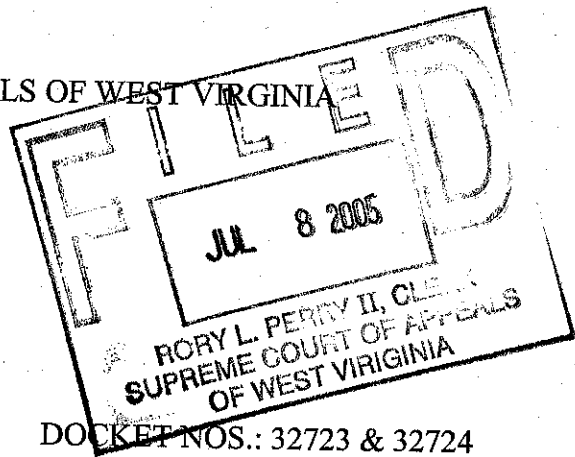


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



THOMAS J. ALUISE and  
JACQUELINE B. ALUISE,

Appellants,

v.

NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY,  
BETSY A. ROSS and  
TERRY RIDENOUR

Appellees.

**APPELLANTS' BRIEF**

**APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY**  
**C.A. NO. 03-C-1758**

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**I. THE KIND OF PROCEEDING AND NATURE  
OF THE RULING IN THE LOWER TRIBUNAL**

Docket No. 32723 is an appeal from the Circuit Court's Order entered July 22, 2004, granting summary judgment to defendant, Nationwide, and denying Plaintiffs'<sup>1</sup> several motions for partial summary judgment, all relating to plaintiffs' Count I - Breach of Contract. Docket No. 32724 is an appeal from the Circuit Court's Order entered December 20, 2004, granting summary judgment to Nationwide and the individual defendants on all remaining counts and denying plaintiffs' several additional motions for partial summary judgment. Separate petitions for appeal to this Court have both been granted and consolidated by Order entered June 7, 2005. Your review as to the granting or denying of the respective motions for summary judgment or partial summary judgment is *de novo*. *Jackson v. State Farm Mutual Automobile Insurance Co.*, 213 W.Va. 634, 600 S.E.2d 346 (2004) citing Syl.Pt. 1, *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994). Because such motions involved either the determination of insurance coverage, or interpretation of a statute, each of which is a question of law, your review is *de novo* for those reasons as well. Syl. Pt. 1, *Crystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995). Review of specific findings or conclusions, however, requires review application of a clearly erroneous standard. *Walker v. West Virginia Ethics Comm'n*, 302 W.Va. 108, 492 S.E.2d 167 (1977).

Docket No. 32723 also involves a question involving judicial procedure. Although this Court has not established a standard of review for this exact type of appellate issue, it is likewise believed to be *de novo* because it primarily involves questions of law in interpreting the West Virginia Constitution, statutes or rules. See, *Phillip Leone M. v. Bd. of Educ.*, 199 W.Va. 400, 404,

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<sup>1</sup>The terms "plaintiffs" and "Appellants" are alternately used throughout this petition depending upon context. Both are intended to refer to Thomas J. and Jacqueline B. Aluise.

484 S.E.2d 909 913 (1996), modified on other grounds by *Cathe A, v. Doddridge County Bd. of Educ*, 200 W.Va. 521, 490 S.E.2d 340 (1997). To the extent that this Court might go beyond the mere procedural issue and address the substantive objections raised below, such review would be under an abuse of discretion standard. *Drake v. State Farm Mutual Automobile Insurance Co.*, 216 W.Va. 574, 608 S.E.2d 191 (Nov. 12, 2004).

## II. STATEMENT OF FACTS

This is the sequel to a prior case arising out of the sale of a house.<sup>2</sup> There, plaintiffs complained of their post purchase discovery of prior damage which the sellers, or one of them, negligently attempted to repair and further negligently failed to disclose.

