationwide does not dispute that on April 19, 2001, Chris Heavens, counsel for the Plaintiff, sent a letter to Nationwide advising of his representation and requesting that the subject vehicle be stored until he could have the same inspected by an expert. In this April 19, 2001 letter, the Plaintiff did not make any arrangements for the continued storage of the vehicle nor did she advise Nationwide as to where or when the inspection would take place. More importantly, after this April 19, 2001 letter was sent to Nationwide, the Plaintiff took no further action to secure storage of the

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<sup>1</sup>The Plaintiff alleges in her Complaint that the underinsurance provisions of the policy were applicable; however, the claims should have been properly designated as "uninsured".

vehicle or to have the same inspected by her expert. Due in part, to the lack of claim identifying information on the Plaintiff's April 19, 2001 letter, Nationwide sold the subject vehicle to a salvage yard in May 2001. Nonetheless, the Plaintiff's husband was fully aware in May 2001, that the subject vehicle was estimated to be total loss and the same had been sold for salvage. In this regard, Nationwide spoke to Plaintiff's husband confirming the total loss of the vehicle and the fact that the same would be sold for salvage.

Moreover, on January 17, 2002, after the Plaintiff contacted Toyota and asserted her theory of a defective vehicle in causing her injuries, Plaintiff's counsel contacted Nationwide and requested information regarding the location of the subject vehicle. This request was prompted as a result of Toyota's inquiry to inspect the subject vehicle. Consequently, there is no question the Plaintiff clearly knew on January 17, 2002 that Toyota believed the subject vehicle was critical to the viability of her products liability claim. In response to the Plaintiff's request, on January 19, 2002, more than two years and three months before the Plaintiff filed her Motion for leave to amend her Complaint, Nationwide provided to Plaintiff's counsel documentation confirming the vehicle had been salvaged and the exact location of the said vehicle. See, **Exhibit B**, (Documents confirming salvage of vehicle). Despite being advised by Nationwide of the vehicle's location, the Plaintiff chose to ignore the same and took no action whatsoever to secure the salvaged vehicle or to have the same inspected.

On April 23, 200, after Toyota indicated it would file a Motion for Summary Judgment based upon its vehicle inspection on January 27, 2004, the Plaintiff filed a Motion for Leave to Amend Complaint to add a spoliation of evidence claim against Nationwide. To justify the delay in filing her Motion, the Plaintiff alleged she just learned that the vehicle had been "spoiled" as a result of Toyota's vehicle inspection on January 27, 2004.

At a hearing held on June 8, 2004 the lower Court denied the Plaintiff's Motion and ruled the Plaintiff's proposed amendment was barred by the two year statute of limitations. The lower Court found the Plaintiff chose to sit on her rights and not investigate her claim or the subject vehicle. Moreover, the lower Court found the proposed amendment was a "separate and distinct" cause of action against Nationwide, and accordingly, did not "relate back" to the date of the original filing of the Complaint.

In an effort to challenge the lower Court's ruling of June 8, 2004 denying leave to amend and to create an opportunity to assert additional grounds as to why the requested leave to amend should be granted, the Plaintiff on July 30, 2004, filed a *Motion for Rule 60 Relief*. Nationwide contends the Plaintiff's Rule 60 Motion was procedurally inappropriate, and, the lower Court's denial of the Motion for leave to amend was proper. See, Nationwide's Opposition to Plaintiff's *Motion for Rule 60 Relief*, attached as **Exhibit C**. On August 11, 2004, the lower Court denied the Plaintiff's *Motion for Rule 60 Relief*. Nationwide contends the lower Court's rulings denying the *Motion for Leave to Amend* and denying the *Motion for Rule 60 Relief* were proper and in accordance with the Court's sound discretion. It is upon these Orders that the Plaintiff bases her *Petition for a Writ of Mandamus*.

### DISCUSSION OF LAW

The Plaintiff requests that this Court compel the Honorable Judge Paul Zakaib, Jr. to grant her *Motion for Leave to Amend Complaint* to add a spoliation of evidence claim against Nationwide. The Plaintiff's request for this extraordinary relief fails to meet the stringent requirements for the relief sought. In this regard, the Court in *Wampler Foods, Inc. v. Workers' Compensation Division*, 602 S.E.2d 805 (W. Va. 2004) explained that "a writ of 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 writ of error, appeal or certiorari." *Id. at. 817*, quoting *Syl. Pt. 1, Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953).

Moreover, the *Wampler* Court explained that in determining whether to issue a writ when it is claimed the court exceeded its legitimate powers, this Court must consider the following 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.

The Court noted "that 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, the third factor, the existence of a clear error as a matter of law, should be given substantial weight." *Id.* at 817, citing, *Syl. Pt. 4, State ex. rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12(1996). Moreover, the *Wampler* Court reiterated that "mandamus is a proper remedy to require the performance of a non-discretionary duty by various governmental agencies or bodies." *Id.* at 817, citing *Syl. Pt. 1, State ex. rel. Allstate Ins. Co. v. Union Public Service Dist.*, 151 W. Va. 207, 151 S. E.2d 102 (1996). Mandamus will not ordinarily lie to direct the manner in which the lower court exercised its discretion.

Furthermore, the *Wampler* Court explained a Petitioner seeking a writ must meet each element of a three-part test:

- (1) a clear legal right in the Petitioner to the relief sought;
- (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and,
- (3) the absence of another adequate remedy.

*Id.* at 817, citing *Syl. Pt. 2 State ex. rel. Kucera v. City of Wheeling*, 153 W. Va. 538, 170 S. E. 2d 367 (1969).

The lower Court's Order denial of the Plaintiff's *Motion for Leave to Amend Complaint* in this case, should not be subject to a Writ of Mandamus, because the lower Court was acting within its sound discretion in denying the leave to amend. Based upon the determinative factors set forth in both *Hoover v. Berger* and *State ex. rel. Kucera v. City of Wheeling*, the Plaintiff has failed to establish that the lower Court's Order is clearly erroneous as a matter of law, and/or that there is a legal duty on the part of the respondent to do the thing which the Petitioner seeks to compel.

Indeed, the lower Court properly exercised its discretion, in denying the Plaintiff leave to amend her complaint. Moreover, the interpretive case law governing motions for leave to amend unequivocally state that said decision lies within the sound discretion of the trial court. *Mauck v.*

*City of Martinsburg*, 178 W. Va. 93, 96, 357 S.E.2d 775, 778 (1987).

The Plaintiff's Petition fails to satisfy the factors necessary for the issuance of the *Writ*; thus this Court should deny the requested relief.

Additionally, the lower Court's Order is correct and does not constitute "clear legal error". In this regard, the Plaintiff's proposed amendment to add a third-party spoliation of evidence claim against Nationwide is a "separate and distinct" cause of action against Nationwide, which does not arise out of the same "conduct, transaction or occurrence" alleged against Nationwide in the initial Complaint. *Rule 15(c), West Virginia Rules of Civil Procedure*. The original Complaint against Nationwide alleged only that Nationwide committed bad faith insurance practices and unfair settlement practices in the timely adjustment of her uninsured motorist claim. Notably absent from the Complaint is any reference or allegation that Nationwide negligently or improperly failed to store the vehicle after being requested to do so by the Plaintiff thereby, causing vital evidence to be "spoiled". Therefore, the lower Court correctly ruled that the proposed amendment did not "relate back" to the date of the original filing of the Complaint and was barred by the applicable statute of limitations. The lower Court, in its exercise of its discretion, determined the proposed amendment was a new cause of action not originally pled and did not arise out of the same conduct, transaction, or occurrence as set forth in the original Complaint. The original Complaint focused on Nationwide's alleged delay in adjusting the uninsured contractual claim, while the proposed amendment set forth a negligence claim against Nationwide for spoliation of the vehicle evidence. The lower Court observed that there was no similarity of elements or facts between the stated bad faith contractual claim and the proposed spoliation of evidence claim.

