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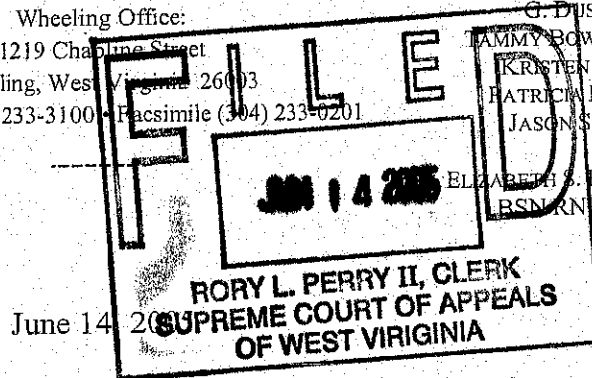
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Via Hand Delivery

The Honorable Justices of the
West Virginia Supreme Court of Appeals
ATTENTION: Rory L. Perry, Clerk
West Virginia Supreme Court of Appeals
State Capitol
Charleston, West Virginia 25305

Re: *Thrasher Engineering, Inc. v. The Honorable Fred L. Fox, II,
Judge of the Circuit Court of Marion County, West Virginia, and
Greater Marion Public Service District and Robert Brummage, et
al.; No. 051126*

Honorable Justices of the West Virginia Supreme Court of Appeals:

I, Charles R. Bailey, along with Heather D. Foster of Bailey & Wyant, P.L.L.C., am writing on behalf of the West Virginia Department of Environmental Protection, Public Service Commission, and Department of Natural Resources. This Honorable Court offered these state agencies the opportunity to respond at this informal stage of the proceedings to a Petition for a Rule to Show Cause and Writ of Prohibition filed by Thrasher Engineering, Inc. as against The Honorable Fred L. Fox, II, Judge of the Circuit Court of Marion County, West Virginia, and Greater Marion Public Service District and Robert Brummage, *et al.*

Thrasher petitions this Court to prohibit Judge Fox from enforcing his February 28, 2005 Order denying impleader of the state agencies in the underlying civil action. Thrasher filed its petition *three months* after the Order was entered and upon the eve of trial. The underlying action is a consolidated civil action as instituted by the Brummage class

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plaintiffs and Greater Marion Public Service District (Civil Action No. 03-C-221, consolidating 03-C-221 and 04-C-107). Plaintiffs brought suit against Thrasher Engineering because a vacuum sewage system constructed and installed in Marion County by Thrasher does not work properly. The class plaintiffs are members of communities affected by the malfunctioning vacuum sewer system, plaintiffs whose homes regularly flood with sewage because of the system.

The state agencies submit this informal response in opposition to the Petition for the Rule to Show Cause and Writ of Prohibition in that Judge Fox did not abuse his discretion in denying impleader of the agencies.

“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 often 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.

Syl. pt. 1, *Syl. pt. 1, Leung v. Sanders*, 213 W.Va. 569, 584 S.E.2d 203 (2003) (internal citations omitted).

The history of the case is such that Greater Marion Public Service District first filed suit against Thrasher Engineering, Inc. and others on September 9, 2003. Thrasher could have easily impleaded the agencies at that time. Thereafter, on April 9, 2004, the Brummage class plaintiffs filed a complaint against Thrasher and others. Thereafter, Thrasher served a third-party complaint upon these same state agencies on June 22, 2004. See Exhibit 1. The Court entered an Order on October 6, 2004 granting the state agencies' Motion to

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Dismiss and further granting the class Plaintiffs' Motion to Strike Thrasher's Third-Party Complaint which was based on Rule 14 of the West Virginia Rules of Civil Procedure.

The Court set forth in its October 6, 2004 Order that Thrasher failed inexplicably to provide notice to the state agencies of claims as against these agencies. *See* Exhibit 2 at p. 9, ¶ 8. However, the Court more pointedly found in its October 6, 2004 Order that impleading of agencies "unduly complicated this litigation by involving separate and distinct issues, created significant confusion, and unduly delayed its ultimate resolution." *See* Exhibit 2 at p. 9, ¶ 6. The Court went on to state that "the merits of the complaint against [the agencies] are, at best, questionable." *Id.*

Thereafter, Thrasher complied with the notice requirements and filed a Motion to File a Third-Party Complaint against the state agencies. *See* Exhibit 3. In response, the agencies relied upon West Virginia Rule of Civil Procedure 14 and the court's previous Order recognizing the delay and confusion impleader of the agencies would create in the action. *See* Exhibit 4. The agencies also set forth a factual basis of delay and prejudice for the Court's consideration concerning discovery conducted to that point. *See Bluefield Sash and Door Co. v. Corte Construction Co.*, 158 WV 802, 216 S.E.2d 216 (1975), *overruled on other grounds by Haynes v. City of Nitro*, 161 W.Va. 230, 240 S.E.2d 544 (1977). The parties briefed the matters extensively and argued the issues to the Court on February 22, 2005. *See* Exhibit 4; Exhibit 5.

