

No. 051126

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

AT CHARLESTON

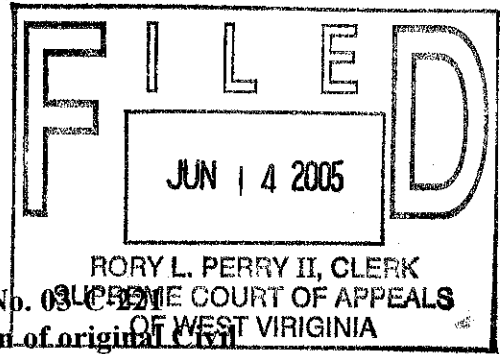
THRASHER ENGINEERING, INC.,

Petitioner and
Defendant Below,

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.

Civil Action No. 03-C-121
(Consolidation of original Civil
Action Nos. 03-C-221 and 04-C-107)
(Circuit Court of Marion
County, West Virginia)



Respondents.

**JOINT RESPONSE OF GREATER MARION PUBLIC SERVICE DISTRICT
AND THE CLASS PLAINTIFFS IN OPPOSITION TO THRASHER
ENGINEERING, INC.'S PETITION FOR WRIT OF PROHIBITION AND
AN ATTACHED APPENDIX OF EXHIBITS**

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I. Introduction

COME NOW Respondents Greater Marion Public Service District (hereinafter "the District") and the Class Plaintiffs, by counsel, and respectfully request that this Honorable Court deny Petitioner Thrasher Engineering, Inc.'s (hereinafter "Petitioner") Petition for Writ of Prohibition against the Honorable Judge Fred L. Fox, II, relating to enforcement of his Order entered on February 28, 2005 in the consolidated cases of Greater Marion Public Service District v. Thrasher Engineering, Inc., et al., Civil Action No. 03-C-221, and Robert Brummage, et al. v. Thrasher Engineering, Inc., et al., Civil Action No. 04-C-107, Circuit Court of Marion County, WV. The Order denied Thrasher's motion to implead the WV Department of Environmental

Protection, the WV Division of Natural Resources, and the WV Public Service Commission (collectively "the state agencies") (attached as Exhibit 1 to Petitioner Thrasher's Appendix of Exhibits). For reasons fully developed below, this Honorable Court should deny Petitioner the writ it seeks because the Circuit Court did not exceed its legitimate powers in holding that the granting of the motion would lead to undue complication and delay in the litigation and, further, denying the motion.

II. Statement of the Case

The District filed a lawsuit against defendants Thrasher Engineering, Inc., AIRVAC, Inc., and Green River Group, LLC, on September 9, 2003, designated as civil action number 03-C-221. See District's Compl. attached hereto as Exhibit 1. The Complaint alleged various claims against the defendants, including: Breach of contract against Thrasher Engineering, Inc., and Green River Group, LLC; breach of warranty against Green River Group, LLC; indemnification against Green River Group, LLC; breach of warranty of fitness for a particular purpose against AIRVAC, Inc.; and, breach of implied warranty of merchantability against AIRVAC, Inc. The District requested, among other things, repair of the Vacuum System, completion of the pertinent contracts, and related damages.

On April 16, 2004, the Class Plaintiffs filed a lawsuit against the Defendants, designated as civil action number 04-C-107. See Class Plaintiffs' Compl. attached hereto as Exhibit 2. The Class Plaintiffs alleged property and health damages arising from the buildup and spillage of raw sewage into the basements, lawns, streets, homes, and businesses of the residents of Idamay, Carolina, and Kellytown. The Complaint asserted claims for negligence against Thrasher and Green River; willful, wanton, or reckless conduct against Thrasher and Green River; breach of warranty, negligent manufacture, and strict liability against AIRVAC; breach of contract against

Thrasher and Green River; nuisance against Thrasher, Green River, and AIRVAC; and, punitive damages against Thrasher, Green River, and AIRVAC.