Specifically, the "bad faith" allegations asserted against Nationwide arose from those duties imposed upon Nationwide, as an insurer, under the Unfair Trade Practices statute set forth in *W. Va. Code* §33-11-4 (9), the West Virginia Insurance Commissioner Regulations and the applicable policy of insurance. In addition, the original Complaint allegations asserted against Nationwide related entirely and exclusively to Nationwide's alleged failure to timely respond to Plaintiff's claim for uninsured motorist benefits. Moreover, there is no question that the Plaintiff clearly knew at the time she filed the Complaint against Nationwide that Nationwide had not stored the vehicle and that the same had been sold for salvage. Despite this knowledge, the Plaintiff failed to make any

complaint against Nationwide related to said vehicle preservation.

Consequently, the lower Court, did not commit clear legal error and did not abuse its discretion in concluding that the proposed amendment against Nationwide did not "relate back" to the date of the original Complaint. Quite simply, the original allegations involved Nationwide's failure to timely tender or deny the uninsured motorists benefits to Plaintiff while the spoliation claim is an independent tort based upon Nationwide's failure to preserve vital evidence. These theories are distinctly different and unrelated.

Moreover, the lower Court correctly concluded that the Plaintiff's proposed amendment was timed-barred by the applicable statute of limitations. In this regard, the lower Court correctly found that the Plaintiff knew on January 19, 2002 that Nationwide sold the subject vehicle for salvage and the location of the said vehicle. Thus, the statute of limitations on any potential spoliation of evidence claim began to run at this time, January 19, 2002. See, Fax Cover Sheet sent to Plaintiff's counsel along with the salvage documents dated January 19, 2002 and attached hereto as **Exhibit B**. Also, in January, 2002, and thereafter, no one prevented the Plaintiff from investigating her own case and maintaining the condition of the vehicle as it existed at that time. The lower Court correctly determined it was the Plaintiff's burden to investigate her own claim and it was her choice not to inspect the subject vehicle in January, 2002 when she knew the same had been sold for salvage and where it was located. Also, the Plaintiff should have recognized the importance of the vehicle to her pending claim against Toyota. Rather than inspect and store the vehicle, the Plaintiff made a choice to be dilatory in the inspection and preservation of the evidence needed for her case, and the lower Court rightfully found the Plaintiff, alone, should bear the consequences of her inaction. The lower Court did not commit error in holding that it was the Plaintiff's absolute and sole duty to have the vehicle inspected and preserved and to take adequate steps to maintain any evidence she deemed necessary to pursue her claim against Toyota, especially after being advised by Nationwide on January 19, 2002, that the vehicle had been sold. Accordingly, any arguable duty imposed on Nationwide by the Plaintiff's April 19, 2001 letter was breached if at all, on January 19, 2002, and, thus the statute of limitations on all potential claims against Nationwide began to run at that point. This Court previously held that the statute of limitations for spoliation of evidence claims is two years. *Harrison v. Davis*, 197 W. Va. 651, 478, S.E.2d 104 (1996).

In an attempt to circumvent the statute of limitations, the Plaintiff argues the discovery rule tolled said statute of limitations. Specifically, the Plaintiff contends that she did not know the vehicle evidence had been "spoiled" until after Toyota had the vehicle inspected on January 27, 2004. However, this argument is unpersuasive and merely an attempt by Plaintiff to cover up her own inaction in failing to take any steps to inspect and/or preserve the vehicle after January 14, 2002, when she undisputably knew the vehicle had been sold to a salvage yard and the location of the salvage yard.<sup>2</sup> This Court in *Cart v. Marcum*, 188 W. Va. 241, 423 S.E.2d 644 (1992) held that while West Virginia has a "discovery rule," this does not "eviscerate the statute of limitations; the statute of limitations will apply unless the handicaps to discovery at the time of the injury are great and largely the product of the defendant's conduct in concealing either the tort or the wrongdoer's identity. *Id.* at 648. In addition, the *Cart* Court held that the "discovery rule" is to be applied with "great circumspection on a case-by-case basis only when there is a strong showing by the plaintiff that he was prevented from knowing about the claim at time of the injury. The general rule is that mere ignorance of the existence of a cause of action or the identity of the wrongdoer does not prevent the running of the statute of limitations. *Id.*

In the instant case, Nationwide did nothing to conceal the tort or to prevent the Plaintiff from determining whether an injury existed. Indeed, Nationwide did just the opposite. To illustrate, Nationwide, forthrightly, advised the Plaintiff on January 19, 2002, that the subject vehicle had been sold for salvage and the exact location of the vehicle. There is no question the Plaintiff could have easily gone to the identified salvage yard and inspected the vehicle. Also, Nationwide did nothing to prevent the Plaintiff from continuing to store and preserve the vehicle. As the lower Court aptly found, the Plaintiff had the opportunity and duty to investigate her own case and to preserve the evidence she deemed necessary for her claim.

Furthermore, the Plaintiff unpersuasively argues that since this Court did not render its decision in *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003) until June 30, 2003, the statute of limitations on the spoliation of evidence claim did not begin to run until the date of the

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<sup>2</sup>It is interesting to note that the inspection of the vehicle by Toyota in January, 2004, took place at the exact salvage yard Nationwide had advised the Plaintiff the vehicle was located in January, 2002. The vehicle had not been moved since the time it was originally sold by Nationwide; thus, clearly available to the Plaintiff if she would have made any effort whatsoever to inspect or preserve the same.

decision, June 30, 2003. This argument is flawed. First, there is not indication that this Court intended its recognition of a third-party spoliation claim to be applied retrospectively to all those potential claims that existed before June 30, 2003. Such a retrospective application could potentially open the "floodgates" for thousands of cases as such interpretation would allow a party to file a claim irrespective of when the alleged spoliation took place. Additionally, unless specifically noted, new causes of action should be applied prospectively. See, *Shanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 270 S.E.2d 178 (1980).

Moreover, this Court as well as courts from other jurisdictions have recognized the existence of a potential claim for spoliation of evidence before the Plaintiff filed her Complaint in this case. See, *Harrison v. Davis*, *Id* at 117. The Plaintiff, herself, which causes of action to plead against Nationwide and could have alleged facts supporting a spoliation of evidence theory. The Plaintiff did not do so, and, is now barred by the statute of limitations.

Furthermore, this Court has noted that a trial court is permitted to deny an motion for leave to amend a complaint when an unreasonable delay has occurred between the time the plaintiff acquires knowledge of the cause of action and the motion for leave to amend is filed. *McCoy v. CAMC, Inc.*, 210 W. Va. 324, 557 S.E.2d 378 (2001). Although Rule 15 of the *West Virginia Rules of Civil Procedure* provides "liberality" in amendments to pleadings, this "liberality" does not entitle a party to be dilatory in asserting claims or to neglect his case for a long period of time. In *McCoy*, the circuit court denied the plaintiff's motion to amend her complaint to assert a new theory. In this regard, the McCoy Plaintiffs began asserting a new theory of their case as early as July, 2000, but did not file a motion to amend their complaint until October 16, 2000. This Court found the circuit court did not abuse its discretion in denying McCoy's motion to amend the Complaint because of lack of diligence on the Plaintiff's part. The McCoy Court also recognized that the delay of two months between the filing of the motion to amend and the time when the plaintiffs began asserting a new theory of their case was unreasonable. See, also, *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 201 W. Va. 385, 508 S. E. 2d 102 (1998) in which this Court held that sixteen months between the time the Plaintiff learned that it could file a bad faith action and when it filed its motion to amend was unreasonable and the amendment was properly denied. In this instant case, the *Hannah v. Heeter* decision was rendered on June 30, 2003; but, Vedder did not seek to amend

her Complaint until April 24, 2004, approximately ten months later.