At the time of the February 22, 2005 Hearing substantial discovery had taken place since the state agencies' dismissal on October 6, 2004. The state agencies argued that they would be unduly prejudiced by impleader in this matter in that depositions had been had of key factual witnesses without participation of the agencies, those being:

Donna Menefee
Renee Goines,
Richard Spots,
Teresa Efaw,
Kevin Johnson,
Steve Calvert,
Joe Hebda,
H. Wood Thrasher,
Kenneth P. Moran,
Curtis Poe,
Mote Fike,
Robert Brummage,
Deborah Spears,

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David Haun,
Clint Hawn,
Michael Taylor, and
David Simon

See Exhibit 4 at pp. 3-4.

Given the substantial discovery that had taken place in this matter, the state agencies argued that they would have had to have undertaken to depose all of those factual witnesses and incur substantial expense to do so, thereby causing delay in the litigation¹. See Exhibit 5 at p. 12; See Exhibit 4 at p. 3-4 . In addition to depositions that had been had, expert disclosures had been made evidencing further the prejudice the state would have incurred as the result of impleader if granted. See Exhibit 4 at p. 4. Much investigation had been undertaken and conducted by each party to this matter further prejudicing the state agencies. The litigation would certainly have been delayed by the state agencies need to “get up to speed” as explained to the trial court at hearing on the matter. See Exhibit 5 at 10-13.

At the February 22, 2005 Hearing the Court set forth its reasoning to deny impleader of the state agencies upon the record:

I agree that the addition of the three (3) state agencies as third-party defendants would unduly complicate the litigation at hand and would cause and even greater delay in this case. In addition, it has great potential to confuse the jury with additional and diverse issues, which could include but are not limited to State agency regulations, communications from State agencies, publication by these State agencies, certification procedures and State policies. The permission to interplead a third-party pursuant to Rule 14A of the West Virginia Rules of Civil Procedure (sic) is placed within the sound discretion of the trial court, and with that latitude I feel that the addition of these three (3) State agencies would significantly prejudice the certified class and the Greater Marion Public Service Commission.

...

¹At the February 22, 2005 Hearing the Court granted Plaintiffs' Motion for a definite trial date and set trial to commence on July 26, 2005.

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In addition to the delays and confusion which granting the third-party complaint would occasion, in addition the State agency has the potential to prejudice the State agencies themselves which would be drawn into an entity - - into the entirety of the litigation, much of which does not relate to the potential claims against them. This would result in the waste of State resources which is at the very heart of the doctrine of sovereign immunity.

Although I recognize that Thrasher has complied with notice provisions and that Thrasher has a right to bring this claim despite constitutional immunity pursuant to West Virginia - - pursuant to *Pittsburgh Elevator* series of case, I believe that the general principles of avoiding an undue complication of the issues in the case and undue delay and resolution of the case as it relates to the plaintiffs, and the waste of state resources by requiring the State institutions to participate far outweighs the defendants right to file a third-party complaint at this time.

See Exhibit 5 at pp. 19-21.

Thus, the Court found that it had the proper factual basis to deny Thrasher's motion to file a third-party complaint and therefore did so. Judge Fox's February 28, 2005 Order was not clearly erroneous as a matter of law for his ruling was within his sound discretion and he did not abuse such discretion. *See Exhibit 6.* Thrasher has consistently delayed the underlying litigation and its late filing of this Petition (May 23) continues this pattern in that the discovery deadline is set for June 14 and trial is set for July 25 to August 6. The Court issued its contested order on February 28, 2005. *See Exhibit 6.* Therefore, Thrasher waited almost a full three months prior to filing the subject petition. Additionally, Thrasher, as below, alleges only state agency regulatory issues that will only serve to confuse the issues to be presented to the jury. *See Exhibit 3, attachment.* In that same vein, the granting of the Rule to Show Cause will stay the proceedings and inevitably delay the litigation, of which the trial court took great care to avoid in issuing its order denying impleader below. *See Exhibit 5 at pp. 19-20.*

At this juncture, discovery in the case is substantially complete but for deposition of Thrasher's liability expert scheduled for June 14, 2005. Discovery deadline is June 15, 2005. The undersigned trial counsel has participated in no depositions to date although, to be fair, it is understood that internal counsel for the respective agencies attended

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depositions had of employees. Among the depositions had are the following, primarily employees of either DEP or PSC:

Mike Johnson
Larry Batante
Paul Frantz
Bob Koontz
Michael Zito
Brad Swagger
David Dove
James Corder
Mike Kitchnell

Additionally, there have been two (unsuccessful) mediations conducted, of which the agencies have not been a party.