On August 13, 2004, the Court consolidated civil action numbers 03-C-221 and 04-C-107 for trial. See Agreed Order attached hereto as Exhibit 3. Thereafter, on August 31, 2004, the Class Plaintiffs moved the Court to certify their portion of the case as a class action. See Class Plaintiffs' Mot. attached hereto as Exhibit 4. By Opinion/Order entered on November 4, 2004, the Court granted the Class Plaintiffs' motion for class action certification. See Opinion/Order attached hereto as Exhibit 5. These cases are now set to begin trial on July 25, 2005, nearly two years after inception of the District's suit.

On June 4, 2004, Defendant Thrasher filed a third party complaint in order to implead three state agencies. See Thrasher Third-Party Compl. attached hereto as Exhibit 6. Thrasher's theory of liability as to these agencies was that, by simply adopting and enforcing rules, these state agencies are liable for contribution to Thrasher, and that Thrasher is entitled to indemnification to the extent of its liabilities to the District and to the Class Plaintiffs. By Order of October 8, 2004, the Circuit Court dismissed the state agencies, upon motion, because Thrasher failed to comply with notice requirements for filing a complaint against state agencies. See Order attached hereto as Exhibit 7.

On December 6, 2004, Thrasher served a motion seeking to implead the state agencies, this time after complying with applicable notice requirements. See Thrasher Mot. attached hereto as Exhibit 8. By Order of February 28, 2005, the Circuit Court again denied the motion, this time holding that allowing for impleader of these state agencies would cause confusion and complication of issues, in addition to causing unnecessary delay in this litigation, which has carried on for nearly two years. See Order attached hereto as Exhibit 9. The parties are now

before this Honorable Court on Thrasher's Petition for Writ of Prohibition to prohibit the Circuit Court of Marion County from enforcing its February 28th Order denying Thrasher's motion to implead the state agencies.

III. Standard for Issuing a Writ of Prohibition

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code, § 53-1-1 (2005). In cases such as the case at hand where petitioner complains that a lower court has exceeded its legitimate power, this Court has announced the following five factors to be considered in ruling on the petition:

- (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.

State ex rel. Hoover v. Berger, 199 W.Va. 12, 21; 483 S.E.2d 12, 21 (1996). This Court has also cautioned that "[I]n this type of case the issuance of the writ is discretionary with the appellate court. Prohibition will issue only in clear cases of abuse." Woodall v. Laurita, 156 W.Va. 707, 712; 195 S.E.2d 717, 720 (1973). Furthermore, this Court has reserved this extraordinary writ for cases where the lower court's "abuse of powers is so flagrant and violative of petitioner's rights as to make a remedy by appeal inadequate[.]" Id., at Syl. pt. 2.

IV. Arguments Supporting Denial of the Writ

A. Refusing to Allow Impleader Based on Confusion and Delay is not Abuse of Discretion

By order dated February 28, 2005, the Circuit Court of Marion County denied Thrasher's second attempt at a Rule 14(a) motion to implead the state agencies. (See Petitioner's Exhibit 1.) Previously, by an Order entered on October 8, 2004, the Circuit Court denied Thrasher's first motion to implead the state agencies. (Pet.'s Exhibit 10.) Within the October 8th Order, the Circuit Court held the following with respect to the impleading of the state agencies:

[Impleader] has unduly complicated this litigation by involving separate and distinct issues, created significant confusion, and unduly delayed its ultimate resolution. Further, the merits of the complaints against WVDNR, WVPS, and WVDEP are, at best, questionable.

(Pet.'s Ex. 10, p. 9 ¶ 6.) The Order continues, "This Court is constrained to add that Thrasher's allegations against [the State Agencies] are, at best, dubious and unpersuasive." (Id. at ¶ 10.)

The rule governing motions to implead under Rule 14(a) was announced by this court in Bluefield Sash & Door Co. v. Corte Constr. Co. as follows:

The provisions for impleader under Rule 14(a), West Virginia Rules of Civil Procedure...are within the sound discretion of the trial court and where the third party procedure may create confusion or cause complicated litigation involving separate and distinct issues the trial court does not abuse its discretion in refusing to allow impleader under third party practice.