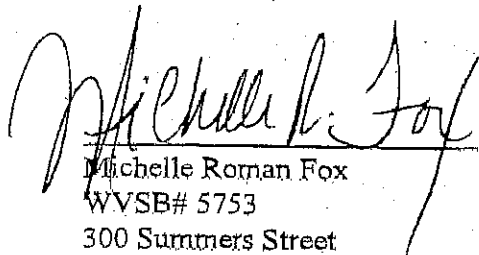
In conclusion, the lower Court in this case did not commit "clear legal error" or abuse its discretion when it denied Nancy Vedder's *Motion for Leave to Amend her Complaint*. The lower Court correctly found that the statute of limitations began to run on January 19, 2002, and, thus, expired before the Plaintiff sought leave to amend her Complaint against Nationwide. Moreover, the lower Court rightfully found the Plaintiff failed to act upon her obligations to inspect and/or preserve the vehicle evidence she needed to support her claim against Toyota. Thus, the discovery rule did not toll the statute of limitations. Finally, the lower Court correctly found the proposed amendment, asserting a new case of action against Nationwide, did not arise out of the same conduct, transaction, or occurrence as the original Complaint against Nationwide, and, consequently did not "relate back" to the date of the original filing of the Complaint.

Accordingly, Nationwide requests that this Court deny the Plaintiff's *Petition for a Writ of Mandamus*.

**RESPECTFULLY SUBMITTED:**  
**NATIONWIDE MUTUAL INSURANCE**  
**COMPANY AND ANGELA OWENS**  
**BY COUNSEL**

MARTIN & SEIBERT, L. C.

BY:



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## IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

NANCY VEDDER,

Plaintiff,

v.

CIVIL ACTION NO.: 03-C-534

ANGELA OWENS, individually and  
as a agent for NATIONWIDE MUTUAL  
INSURANCE COMPANY; NATIONWIDE  
MUTUAL INSURANCE COMPANY,  
a foreign corporation; TOYOTA MOTORS  
SALES, U.S.A., INC., a foreign corporation;  
TOYOTA MOTORS DISTRIBUTORS, INC.,  
a foreign Corporation; and JOHN DOE,

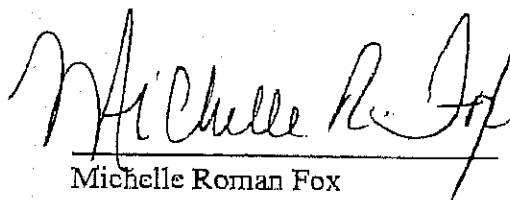
Defendants.

CERTIFICATE OF SERVICE

I, Michelle Roman Fox, Counsel for the Defendants, Angela Owens and Nationwide Mutual Insurance Company hereby certify that I served a true copy of the foregoing *Nationwide Mutual Insurance Company and Angela Owens' Response to Plaintiff's Petition for Writ of Mandamus* upon the following individuals, by facsimile and by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 23<sup>rd</sup> day of November, 2004.

Christopher J. Heavens  
Heavens Law Offices  
2438 Kanawha Boulevard, East  
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Charleston, WV 25301

Andrew P. Workman, Esq.  
Law Office of Dana F. Eddy  
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Charleston, WV 25301

  
Michelle Roman Fox

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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

NANCY VEDDER,

Plaintiff,

v.

Civil Action No. 03-C-534

ANGELA OWENS, individually and as agent for NATIONWIDE MUTUAL INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE COMPANY, a foreign corporation; TOYOTA MOTORS SALES, U.S.A., INC., a foreign corporation; TOYOTA MOTORS DISTRIBUTORS, INC., a foreign Corporation; and JOHN DOE,

Defendants.

COMPLAINT

Comes now the Plaintiff, Nancy Vedder, by and through plaintiff's counsel, Christopher J. Heavens, and Heavens Law Offices, and moves for judgment against Nationwide Mutual Insurance Company, Angela Owens, Toyota Motor Sales, U.S.A., Inc., Toyota Motors Distributors, Inc., and John Doe on grounds and in the amount as follows:

- 1. That at all times mentioned hereinafter, the plaintiff, Nancy Vedder (herein after sometimes referred to as "Vedder"), was a citizen and resident of Winfield, Putnam County, West Virginia.
2. That at all times mentioned hereinafter, the defendant, Nationwide Mutual Insurance Company (hereinafter sometimes referred to as "Nationwide"), was a foreign corporation conducting business in Kanawha County, West Virginia, and Nationwide is subject to the jurisdiction of this Court.
3. That at all times mentioned hereinafter, the defendant, Angela Owens (hereinafter sometimes referred to as "Owens"), was a resident of West Virginia

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and was acting individually and as an agent of Nationwide, and Owens is subject to the jurisdiction of this Court.

4. That at all times mentioned hereinafter, the defendant, Toyota Motor Sales, U.S.A., (hereinafter sometimes referred to as "Toyota"), was a foreign corporation conducting business in Kanawha County, West Virginia, and Toyota is subject to the jurisdiction of this Court.

5. That at all times mentioned hereinafter, the defendant, Toyota Motors Distributors, Inc (hereinafter sometimes referred to collectively with Toyota Motor Sales, U.S.A. as "Toyota") was a foreign corporation conducting business in Kanawha County, West Virginia, and Toyota is subject to the jurisdiction of this Court.

6. That at all times mentioned hereinafter, the defendant, John Doe, was an unknown defendant whose negligence, along with the negligence and strict liability of Toyota, was a proximate cause of the injuries and damages incurred by the plaintiff.

### COUNT ONE

#### Tort Liability

7. The plaintiff incorporates by reference, as if recited verbatim herein below, all other paragraphs in this Complaint.

8. On March 16, 2001, Nancy Vedder was driving a Toyota 4-Runner on Rt. 44 at or near Horsepen Mountain in Mingo County, West Virginia, when she was forced off of the road by an unknown motorist who will be referred to as John Doe.

9. Defendant, John Doe, had a duty to operate his vehicle on that date with due care and regard for the safety of others.

10. Notwithstanding said duties, on or about March 16, 2001, Defendant, John Doe, was operating his vehicle in such a negligent and careless manner so as to cause his vehicle to illegally enter into the plaintiff's lane of travel and cause the plaintiff to crash and be injured.

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11. As a proximate result of the wrongdoing of the defendant, John Doe, the plaintiff was injured and suffered damages for which John Doe as an uninsured motorist is legally responsible.

## COUNT TWO

### Negligence and Strict Product Liability

12. The plaintiff incorporates by reference all other paragraphs in the Complaint.

13. At all times relevant herein, Toyota manufactured and placed into the stream of West Virginia commerce a defective and unreasonably dangerous product known as the 4Runner, and that the plaintiff was using a Toyota 4Runner in a safe and foreseeable manner when the 4Runner, because of its defective and unreasonably dangerous design, overturned causing injuries and damages to the plaintiff.

14. The use of the aforesaid defective product by the plaintiff was proper and foreseeable and, in fact, such use was encouraged by Toyota and its dealers and agents, through direct consumer contact huckstering and through television and radio media marketing and advertising.

15. Said defective product was inherently dangerous, and, therefore, Toyota had a duty to exercise great care commensurate with the danger of the product and the injuries which it was capable of inflicting, and Toyota negligently failed to do so, proximately causing injuries and damages to the plaintiff.

16. Toyota is strictly liable for all damages caused by the defective condition of said product, including damages caused to the plaintiff.

17. Prior to the plaintiff's accident, Toyota knew about numerous other rollover incidents involving the 4Runner in which people were seriously injured or killed, and, despite this knowledge, Toyota willfully continued to manufacture and market the 4Runner with the same defective and unreasonably dangerous design characteristics that were causing and/or contributing to said rollover incidents.