The sellers were insured by Nationwide but Nationwide denied both defense and indemnity.<sup>3</sup> Left to defend themselves, the sellers ultimately confessed judgment for the cost of repairs (\$34,000), made a personal payment of \$4,000 and assigned any claim they may have had against Nationwide, et al., to plaintiffs in exchange for a covenant not to execute against their personal assets<sup>4</sup>. On July 18, 2003, plaintiffs filed C.A. No.: 03-C-1758 in the Circuit Court of Kanawha County asserting three counts against Nationwide: Count I - Breach of Contract, Count II - First Party Unfair Claim Settlement Practices, and Count III - Third Party Unfair Claim Settlement Practices. Most issues raised in Docket No. 32723 arise from Nationwide's motion for summary judgment and plaintiffs' first, second, third, fourth and fifth cross motions for partial summary judgment with respect to Count I and various discovery orders related thereto.

On November 21, 2003, this Court decided *Taylor v. Nationwide Mutual Insurance Company*, 214 W.Va. 324, 589 S.E.2d 55 (2003), wherein it was determined that a cause of action also exists to hold a claims adjuster employed by an insurance company personally liable for

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<sup>2</sup>C.A. No.: 02-C-3223 in the Circuit Court of Kanawha County. A copy of that complaint was attached to the complaint in C.A. 03-C-1758 (Record at 1-11) as Exhibit A and an amended version was attached as Exhibit B.

<sup>3</sup>The policy language and putative basis for the denial will be discussed in IV.B. and C., *infra*.

<sup>4</sup>Assignment and Covenant each attached to the complaint in C.A. 03-C-1758 (Record at 1-11) as Exhibits I and J, respectively.

violations of the West Virginia Unfair Trade Practices Act. *Id.* at Syl.Pt. 1. Bearing in mind that this Court had previously held that a claim for violation of the Unfair Trade Practices Act was governed by a one-year statute of limitations, *Wilt v. State Automobile Mutual Insurance Company*, 203 W.Va. 165, 506 S.E.2d 608 (1998), and further recognizing that the one-year anniversary of the denial letters would be approaching in January, 2004, plaintiffs sought an agreement to extend any potential expiration of the statute of limitations pending the outcome of the existing case and the summary judgment motions already scheduled to be filed thereunder. Nationwide refused. Plaintiffs then found themselves on the horns of a dilemma. Wishing to protect all causes of action, but not wanting to delay motions with respect to the allegations already pled, plaintiffs opted to file a second suit in Cabell County joining, in addition to Nationwide, both Betsy Ross, its adjustor, and Terry Ridenour<sup>5</sup>, whose title was Claims Legal Counsel but who, as a practical matter, also served as an adjustor<sup>6</sup>. The Cabell action also added additional contract counts with respect to policies written in Indiana and Virginia where the sellers resided, and were believed to be insured, by the time of the closing on the Charleston house and at the time of discovery and claim, respectively.

Meanwhile, back in the Kanawha County suit, under the initial scheduling order, summary judgment motions on the three original counts in that action were due on March 31, 2004. Accordingly, in addition to plaintiffs' first, second, third, fourth and fifth motions regarding the

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<sup>5</sup>Ridenour worked in the Barboursville, Cabell County, claims office of Nationwide.

<sup>6</sup>See fn. 6, *Barefeld v. DPIC Companies, Inc.*, 215 W.Va. 544, 600 S.E.2d 256 (2004) (holding open the question of whether an attorney hired to investigate or give advice upon the validity of a claim in the same fashion as a company claims representative might also be personally liable) and *State of West Virginia ex. rel. United States Fidelity and Guaranty Company v. Canady*, 194 W.Va. 431, 460 S.E.2d 677 at 690 (1995) (refusing to adopt a per se rule making ordinary investigative employees, who hold licenses to practice law, attorneys for purposes of attorney/client privilege)

contractual issues set forth in Count I, plaintiffs also timely filed their sixth, seventh, eighth and ninth motions for partial summary judgment with respect to the extracontractual allegations set forth in Counts II and III in Kanawha County. Thereafter, Nationwide moved to consolidate the new Cabell action with the existing Kanawha action, in Kanawha County, but also moved to bifurcate the contractual from the extracontractual issues. Nationwide further moved to stay all discovery with respect to the extracontractual issues. Each of Nationwide's motions were granted.<sup>7</sup> The Circuit Court of Kanawha County then amended the Scheduling Order clarifying that it would proceed first to hear the various cross motions for summary judgment with respect to Count I, breach of contract (WV policy), at a hearing to be held June 16, 2004<sup>8</sup>. That hearing was then held, summary judgment granted to Nationwide and denied to plaintiffs<sup>9</sup>, and each of those rulings are the subject of Docket No. 32723.