Syl. Pt. 5, 158 W.Va. 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 Circuit Court was correct to conclude that including the state agencies in this litigation would only cause confusion, complication, and delay. First, it is highly likely that the

state agencies will raise a meritorious immunity defense based on Parkulo v. W.V. Bd. Of

Probation and Parole where this Court held:

Unless the applicable insurance policy otherwise expressly provides, a State agency or instrumentality, as an entity, is immune under common-law principles from tort liability in W.Va. Code § 29-12-5 actions for acts or omissions in the exercise of a legislative or judicial function and in the exercise of an administrative function involving the determination of fundamental governmental policy.

Syl. Pt. 6, 199 W.Va. 161, 176; 483 S.E.2d 507, 522 (1996). Thrasher's tenuous theory of state agency liability is simply that the agencies were negligent in the establishment and enforcement of rules and regulations regarding sewer systems. (Pet.'s Memo. Of Law In Support of Writ of Prohibition at p. 8.) Allowing Thrasher to implead the state agencies will likely result in protracted argument over whether the Parkulo rule grants the state agencies immunity for their rule-making functions, thereby confusing and complicating issues and further delaying this litigation.

Second, trial in this case is set for July 25, 2005. Granting Thrasher's writ at this point in the litigation will produce added burden on the District and the Class Plaintiffs by adding three additional adverse parties, as to all of which additional discovery would have to be completed. Petitioner argues that since Petitioner's defenses are similar to issues raised by Petitioner's third-party complaint and that some of the witnesses relating to those issues have already been deposed, there will be no confusion, complication, or delay. However, this argument fails to acknowledge that adding parties could potentially alter the parties' strategies and approaches to this litigation, including those of the District and the Class Plaintiffs.

Furthermore, the Circuit Court has already noted that it finds Thrasher's third-party claims against the state agencies to be "at best dubious and unpersuasive." (October 8th Order, Pet.'s Ex. 10, ¶ 10.) Therefore, Thrasher's benefit gained by impleading the state agencies is,

according to Judge Fox, tenuous. In any evaluation of the Circuit Court's ruling that granting Thrasher's Rule 14 motion would cause confusion and delay, it is difficult to recognize how the Circuit Court committed a flagrant abuse of discretion or was clearly erroneous as a matter of law

B. Thrasher Has Been Dilatory and Lacked Diligence in Pursuing Its Third Party Claim

Petitioner's writ should also be denied because Petitioner delayed 15 months before filing an appropriate motion to implead the state agencies. "Normally, a 'party must not be dilatory in proceeding ... after a basis for impleader becomes clear.' Ideally, of course, motions for leave to implead a third party under Rule 14 should be made promptly or 'as soon as possible after the filings of the pleadings in the suit.'" State ex rel. Leung v. Sanders, 213 W.Va. 569, 575; 584 S.E.2d 203, 209 (2003) (citations omitted). More recently, in State ex rel. Vedder v. Zakib, this Court held that due diligence requires a claimant to pursue a claim promptly, taking into account when the claimant became aware of the possible claim. ___ S.E.2d ___ (W.Va. 2005) (Jan. 2005 Term No. 32266). In Vedder, this Court found that a delay of ten months was sufficient dilatoriness to justify a denial of a motion to amend a pleading. Id.

In the present case, the District's complaint against Thrasher was filed on September 9, 2003. From that point or some time close to it, Petitioner was aware or should have been aware of possible third-party claims by Petitioner against the state agencies. However, petitioner waited 10 months, until June 8, 2004, before Petitioner filed the first third-party complaint, which failed to meet preliminary notice requirements. Then, after Petitioner's first motion to implead was dismissed without prejudice by Order entered on October 8, 2004, Petitioner waited *two more months* before filing a motion to implead that complied with notice requirements. The second

motion was filed on December 6, 2004, nearly 15 months since the commencement of this action.