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18. Because of Toyota's willful, wanton and reckless failure to rectify the design defects in the 4Runner prior to the plaintiff's accident, the plaintiff requests an award of punitive damages against Toyota

### COUNT TWO

#### Bad Faith Insurance Practices and Unfair Claim Settlement Practices

19. The plaintiff incorporates by reference all other paragraphs in the Complaint.

20. Nationwide insured the 4Runner being operated by the plaintiff at the time of the accident.

✓ 21. The plaintiff was a permissive user of the 4Runner and was defined as an "insured" under the applicable Nationwide policy.

✓ 22. The applicable Nationwide policy contained underinsured motor vehicle coverage and the plaintiff made a claim for this coverage in a reasonably timely fashion following the accident.

✓ 23. The plaintiff is entitled to underinsured motor vehicle coverage under the applicable Nationwide policy and Nationwide has wrongly refused to provide such coverage to the plaintiff.

✓ 24. The plaintiff is entitled to underinsured policy proceeds and all damages permitted pursuant to the precedent established in Hayseeds v. State Farm and its progeny.

25. At all times relevant herein, Owens was an agent of Nationwide and was acting at the direction of Nationwide.

26. At all times relevant herein, Nationwide took a course of action which was in conflict with the interests of its insured, Vedder.

27. At all times relevant herein, Nationwide failed to respond to the plaintiff's initial underinsured claim and Owens is now blaming a previous employee of

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Nationwide for failing to take prompt action on the plaintiff's claim.

28. Owens and Nationwide are now making claim investigation demands on the plaintiff that should have been made over a year ago, and the plaintiff has been unfairly prejudiced by Nationwide's lack of diligence and lack of professionalism in Nationwide's claim investigation.

29. Nationwide was promptly notified of the plaintiff's accident, and Nationwide assigned a claim number to the plaintiff's claim over a year prior to the filing of the instant lawsuit.

30. Owens and Nationwide had adequate notice of the accident and had adequate time to investigate any questions pertaining to insurance coverage and liability, and Nationwide had adequate time to conduct factual inquiries relevant to the cause of the accident.

31. Owens and Nationwide have had adequate time to file a declaratory judgment action to resolve any insurance coverage questions and they have knowingly delayed and refused to do so for over a year prior to the filing of the instant lawsuit.

32. Owens and Nationwide have given no reasonable explanation to the plaintiff as to why it has taken Nationwide over one year to reach a decision on the plaintiff's claim, and Owens is now floating sham defenses such as the plaintiff's failure to report the accident to Nationwide within 24 hours of the accident.

33. Even if Owens' sham defenses had any validity, those defenses should have been asserted by Nationwide over one year ago, not now in the eleventh hour when the plaintiff is forced to take legal action to protect her rights.

34. Under West Virginia law, Nationwide has waived all defenses that it might have had by its inexplicable failure to promptly investigate the plaintiff's claim and inexplicable failure to assert any defenses in a timely fashion.

35. The conduct of Owens and Nationwide, including the failure to fully investigate all theories of liability and asserting sham legal defenses, constitutes a

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calculated misrepresentation of material fact designed to intimidate and damage the economic rights of the plaintiff, and this is a direct violation of West Virginia Code § 33-11-4(9)(a), for which Nationwide is legally responsible to the plaintiff.

36. Owens and Nationwide have made calculated material misrepresentations that its insured, Vedder, failed to abide by policy provisions in a belated attempt to contrive a smoke screen for Nationwide's failure to promptly investigate the plaintiff's claim, and this constitutes bad faith and malice under West Virginia law, for which Owens and Nationwide are legally responsible.

37. Owens and Nationwide have deliberately manipulated and misrepresented the facts leading up to and surrounding the claim made by the plaintiff so as to contrive sham legal defenses for Nationwide, while at the same time asking the plaintiff and her counsel for information to investigate the claim over one year after the claim investigation should have been completed, and this has irreparably damaged the rights of its insured, Vedder, in violation of West Virginia law.

38. The above-described conduct of Nationwide is fraudulent and malicious; designed to defraud Vedder and severely damage her economic rights through an attempt by Nationwide to manipulate and misrepresent the facts surrounding the claim and to disclaim coverage to its own insured, Vedder.

39. Nationwide has failed to conduct a reasonable investigation into the claim of Vedder based upon all of the available information, and this constitutes a direct violation of West Virginia Code § 33-11-4(9)(d), for which Nationwide is legally responsible to the plaintiff.

40. Nationwide has failed to act in good faith to effectuate a prompt, fair and equitable settlement with Vedder, and this constitutes a direct violation of West Virginia Code § 33-11-4(9)(f).

41. Owens and Nationwide have failed to adopt or implement reasonable standards for the prompt investigation of Vedder's claim arising under the insurance policy which insured Vedder, and this failure constitutes a direct violation of West Virginia Code § 33-11-4(9)(c), for which Owens and Nationwide are legally responsible to plaintiff.

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42. The aforementioned conduct of Nationwide in handling the claim of Vedder is a general business practice of Nationwide in the State of West Virginia, and constitutes unfair claim settlement practices under West Virginia Code § 33-11-4(9).

43. From its initial notification of the aforementioned accident, Nationwide acted in bad faith, and maliciously predetermined to damage the economic rights of Vedder through fraud, misrepresentation, malice and intimidation.

44. At all times relevant herein, Nationwide has acted with a deliberate and malicious intent to injure and defraud Vedder, and has violated West Virginia law in the manner set forth herein above, all of which has proximately caused continuing economic and non-economic damages to Vedder and which warrants and commands an award of punitive damages against Nationwide to discourage future like conduct.

45. Under the legal precedent established in Jenkins v. J.C. Penney Cas. Ins. Co., and Dodrill v. Nationwide Mut. Ins. Co., this Court has jurisdiction over this private cause of action for the unfair claim settlement practices and bad faith of Nationwide, and Vedder is entitled to an award of damages for legal fees and costs, net economic losses, annoyance and aggravation, and punitive damages pursuant to this cause of action.

WHEREFORE, the plaintiff, Nancy Vedder, requests the following relief: that she be awarded judgment against the defendants, Nationwide Mutual Insurance Company, Toyota Motor Sales, U.S.A., Inc., Toyota Motors Distributors, Inc., and John Doe, both jointly and severally, in such an amount as will fully and fairly compensate her for her injuries and damages; that she be awarded both pre-judgment and post-judgment interest against the defendants; that she be awarded her attorney fees and legal costs; that she be awarded punitive damages; and, that she be awarded such other further and general relief as the Court deems just and proper.

THE PLAINTIFF DEMANDS A TRIAL BY JURY.

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3047449635 TO 3042678731

P.11/11

*Christopher J. Heavens by Vicki D. G. (WV Bar # 291)*

Christopher J. Heavens (WV Bar No. 5776)

Heavens Law Offices

2438 Kanawha Boulevard, East

Post Office Box 5711

Charleston, West Virginia 25301

(304)346-0464

\*\* JOB STATUS REPORT \*\*

AS OF JAN 17 2002 08:46

PAGE 01

CHARLESTON CLAIMS

JOB #219

DATE TIME  
001 1/17 08:44

TO/FROM  
93455775

MODE  
EC--S

MIN/SEC  
01' 52"

PGS  
005

STATUS  
OK

2301 Mountaineer Blvd.  
South Charleston, WV 25313  
Phone: 1-800-950-2959  
Fax: 304-746-7690



# Fax

To: Cindy Laoham From: Mary Fitzwater  
 Fax: 345-3775 Pages: 4  
 Phone: \_\_\_\_\_ Date: 1-17-02  
 Re: Nancy Vedder CC: \_\_\_\_\_

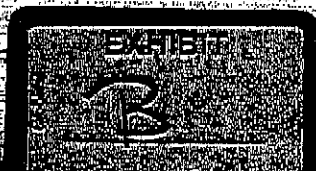
- Urgent  For Review  Please Comment  Please Reply  Please Recycle

• Comments:

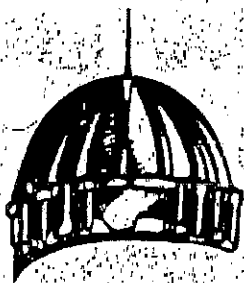
Cindy,

The Salvage file came in today.  
I am faxing copy Salvage Sale.