Subsequently, Nationwide filed a motion for summary judgment "on all remaining counts", i.e., in both the Kanawha and Cabell actions, then consolidated. Plaintiffs responded noting, among other things, the issue of the stay which had prohibited any discovery on the newly added counts, but Plaintiffs also filed a contingent notice (to the extent the Court was going to consider the stay lifted and decide Nationwide's motion on all remaining counts) with respect to plaintiffs' previously served (prior to the filing of the Cabell suit, consolidation or stay) sixth, seventh, eighth and ninth

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<sup>7</sup>Order entered May 13, 2004 (Record at 210-211). Although substantially complicating the procedural aspects of the case, the Court was within its discretion and no appeal is sought as to that Order.

<sup>8</sup>Order entered May 26, 2004. Again, the Circuit Court was within its discretion and no appeal is sought.

<sup>9</sup>Order entered July 22, 2004 (Record at 246-250).

motions for partial summary judgment with respect to original Counts II and III in the Kanawha action<sup>10</sup>. Without addressing the stay, and notwithstanding that no discovery had been served on the new Cabell defendants or allegations, or that the Cabell complaint had never even been seen by the Kanawha judge<sup>11</sup>, Nationwide's motion was granted<sup>12</sup>. Moreover, even though the newly added individual defendants had not joined in Nationwide's motion, the Order stated:

...the Court hereby **GRANTS** summary judgement in favor of the defendants on all remaining counts, **DENIES** Plaintiffs' outstanding motions for Partial Summary Judgment and **ORDERS** this matter to be and the same is hereby **DISMISSED** with prejudice. (One letter underscoring added)

Hence this Appeal.

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<sup>10</sup>Plaintiffs' Response to Nationwide's Motion for Summary Judgment on All Remaining Counts (Record at 259-263) stated:

Nationwide has also vacillated on whether your Honor's ruling on Count I implicitly lifted the stay as to all others. Intuitively, it did, but when Plaintiffs suggested that fact in support of a final exchange of information critical to evaluation prior to mediation, Nationwide responded: "Further, while this matter is under bifurcation and stay, there is absolutely nothing to be gained by engaging in discovery disputes arising from claims handling". Conversely, now it asks the Court to summarily rule on those same counts without first lifting the stay (it requested and) which precludes doing so. To the extent that the Court does so, plaintiffs ask that the Court also take up their Sixth, Seventh, Eighth and Ninth Motions for Partial Summary Judgment. Presumably, Plaintiffs' Seventh Motion will necessarily have to be formally denied, without waiving Plaintiff's objection, based upon the Court's ruling with regard to the West Virginia contract.

<sup>11</sup>Although in preparing the Order defense counsel gratuitously included the heading of each count from the Cabell complaint (Record at 271-272), no copy was attached to Nationwide's motion and the Kanawha docket sheet still does not reflect any transfer of the Cabell file.

<sup>12</sup>Although Appellants would like to cite you to a transcript, the Circuit Judge had her secretary call and cancel the hearing, announce her ruling, and direct that defense counsel prepare an Order.