Petitioner notes that "some delay is inevitable" and "there is usually nothing talismanic about delay alone." Leung, 584 S.E.2d at 209. However, 10-15 months is not "some delay". Additionally, a party who has delayed must offer some explanation for the delay so the Court can "examine if the reason for the delay is excusable." Id. In the present case, Petitioner has failed to allege any excusable reason for the 10-15 month delay. Furthermore, in the Leung case relied upon by Petitioner, this Court noted that "[I]f this case would not have otherwise have had to be continued, we would be hard pressed to find Dr. Leung's impleader motion timely when it was served only two months before trial[.]" Id., at 210, n.8.

V. Conclusion

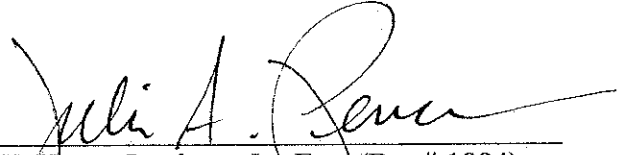
The Circuit Court of Marion County has twice denied Petitioner's motion to implead the State Agencies, stating that allowing the State Agencies to be drawn into the case would cause confusion, complication, and delay. Based on the fact that the parties are likely to encounter an immunity defense offered by the State Agencies and the fact that adding parties at this stage in the litigation would create new issues for every party involved, the Circuit Court's ruling was neither a flagrant abuse of power nor clearly erroneous as a matter of law. Furthermore, Petitioner's unexplained 10-15 month delay in pursuing a third-party claim against the State Agencies is dilatory and lacks diligence. As such, no grounds exist for the granting of such a writ.

WHEREFORE, the District and the Class Plaintiffs respectfully request that this Honorable Court deny Thrasher Engineering, Inc.'s Petition for a Writ of Prohibition.

Respectfully submitted by,

GREATER MARION PSD,
CLASS PLAINTIFFS,

By counsel,



W. Henry Jernigan, Jr., Esq. (Bar # 1884)

Julie A. Pence, Esq. (Bar # 9096)

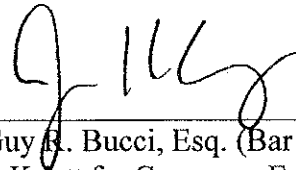
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CERTIFICATE OF SERVICE

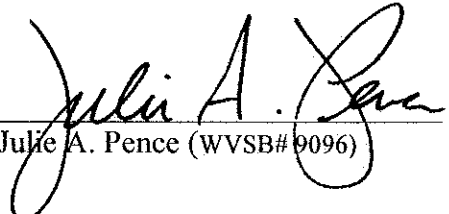
I, Julie A. Pence, counsel for Greater Marion Public Service District, do hereby certify that on the 14th day of June 2005, a true and exact copy of the "**Joint Motion to Exceed Page Limitation**" and "**Joint Response of Greater Marion Public Service District and the Class Plaintiffs in Opposition to Thrasher Engineering, Inc.'s Petition for Writ of Prohibition and an Attached Appendix of Exhibits**" was served upon the following via U.S. mail, postage prepaid:

The Honorable Judge Fred L. Fox, II
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Appendix of Exhibits

- Exhibit 1 Greater Marion Public Service District Complaint
- Exhibit 2 Robert Brummage, et al., Complaint
- Exhibit 3 August 13, 2004 Agreed Order Consolidating Civil Actions
- Exhibit 4 Plaintiffs' Motion for Class Action Certification
- Exhibit 5 November 4, 2004 Opinion/Order Granting Class Certification
- Exhibit 6 Thrasher Engineering, Inc.'s Third-Party Complaint
- Exhibit 7 October 8, 2004 Opinion/Order
- Exhibit 8 Thrasher Engineering, Inc.'s Motion for Leave
- Exhibit 9 February 28, 2005 Order