Please let me know if you need further  
information.



*Agreement and Bill of Sale*



**CAPITAL  
AUTO  
SALVAGE**

150 Pickens Road Nitro, WV 25143

(304) 755-5952 Fax: (304) 755-2300

ENTRY NUMBER  
149

STOCK NUMBER  
W-000059

ANNOUNCEMENTS:

DATE: 05/03/2001

CASH SALE PRICE 2000.00	SELLERS FEE 107.00	TRANSPORT FEE 0.00
	WRAP FEE	DETAIL
	UP-FRONT	SALES TAX
MISC. FEE		
TAX 6.42	SELLERS NET 2006.58	CHECK NO. 001

ALL UNITS SOLD "AS IS, WHERE IS." ALL SALES FINAL  
THERE ARE NO IMPLIED WARRANTIES OR GUARANTEES  
ON ANY UNIT

ALL PURCHASED SALVAGE IS YOUR RESPONSIBILITY,  
IMMEDIATELY AFTER THE AUCTIONEER DECLARES YOU  
THE BUYER

ALL VEHICLES MUST BE MOVED WITHIN 7 DAYS,  
AFTER WHICH BUYER WILL BE CHARGED STORAGE.

SEE POSTED TIMES FOR REMOVAL

**CAPITAL AUTO SALVAGE  
ASSUMES NO RESPONSIBILITY NOR  
GUARANTEES ACCURACY OF  
ODOMETER READING ON ANY  
CONSIGNED CARS.**

**ODOMETER DISCLOSURE STATEMENT**

Federal law (and State law, if applicable) requires that you state the mileage upon transfer of ownership. Failure to complete or providing a false statement may result in fines and/or imprisonment.

NATIONWIDE -- TLC state that the odometer (of the vehicle described below) now reads 67001 (no tenths) miles and to the best of my knowledge that it reflects the actual mileage of the vehicle described below, unless one of the following statements is checked.

- (1) I hereby certify that to the best of my knowledge the odometer reading reflects the amount of mileage in excess of its mechanical limits.
- (2) I hereby certify that the odometer reading is not the actual mileage. **WARNING - ODOMETER DISCREPANCY.**

MAKE TOYOTA	BODY TYPE 4DR	MODEL 4 RUNNER
VEHICLE I.D. NUMBER JT3HNAGRXU0100632		
COLOR TAN	TRIM	YEAR 1997
TRANSFEROR'S PRINTED NAME (SELLER) NATIONWIDE -- TLC		
TRANSFEROR'S STREET ADDRESS 2501 MOUNTAINEER BLVD		
CITY NITRO	STATE WV	ZIP CODE 25143
DATE OF STATEMENT 05/03/2001	TRANSFEROR'S SIGNATURE (SELLER) 	
CLAIM NUMBER 0247N327203	PRINTED NAME OF PERSON SIGNING X	
TRANSFEREE'S PRINTED NAME (BUYER) GRASSY AUTO SALES#		
TRANSFEREE'S STREET ADDRESS 6374 HIGHWAY 460W		
CITY	STATE	ZIP CODE
WEST VIRGINIA	WV	26147
RECEIPT OF COPY ACKNOWLEDGED		
TRANSFEREE'S SIGNATURE (BUYER)		
PRINTED NAME OF PERSON SIGNING		
DATE		
X		

PICKUP ORDER FOR STATE LINE SALVAGE EXCHANGE  
MT. MORRIS, PA

DATE CALLED IN : 03/20/2001 STOCK #: 8059

COMPANY: 11

CLAIM NUMBER...: 9247N327283

DATE OF LOSS: 03/16/2001

INSURED'S NAME...: WILLIAMS

OWNERS NAME: WILLIAMS

VEHICLE TYPE...: 1997 TOYOTA

4 RUNNER

SERIAL NUMBER...: JT3HN86RXV0100632

COLOR.....: TAN

BODY.: 4DR

ACV: \$ 21100

LOCATION OF VEHICLE: GAYLOCKS WRECKER

PHONE # (HOME).....: LOGAN

(WORK): WV  
304-752-2122

DIRECTIONS.:

DENABLE/ROLLBACK: ROLLBACK IS REQUIRED

CHARGES - TOWING.: 0.00

MISCELL.: 0.00

STORAGE: 0.00 PER DAY BEGINNING 03/16/2001 THRU

OF LOSS.....: C

DAMAGE CODES: ABCDEFGH

OTHER INFORMATION: NW CK# 91484939 \$453.00 4-2-01..SNK

\*\*\*\*\*  
STATE LINE DRIVER USE ONLY

PICKUP DATE: \_\_\_\_\_ TIME OUT: \_\_\_\_\_ TIME IN: \_\_\_\_\_ MILES: \_\_\_\_\_

SERIAL #: \_\_\_\_\_ COLOR: \_\_\_\_\_ # DOORS: \_\_\_\_\_

KEYS.: YES NO AIR BAG: YES NO BATTERY: YES NO RADIO: YES NO  
SEBELS: YES NO

OTHER: \_\_\_\_\_

TYPE OF LOSS: (Circle)

- Collision W - Water damage
- Fire U - Undercarriage
- Theft Z - Other

MARK DAMAGE AREA:

B	C	D
A	F	E
M	G	F

DRIVERS NAME: \_\_\_\_\_ CHECK AMOUNT: \_\_\_\_\_ CHECK #:

# CERTIFICATE OF SALVAGE FOR A VEHICLE

665 11 149

011010061002724-001

STPHN86KXV010853Z 1997 TOYOTA 55969188601 NA

VEHICLE IDENTIFICATION NUMBER YEAR MAKE OF VEHICLE TITLE NUMBER

SW	XXX	RV	4/16/01	067901	0	
BODY TYPE	DUP	SEAT CAP	PRIOR TITLE STATE	ODOM. PROCD. DATE	ODOM. MILES	ODOM. STATUS
4/16/01	4/16/01	XXXXXX	XXXXXX	XXXXXX		
DATE PA TITLED	DATE OF ISSUE	UNLADEN WEIGHT	GVWR	GVWR	GVWR	TITLE BRANDS

**VOID VOID VOID VOID VOID**

- | TITLE BRANDS                                   |                                   | ODOMETER STATUS  |  |
|--|-----------------------------------|--|--|
| A - ANTIQUE VEHICLE                            | L - LOADING VEHICLE               | 6 - ACTUAL MILEAGE                                     |  |
| C - CLASSIC VEHICLE                            | P - IS WAS A POLICE VEHICLE       | 1 - MILEAGE EXCEEDS THE MECHANICAL LIMITS              |  |
| D - COLLECTIBLE VEHICLE                        | R - RECONSTRUCTED                 | 2 - NOT THE ACTUAL MILEAGE                             |  |
| F - OUT OF COUNTRY                             | B - STREET ROD                    | 3 - NOT THE ACTUAL MILEAGE-ODOMETER TAMPERING VERIFIED |  |
| G - ORIGINALLY MFGD. FOR NON-U.S. DISTRIBUTION | T - RECOVERED THEFT VEHICLE       | 4 - EXEMPT FROM ODOMETER DISCLOSURE                    |  |
| H - AGRICULTURAL VEHICLE                       | Y - VEHICLE CONTAINS REISSUED VIN |  |  |
|  | W - FLOOD VEHICLE                 |  |  |
|  | X - IS WAS A TAXI                 |  |  |

REGISTRATION NOT TO BE ISSUED  
 REGISTRATION NOT TO BE ISSUED  
 REGISTRATION NOT TO BE ISSUED  
 REGISTRATION NOT TO BE ISSUED

SALVAGE VEHICLE OWNER(S) 039222  
 NATIONWIDE TLC  
 RR 1 BOX 64 B  
 MOUNT MORRIS PA 15349

**BRADLEY L MALLORY**  
 Secretary of Transportation

I certify as of the date of issue, the official records of the Pennsylvania Department of Transportation reflect that the person(s) or company named herein is the lawful owner of the said salvage vehicle.