**III. ASSIGNMENTS OF ERROR AND THE  
MANNER IN WHICH THEY WERE HANDLED BELOW**

July 22, 2004 Order

- A. THE CIRCUIT COURT ERRED IN GRANTING NATIONWIDE'S MOTION FOR SUMMARY JUDGMENT:
1. THE MOTION WAS PROCEDURALLY FLAWED IN THAT IT RELIED EXCLUSIVELY ON MATTERS OUTSIDE THE PARAMETERS OF RULE 56 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.
  2. THE ORDER IGNORED THIS COURT'S CLEAR PRONOUNCEMENTS THAT THE DUTY TO DEFEND IS BROADER THAN THE DUTY TO PAY.
  3. THERE REMAINED UNANSWERED QUESTIONS OF FACT.
- B. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT (COUNT I - DUTY TO DEFEND) BECAUSE THE DUTY TO DEFEND WAS NOT SUBJECT TO THE LIMITATION OF AN "OCCURRENCE".
- C. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT (COUNT I - DUTY TO DEFEND) BECAUSE NATIONWIDE DID NOT MEET ITS BURDEN OF ESTABLISHING THE FACTS NECESSARY TO DENY COVERAGE FOR LACK OF AN "OCCURRENCE".
- D. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' THIRD MOTION FOR PARTIAL SUMMARY JUDGMENT (COUNT I - BREACH OF CONTRACT) UNDER THE INNOCENT SPOUSE DOCTRINE.
- E. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' FOURTH MOTION FOR PARTIAL SUMMARY JUDGMENT (COUNT I - BREACH OF CONTRACT) UNDER THE DOCTRINE OF WAIVER).
- F. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' FIFTH MOTION FOR PARTIAL SUMMARY JUDGMENT (COUNT I - BREACH OF CONTRACT) UNDER *HAYSEEDS*.

February 25, 2004 Order

- G. THE CIRCUIT COURT ERRED IN ITS WHOLESALE RELIANCE ON THE DISCOVERY COMMISSIONER AND REFUSAL TO ALLOW A HEARING OR A RECORD TO BE MADE FOR THIS COURT'S REVIEW

December 20, 2004 Order

- H. THE CIRCUIT COURT ERRED IN RELYING ON NATIONWIDE'S MISINTERPRETATION OF WEST VIRGINIA LAW AND IN GRANTING ITS MOTION FOR SUMMARY JUDGMENT ON ALL REMAINING COUNTS.
- I. THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER, MAKE SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND IN DENYING PLAINTIFFS' SIXTH, SEVENTH, EIGHTH AND NINTH MOTIONS FOR PARTIAL SUMMARY JUDGMENT.

**IV. POINTS AND AUTHORITIES,**  
**DISCUSSION OF LAW AND RELIEF SOUGHT**

**A. THE CIRCUIT COURT ERRED IN GRANTING NATIONWIDE'S MOTION FOR SUMMARY JUDGMENT:**

- 1. THE MOTION WAS PROCEDURALLY FLAWED IN THAT IT RELIED EXCLUSIVELY ON MATTERS OUTSIDE THE PARAMETERS OF RULE 56 OF THE WEST VIRGINIA RULES OF CIVIL PROCEDURE.**

Nationwide moved for summary judgment pursuant to Rule 56 of the West Virginia Rules of Civil Procedure. Rule 56(c) states, in pertinent part:

The judgment sought shall be rendered forthwith if the **pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits** if any, show that there is no genuine issue of any material fact that the moving party is entitled to judgment as a matter of law (emphasis added).

The motion did not attach any affidavits nor did it cite any deposition testimony, answers to interrogatories or admissions by plaintiffs. Instead, it relied primarily upon an extraneous Disclosure Statement<sup>13</sup> from the preceding case against Nationwide's insureds and which, among other

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<sup>13</sup>Exhibit A attached to Nationwide's Motion for Summary Judgment filed on December 24, 2003 (Record at 53-86). The pertinent questions and answers were:

- k. Are there any structural problems with the improvements?  
 YES  NO  DO NOT KNOW
- l. Have substantial additions or alterations been made without a required building permit?  
 YES  NO  DO NOT KNOW
- m. Are there moisture and/or water problems in basement or crawl space?  
 YES  NO  DO NOT KNOW

things, constituted hearsay<sup>14</sup> and was outside the scope of Rule 56 of the W.Va.R.Civ.P.<sup>15</sup>

More importantly, even the insurance policy<sup>16</sup> was contested<sup>17</sup> and no affidavit was ever offered to substantiate Nationwide's position that the endorsement relied upon was applicable to the subject policy.