This is a very simple issue brought to this Honorable Court. The lower Court had complete discretion to determine if these state agencies should be impleaded in this matter by Thrasher. Rule 14 provides for the Court to exercise its discretion if a third-party complaint unnecessarily confuses, delays or raises distinct and separate issues in the litigation. *See* Syl. pt. 3, *Bluefield Sash and Door Co., supra* (internal citations omitted); *see also* West Virginia Rule of Civil Procedure 14. As it had before, the Circuit Court assessed the claims of Thrasher set forth in its proposed third-party complaint and found that those claims confused the issues presented by Plaintiffs and would likely cause delay in the proceedings. The Court recognized that the complaints by Plaintiffs as against Thrasher is based in the design, implementation, and construction of the subject vacuum sewage system as undertaken by the named defendants in this matter. Thrasher based its proposed third-party complaint as against the three state agencies on their approval of and funding provided as regulatory agencies of the plans submitted them by Thrasher. The issues raised in the complaint(s) as against Thrasher are clearly distinct and separate issues from those raised in Thrasher's third-party complaint proposed to the lower Court.

Furthermore, although Thrasher relies heavily upon prejudice it claims will inure to it if it is not allowed to implead these state agencies, Rule 14 allows for the lower Court to use its discretion to strike a third-party complaint *only if it prejudices the original plaintiff or the third-party defendant*. These respondents have found *no caselaw* to support that prejudice to the original named defendant may be considered by the lower court when considering granting the filing of a third-party complaint. *But see Bluefield Sash and Door Co., supra*.

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Additionally, almost the entirety of Thrasher's argument put before this Court is based on WV DEP's enforcement, or lack thereof, of an Order it issued regarding illegal "Inflow and Infiltration." Thrasher ignores the evidence that has been adduced in discovery, and more specifically evidence that Thrasher's plans submitted for approval to the agencies did not have I/I included and that the homeowners were not responsible for hooking up I/I sources to the system. At deposition had on May 4, 2005, Paul Frantz, WV DEP, offered the following testimony:

Q. Now, back when you reviewed and approved the design and the plans for the Idamay system, those plans didn't include hooking up dozens of sources of storm water, did they?

A. No, sir.

Q. And in fact, if they had, you wouldn't have approved the plan, right?

A. Yes, I wouldn't have approved them.

Q. If Thrasher and Green River during the construction of this project hooked dozens of sources of storm water into the system, the system as built would not be consistent with the system as designed?

A. Well, that is true, if that did take place.

Q. Part of your job was to do a monthly inspection; is that right?

A. Yes, sir.

Q. How many times do you think you went there?

A. Thirty.

Q. So would it be, like, for 30 months then?

A. Yes, uh-huh.

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- Q. And so when you would do your inspections during the construction process, did you look at the work that had already been done, or did you watch the guys as they did the work, or both?
- A. Both.
- Q. Okay. And did you participate in any work where the contractor or engineer was attempting to separate storm water flows from sewer flows?
- A. I don't remember seeing any separation at the time I inspected.

See Exhibit 7 at pp. 31-32.

It is evident from this testimony that the Thrasher had the sole responsibility for hooking up sources flowing into the system. It is further evident that any illegal I/I was not approved by the DEP or other regulatory agency. Furthermore, as argued to the lower Court, these regulatory agencies merely undertake to determine if plans submitted them are in conformance with procedure and within state regulations. The regulatory agencies make no changes if everything is within regulation and a professional engineer has signed off on the plans.

Given the discussion herein, to allow Thrasher leave to proceed with the third-party complaint as against the state agencies would indeed, as recognized by the lower Court in both its October 6, 2004 Order and February 28 Order, unnecessarily confuse, delay, and complicate this litigation. The code of state rules should not be put on trial so that Thrasher may circumvent or confuse the litigation. Due to such, this Court should deny Thrasher a Rule to Show Cause and Writ of Prohibition.

Sincerely,



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Heather D. Foster, Esquire (WV Bar No. 8543)

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