0031955

STORE IN A SAFE PLACE - IF LOST APPLY FOR A DUPLICATE - ANY ALTERATION OR ERASURE VOIDS THIS CERTIFICATE

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

NANCY VEDDER,

*Plaintiff,*

v.

CIVIL ACTION NO.: 03-C-534

ANGELA OWENS, individually and  
as a agent for NATIONWIDE MUTUAL  
INSURANCE COMPANY; NATIONWIDE  
MUTUAL INSURANCE COMPANY,  
a foreign corporation; TOYOTA MOTORS  
SALES, U.S.A., INC., a foreign corporation;  
TOYOTA MOTORS DISTRIBUTORS, INC.,  
a foreign Corporation; and JOHN DOE,

*Defendants.*

**DEFENDANTS, NATIONWIDE MUTUAL INSURANCE COMPANY AND ANGELA  
OWENS' OPPOSITION TO PLAINTIFF'S MOTION FOR RULE 60 RELIEF**

COME NOW the Defendants, Nationwide Mutual Insurance Company and Angela Owens by and through their counsel, Michelle Roman Fox, and Martin & Seibert, L.C. and hereby files this Opposition to the Plaintiff, Nancy Vedder's *Motion for Rule 60 Relief* from the Court's Order denying the Plaintiff's Motion to Amend her Complaint to add a spoliation of evidence claim against Nationwide. First, the Plaintiff's Motion is not procedurally proper under the scope and intent of Rule 60; thus, the Court should deny such Motion on this ground. Second, the Court's Order denying the Plaintiff's Motion to Amend Complaint is legally correct and should be maintained.<sup>1</sup>

**DISCUSSION OF LAW**

I. Plaintiff's Motion to Challenge the Correctness of the Court's Ruling Denying her Motion for Leave to Amend Complaint is not within the Scope of Rule 60 of the *West Virginia Rules of Civil Procedure*; thus, the Motion should be Denied.

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<sup>1</sup> The Plaintiff filed her Motion for Rule 60 Relief on July 30, 200, by U. S. Mail. Pursuant to Rule 6, *West Virginia Rules of Civil Procedure*, the Plaintiff was required to file her Motion at least 9 days prior to the hearing, not including intermediate Saturdays, Sundays and legal holidays; thus, the Plaintiff has not complied with this Rule in setting the hearing on her Motion for August 11, 2004, and said Motion is untimely.



*Rule 60(b)* of the *West Virginia Rules of Civil Procedure* provides, in pertinent part,

on Motion and upon terms that are just, the Court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) Mistake, inadvertence, surprise, excusable neglect, or unavoidable cause; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic) misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or is no longer equitable that the judgment have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

The Plaintiff, in support of her *Motion for Rule 60 Relief* relies upon sub-section (6) of Rule 60(b) specifically, "any other reason justifying relief from the operation of the judgment." The "other reasons" cited by the Plaintiff to justify her Motion is that the Court did not "comply with the law" in denying her Motion to Amend her Complaint to add a spoliation of evidence claim against Nationwide. Essentially, the Plaintiff disagrees with the Court's findings that her Motion to Amend the Complaint was not timely filed, did not relate back to the date of the original Complaint, was barred by the applicable statute of limitations and that she sat on her rights and did not timely investigate her claim. In an attempt to persuade the Court to change its ruling and to challenge the same, the Plaintiff has filed the instant motion. The grounds enumerated by the Plaintiff in support of said Motion are not those within the scope of Rule 60. Rather, the Plaintiff merely seeks to re-litigate adverse findings by this Court which have been previously argued or should have been argued by the Plaintiff.

First, in order for Rule 60, of the *West Virginia Rules of Civil Procedure* to be applicable, the Order being appealed must be a "final judgment, order or proceeding." Interlocutory judgments or orders are not subject to Rule 60. Thus, it is arguable that the Plaintiff's Motion to Amend Complaint is not a final judgment order, due to the other issues which remain active in this case.

However, even assuming arguendo that the Order is final judgment, the Plaintiff does not

meet the prerequisites for Rule 60 Relief. To illustrate, the Court in *Powderidge Unit Owners Assoc. v. Highland Properties, Ltd*, 196 W. Va. 692, 474 S.E.2d 872 (1996) noted that "in establishing the bounds of a Rule 60(b) motion, the weight of authority supports the view that Rule 60(b) motions which seek merely to relitigate legal issues heard at the underlying proceeding are without merit." *Id.* at 885, citing, *Johnson v. Nedeff*, 192 W. Va. 260, 452 S.E.2d 63 (1994). Also, the *Powderidge* Court noted that Rule 60(b) "does not afford relief from a final judgment of the circuit court dismissing a personal injury action with prejudice for failure to comply with the statutory limitations for instituting suit. Legal error, without more, can not justify granting the Rule 60(b) motion. *Id.* (internal citations omitted). Moreover, the Court in *Powderidge* recognized that Rule 60(b) "is designed to address mistakes attributable to special circumstances and not merely to erroneous applications of the law." *Id.* at 885 (internal citations omitted). The Rule 60 Motion is improper, when the Plaintiff's request, as in the instant case, is merely that the Court "change its mind." *Id.*

The *Powderidge* Court explained that a circuit court is not obligated to grant a Rule 60(b) Motion unless the moving party satisfies one of the criteria enumerated under it. In other words, a Rule 60 (b) Motion should not be entertained simply to give a party an opportunity to reargue facts and legal theories upon which a Court has already ruled. In addition, it is well established that a Rule 60 (b) Motion does not present a forum for consideration of evidence which was available but not offered at the original hearing. Rule 60 Motions are not to be used as a vehicle to introduce new evidence that could have been adduced during the pendency of the previous motion. The great weight of authority is that the failure to file documents in an original motion hearing does not convert these documents into "newly discovered evidence." *Id.* at 886, (internal citations omitted). See also, *Rose v. Thomas Memorial Hospital Foundation, Inc.*, 208 W. Va. 406, 541 S.E.2d (2001) wherein the Court held that a Rule 60 (b) motion was not a proper motion in which to challenge the Court's decision to deny the Plaintiff leave to file an amended complaint.

Finally, the *Powderidge* Court cautioned that "rarely is relief granted under Rule 60 because it provides a remedy that is extraordinary and is only invoked upon a showing of exceptional circumstances. Because of the judiciary's adherence to the finality doctrine, relief under this provision is not to be liberally granted." *Powderidge, Id.* at 884 (fn. 21); citing, *Cox v. State*, 194 W. Va. 2310, 460 S. E 2d 25 (1995).

Accordingly, the Plaintiff's Motion, which seeks only to relitigate the issues previously argued and decided by this Court on June 8, 2004, is not proper or within the scope of review contemplated by *Rule 60, West Virginia Rules of Civil Procedure*; thus, this Court should deny the same.