For each of the foregoing reasons Nationwide's motion should have been denied on procedural grounds alone.

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<sup>14</sup>Plaintiffs admitted that the copy of the Disclosure Statement submitted by Nationwide was a true copy of the version prepared in connection with the sale. Plaintiffs denied requests for admissions regarding the signatures thereto as they were not present and did not have personal knowledge regarding the same. Although Nationwide obtained an order compelling the sellers' depositions, after speaking with them by telephone, defense counsel decided to cancel the same, and, accordingly, there is no testimony in the record from the sellers.

<sup>15</sup>Even if procedurally proper, the Disclosure Statement did not provide a factual basis for summary judgment. While Nationwide contended that the "NO" answers contained therein demonstrated some intent on the part of the sellers, in actuality the Disclosure stated that the answers were based on the sellers' then "CURRENT ACTUAL KNOWLEDGE" (emphasis in original) and, therefore, signature thereto was not necessarily false. As plaintiffs noted at deposition, the sellers may well have believed that their repairs had been successful as of that date. (Deposition transcript of Jacqueline B. Aluise at pages 44-45. This transcript was apparently forwarded to this Court by the Circuit Clerk under separate cover and appears at the back of the Court Record as repeat 2.)

<sup>16</sup>Exhibit D attached to Nationwide's Motion for Summary Judgment filed December 24, 2003 (Record at 53-86).

<sup>17</sup>Footnote 4 of Plaintiffs' Complaint in C.A. No. 03-C-1753 (Record at 1-11) stated:

Defendant's denials both cited "Endorsement 3199 but it produced Endorsement 3199-92. The 1-21-93 to 1-21-94 declarations reflects 3199-92 as endorsed thereto. The 1-21-94 to 1-21-95 declarations reflects 3199 as endorsed thereto (subject sale took place October 17, 1994). There is no record of approval of either endorsement still on file with the West Virginia Insurance Commissioner's Office although 3199-D was approved effective November 1, 2002, and it is said to replace 3199-C. Plaintiffs have requested documentation to clarify this issue pre-suit but the same has been refused.

**2. THE MOTION IGNORED THIS COURT'S CLEAR PRONOUNCEMENTS THAT THE DUTY TO DEFEND IS BROADER THAN THE DUTY TO PAY.**

Substantively, the error was even greater in that it ignored this Court's clear pronouncements that the duty to defend is broader than the duty to pay. As you have previously stated: [i]ncluded in the consideration of whether [an] insurer has a duty to defend is whether the allegations in the complaint ... are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance polic[y]. Syl. Pt. 3, in part, *Bruceton Bank v. United State Fid. & Guar. Ins. Co.*, 199 W.Va. 548, 486 S.E. 2d 19 (1997). However, there is no requirement that the facts alleged in the Complaint specifically and unequivocally make out a claim within the coverage. *Aetna Casualty & Surety Co. v. Pitrolo*, 176 W.Va. 190, 194, 342 S.E.2d 156, 160 (1986). If part of the claims against the insured fall within the coverage and part do not, the insurer must defend all the claims, although it might eventually be required to pay only some of the claims. *Horace Mann Insurance Co. v. Leeber*, 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988).

Perhaps the lower Court's Order said as little as it did<sup>18</sup> because Nationwide's motion glossed over virtually all West Virginia law. Except with respect to passing reference to the standard for summary judgment, and the propositions that interpretation of an insurance contract is for the judge and, if unambiguous, the contract terms should be applied and not construed, Nationwide spent thirty out of thirty-two pages in its Motion and Memorandum relying exclusively on authorities from other

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<sup>18</sup>The Order contained only two sentences which could be construed as conclusions of law (Record at 246-250). They were (in reverse order for clarity): "[t]here is no ambiguity in the term 'accident' as used within the Nationwide policy" and "[i]f the causes of action alleged in Plaintiffs' Complaint are entirely foreign to the risks covered by the insurance policy, then the insurance company is relieved of its duty under the policy". Appellants do not disagree with either, as stated, but appeal, instead, because those conclusions were not dispositive of the issues pending.