**II. In addition to failing to meet the procedural requirements for a Motion pursuant to Rule 60 of the West Virginia Rules of Civil Procedure, the Order denying the plaintiff leave to amend her complaint should be upheld on the legal merits of such Order.**

Even assuming the Plaintiff's *Motion for Rule 60 Relief* is procedurally proper, which the Defendants Nationwide and Owens strenuously oppose, this Court's ruling denying the Plaintiff's Motion for leave to amend her Complaint was correct. In this regard, the Plaintiff's proposed amendment to add a third party spoliation of evidence claim against Nationwide<sup>2</sup> is clearly a "separate and distinct" cause of action against Nationwide, which does not arise out of the same "conduct, transaction or occurrence" set forth in the initial Complaint. See, Rule 15(c), *West Virginia Rules of Civil Procedure*.

In this regard, a review of the initial Complaint clearly establishes that the Plaintiff alleged Nationwide, as her insurer, committed "bad faith insurance practices and unfair claims settlement practices" in the adjustment of the Plaintiff's uninsured motorist claim. See, Plaintiff's Complaint, Count Two. Indeed, numerous paragraphs contained within the Plaintiff's Complaint reference specifically Nationwide's and/or Owens' alleged wrongful conduct and/or failure to properly adjust the Plaintiff's underinsured claim.<sup>3</sup> See, ¶ 22, 23, 24, 27, 30, and 31 of Plaintiff's Complaint. However, conspicuously missing from the twenty-seven paragraphs of wrongdoing alleged against Nationwide and Owens, is any mention or reference whatsoever of Nationwide's alleged failure to store the subject vehicle. There is no dispute that at the time the initial Complaint was filed, the

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<sup>2</sup> In *Hannah v. Heater*, 213 W. Va. 704, 584 S.E.2d 560 (2003) the Court specifically determined that West Virginia does not recognize spoliation of evidence as a stand-alone tort when the spoliation is the result of the negligence of a party to the civil action. The third party stand-alone tort of spoliation of evidence is only available when the alleged spoliation is the result of the negligence of a third party, not involved in the original civil action. Thus, under this holding, in order to be a viable cause of action, the Plaintiff's spoliation of evidence claim must be premised upon the theory that it is a third-party spoliation claim. Thus, the Plaintiff's purported amendment may not state a viable cause of action because Nationwide is a party.

<sup>3</sup> The Plaintiff alleges in the Complaint that the underinsurance provisions of the policy were applicable; however, the claim should have been properly designated as an uninsured claim.

Plaintiff clearly knew that Nationwide had sold the vehicle for salvage.

This Court correctly ruled at the hearing on June 8, 2004, that the Plaintiff's proposed amendment did not relate back to the date of the original filing of the Complaint; consequently, the amendment was barred by the applicable statute of limitations. In finding the amendment did not relate back, the Court noted that the new cause of action desired to be alleged against Nationwide was separate and distinct and did not arise out of the same conduct, transaction, or occurrence as set forth in the original Complaint. The illustrate, in *Hannah v. Heater, Id.* the Court noted that in order to establish a spoliation of evidence claim against a third-party, the Plaintiff has the burden of proving the following elements:

- (1) the existence of a pending or potential civil action;
- (2) the alleged spoliator had actual knowledge of the pending or potential civil action;
- (3) a duty to preserve evidence arising from a contract, agreement, statute, administrative rule, voluntary assumption of the duty, or other special circumstances;
- (4) spoliation of the evidence;
- (5) the spoliated evidence was vital to a party's ability to prevail in the pending or potential civil action; and,
- (6) damages.

These elements enumerated by *Hannah v. Heater* are not similar in any respect to the elements necessary to prove the bad faith allegations alleged against Nationwide in the case. The bad faith allegations arise from those duties imposed upon Nationwide, as an insurer, under the *Unfair Trade Practices Act* codified in West Virginia Code §33-11-4 (9) and the West Virginia Insurance Commissioner's Regulations. Accordingly, because of the lack of similarity in the elements necessary to prove each claim and because the alleged wrongful conduct which forms the basis of each claim does not arise out of the same transaction or occurrence, the amendment does not relate back to the date of the original Complaint. As noted by Nationwide in its opposition to the Plaintiff's Motion to Amend Complaint previously filed herein, the transaction, conduct and occurrence complained of in the initial Complaint is the alleged delay by Nationwide in responding to and/or adjusting the Plaintiff's contractual claim under the uninsured provisions of the insurance policy. On the other hand, the conduct, transaction, or occurrence complained of by the Plaintiff in her proposed amended Complaint, relates to Nationwide's alleged failure to maintain the vehicle in which Nancy Vedder was driving at the time of the accident. Accordingly, the complained of

conduct is not the same conduct, transaction, or occurrence as contemplated by Rule 15 of the *West Virginia Rules of Civil Procedure*. Accordingly, the claim is barred by the statute of limitations.

Next, in another attempt to challenge the validity of the Court's decision regarding its denial of the Plaintiff's Motion to Amend Complaint, the Plaintiff argues that the spoliation is simply "part and parcel" of the bad faith allegations raised in her initial Complaint. Specifically, the Plaintiff attempts to state that the spoliation is simply another act of wrongful claims handling as alleged in her Complaint. Even if the Plaintiff is not attempting to add a separate cause of action for spoliation of evidence pursuant to *Hannah v. Heeter*, but rather simply alleging another act of wrongdoing under the *Unfair Trade Practices Act*, this proposed amendment is, likewise, untimely and barred by the applicable statute of limitations. In this regard, there is no question that the Plaintiff knew that Nationwide had not stored the subject vehicle at the time she filed her Complaint in this matter on or about March 27, 2003; however, this conduct was not identified in the Complaint.

In this regard, on April 19, 2001, the Plaintiff, by counsel, sent a letter to Nationwide requesting that the vehicle be stored until such time as she could have the same inspected by an expert. However, the Plaintiff did not make any arrangements for the continued storage of the vehicle, nor did she advise Nationwide when the inspection would take place. Also, after this April 19, 2001 letter was sent to Nationwide, the Plaintiff made no further requests to Nationwide to continue to store the subject vehicle nor did she take any steps to set up an inspection. Indeed, the Plaintiff's husband was fully aware in or about May 2001, the subject vehicle was declared to be a total loss and would be sold for salvage.

More importantly on January 17, 2002, after the Plaintiff asserted a claim against Toyota for a defective product, Plaintiff's counsel contacted Nationwide and requested information regarding the location of the subject vehicle. This request, made nine months after the initial letter was sent to Plaintiff's counsel to Nationwide, was done in direct response to a request by Toyota to inspect the subject vehicle. Thus, the Plaintiff clearly knew on January 17, 2002 that Toyota needed the vehicle to be inspected and that the vehicle inspection was critical to the viability of her products liability claim. In response to this request, in January, 2002, Nationwide provided the Plaintiff's counsel with the salvage documents showing the location of the vehicle. However, despite this knowledge, Plaintiff chose to ignore the same and took no action whatsoever to secure the salvaged vehicle or to inspect the vehicle at the salvage yard. Plaintiff attempts to justify her inaction by asserting that there has been no evidence that the vehicle was "spoiled" on January 17, 2002. However, this argument is immaterial to the statute of limitations inquiry. Once Nationwide advised

the Plaintiff of the location of the salvaged vehicle, the burden was on the Plaintiff to take whatever steps she deemed necessary to investigate her claim against Toyota and to preserve that evidence she deemed necessary for her cause of action against Toyota. Despite Plaintiff's argument, it was not Nationwide's duty at that point to store or examine the vehicle, but rather, Plaintiff had an absolute duty to investigate her cause of action and to maintain and acquire any evidence she deemed necessary to pursue her claim against Toyota. Accordingly, even if the Plaintiff asserts that the salvage of the vehicle was merely another act of bad faith, such new legal theory does not relate back to the original filing of the Complaint, because it is separate conduct and as such is barred by the statute of limitations. Also, the Court has discretion to deny any amendment which the Court finds has been unreasonably delayed by the Plaintiff.

Moreover, the Plaintiff's attempt to cover up her own dilatory conduct in failing to inspect and preserve the vehicle in January, 2002, by arguing that the discovery rule should operate to toll the statute of limitations is unpersuasive and misplaced. In this regard, the Court in *Cart v. Marcum*, 188 W. Va. 241, 423, S.E.2d 644 (1992) held that although West Virginia recognizes the existence of a "discovery rule", the Court does not eviscerate the statute of limitations; the statute of limitations will apply unless the handicaps to discovery at the time of the injury are great and are largely the product of the defendant's conduct in concealing either the tort or the wrongdoers identity. *Id* at 648. In addition, the *Cart* Court held that the "discovery rule" is to be applied with "great circumspection on a case-by-case basis only where there is a strong showing by the Plaintiff that he was prevented from knowing of the claim at the time of the injury. The general rule is that mere ignorance of the existence of a cause of action or of the identity of the wrongdoer does not prevent the running of the statute of limitations." *Id*.

In the instant case, it is undisputable that the Plaintiff knew on January 19, 2002 that Nationwide sold the subject vehicle for salvage and the location of the vehicle. *See, Fax Cover Sheet sent to Plaintiff's Counsel along with Salvage Documents, attached hereto as Exhibit A.* Also, in January, 2002 and thereafter, no one prevented the Plaintiff from investigating her own case and determining the condition of the evidence as it existed at that time. In this regard, it was the Plaintiff's burden to investigate and it was her choice not to look at the subject vehicle, although she clearly knew where it was located, and should of known of its importance to her claim against Toyota. The Plaintiff made a conscious choice to be dilatory in her inspection and preservation of the evidence needed for her case, and she alone, should suffer the consequences of such action.

Finally, the Plaintiff argues for the first time in this *Rule 60 Motion* that the statute of

limitations could not yet have expired due to the fact that the decision recognizing the third party cause of action for spoliation of evidence was not rendered until June 30, 2003. However, the *Carr* Court noted the "mere ignorance" of a cause of action does not toll the statute of limitations. Moreover, all the facts relating to this cause of action were clearly known to the Plaintiff when she filed her suit in March, 2003, but she chose not to make any claim against Nationwide on these facts. Also, Plaintiff alleges in her Motion that Nationwide's alleged failure to preserve the vehicle was merely another act of "wrongful claim handling"; thus, the decision in *Hannah v. Heeter*, is unimportant and should have had no bearing on Plaintiff's decision as to what causes of action and what facts to base her original action against Nationwide.

Furthermore, the West Virginia Supreme Court noted in *Consolidation Coal Co. v. Boston Old Colony Insurance Company*, 203, W. Va. 385, 508 S.E.2d 102 (1998) that even after a plaintiff becomes aware of a decision recognizing a cause of action which it seeks to assert, the plaintiff must be diligent in filing his claim. In this regard, the Court in *Consolidation Coal*, held that the Plaintiff unreasonably delayed the filing of a motion to amend its complaint to add a bad faith claim against Old Boston, when it waited approximately 16 months following the decision which allowed the bad faith actions to be joined in to the same Complaint as the underlying personal injury claim before it filed its Motion. The Court stated that this time period was unreasonable and the "liberality allowed in amendment of pleadings does not entitle a party to be dilatory in asserting claims and to neglect the case for a long period of time. *Id.* at 110.

In this instance, the Plaintiff waited ten months after the decision in *Hannah v Heeter* before she sought to amend her Complaint. This delay was unreasonable given the facts, as known to the plaintiff, as early as January, 2002.

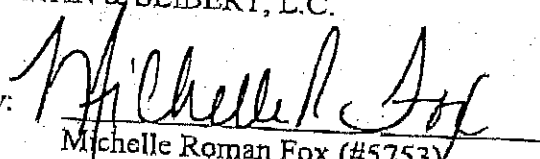
In conclusion, the Plaintiff's *Motion for Rule 60 Relief* is inappropriate and not in accordance with the scope and intent of Rule 60. The Plaintiff merely disagrees with the Court's ruling made at the hearing on June 8, 2004, and now seeks to challenge that ruling. A *Rule 60 Motion* is not the proper avenue to challenge with the Court's Order. In addition, even if considered proper, the Plaintiff's ruling made on June 8, 2004 was correct. The Plaintiff's purported amendment to the Complaint is time barred as the Plaintiff choose to sit on her rights and not to investigate her claim. The Court correctly ruled she not now can not come in and attempt to amend her Complaint and place the blame for her own lack of action on Nationwide.

Accordingly, the Defendants, Nationwide Mutual Insurance Company and Angela Owens, by counsel respectfully request that this Court deny the Plaintiff's *Motion for Rule 60 Relief*.

**RESPECTFULLY SUBMITTED:**  
**NATIONWIDEMUTUALINSURANCE COMPANY**  
**AND ANGELA OWENS**

MARTIN & SEIBERT, L.C.

By:



Michelle Roman Fox (#5753)  
300 Summers Street, Suite 610  
Charleston, WV 25301  
(304) 345-8020  
(304) 345-8024

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

NANCY VEDDER,

Plaintiff,

v.

CIVIL ACTION NO.: 03-C-534

ANGELA OWENS, individually and as a agent for NATIONWIDE MUTUAL INSURANCE COMPANY; NATIONWIDE MUTUAL INSURANCE COMPANY, a foreign corporation; TOYOTA MOTORS SALES, U.S.A., INC., a foreign corporation; TOYOTA MOTORS DISTRIBUTORS, INC., a foreign Corporation; and JOHN DOE,

Defendants.

CERTIFICATE OF SERVICE

I, Michelle Roman Fox, Counsel for the Defendant, Angela Owens, hereby certify that I served a true copy of the foregoing, DEFENDANTS, NATIONWIDE MUTUAL INSURANCE COMPANY AND ANGELA OWENS' OPPOSITION TO PLAINTIFFS MOTION FOR RULE 60 RELIEF upon the following individuals, by fascimile and by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 6<sup>th</sup> day of August, 2004.

Christopher J. Heavens, Esq.  
Heavens Law Offices  
P. O. Box 3711  
Charleston, WV 25301

Andrew B. Cooke, Esq.  
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*Michelle Roman Fox*

# MARTIN & SEIBERT, L.C.

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Michelle Roman Fox

August 6, 2004

Via facsimile & U. S. Mail  
Cathy Gatson, Clerk  
Kanawha County Circuit Court  
111 Court Street  
Charleston, WV 25301

RE: Vedder v. Angela Owens, Nationwide Mutual Insurance  
Company, Toyota and John Doe  
Civil Action No.: 03-C-534

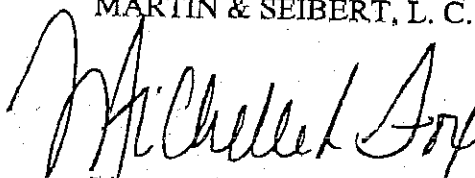
Dear Ms. Gatson:

Please find enclosed for filing in the captioned matter *Defendants Nationwide Mutual Insurance Company and Angela Owens' Opposition to Plaintiff's Motion for Rule 60 Relief.*

If you have any questions, please feel free to contact me.

Very truly yours,

MARTIN & SEIBERT, L. C.



BY: Michelle Roman Fox

MRF/dlw

Enclosure:

cc: Honorable Judge Paul Zakaib, Jr.  
Christopher J. Heavens, Esq.  
Andrew Cooke, Esq.  
Andrew Workman, Esq.