jurisdictions and overlooking our own. Specifically not cited was this Court's holding that the definition of an "occurrence", meaning an accident, is tantamount to an intentional exclusion, requiring proof that the policyholder (1) committed an intentional act and (2) expected or intended the specific resulting damage. *West Virginia Fire & Casualty Company v. Stanley*, 216 W.Va. 40, 602 S.E.2d 483 (2004)<sup>19</sup> (emphasis added), citing *Farmers & Mechanics Mutual Insurance Co. v. Cook*, 210 W.Va. 394, 557 S.E.2d 801 (2001). Even the Disclosure Statement provided no evidence of intent to cause damage and that alone would have necessitated a defense in the instant action at least until that determination was obtained.

The allegations in the underlying tort case clearly allege property damage as a result of negligent repair and negligent failure to disclose.<sup>20</sup> Those allegations, if proven, are covered.<sup>21</sup> The fact that Nationwide believed that the failure to disclose was intentional does not make it so. Even Nationwide does not pretend that there is any evidence that the ultimate failure of the repairs was intentional, and certainly not that damages to plaintiffs were intentional, nor did it ever make any distinction between the state of mind of Mr. Forssenius and Mrs. Forssenius. Without testimony, we don't know which of them made the repairs or their thought processes regarding the same. Thus, under the foregoing West Virginia authorities, there was clearly a duty to defend, at least until those questions were resolved.

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<sup>19</sup>Curiously, when defense counsel prepared the Order at the Court's request, he did cite *Stanley*, albeit for another proposition (Record at 248).

<sup>20</sup>See Count I of the tort complaint, attached as Exhibit A to the Complaint in C.A. 03-C-1753 (Record at 1-11) and the amended version attached as Exhibit B.

<sup>21</sup>Policy language discussed *infra*.

**3. THERE REMAINED UNANSWERED QUESTIONS OF FACT.**

The notion that an insurer has to defend at least until resolution of the facts which determine indemnity should not be foreign to Nationwide. It has been told that before. See, this Court's Per Curiam opinion in *Patton v. Nationwide Mutual Fire Insurance Company*, 191 W.Va. 563, 447 S.E.2d 255 (1994). In that case Nationwide asserted that a fist fight was intentional and therefore it had no duty to defend under a homeowners policy. On the contrary, this Court held that, because the homeowner claimed self defense, there remained a question of fact and Nationwide had to defend.

The following deposition colloquy with Adjustor Ross, and submitted to the Circuit Judge, likewise demonstrates a question of fact necessitating defense in this case:

Q Is an act either intentional or accidental or are there other possibilities besides those two?

A I guess it would be those two.

Q Did you ask Mr. Forssenius whether what he did was intentional or accidental?

A I don't recall coming out and saying those words, was it intentional or accidental.

Q Why wouldn't you do that? We've talked about your concern about coverage, the definition of occurrence, and within the definition of occurrence[] is this concept of an accident. And so you've told us that that's sort of what you were looking at. And that you felt that the failure to disclose was not accidental. Why wouldn't you ask your insured that question?

A Why wouldn't I ask him if it was accidental or intentional?

Q Yes.

A I don't know. He, you know, I would – I don't know.

Q How about Mrs. Forssenius, you talked to her a couple times, did you ask her?

A The -- I mean, the only thing she told me was they made repairs to the basement wall. They did not disclose it when they sold the home. I don't know what their reasoning was, why they did or didn't disclose it.

Q Did you ask her if it was accidental or intentional?

A No.

Q There were other allegations besides failure to disclose, weren't there?

A I -- I don't recall.

Q Surely you're not testifying that's the only allegation you looked at, are you?

MR. BUCK: Object to the question. That mis-characterizes her testimony. Her testimony is she doesn't recall.

THE WITNESS: We -- I investigated the claim by talking to them. They did not disclose it. Furthermore, had they turned in a claim when they discovered there was cracks in the foundation wall, there would not have been any coverage at that time.

BY MR. KING:

Q Do you remember allegations like negligent repair?

A That may be in it. I don't recall specifics as far as how everything was worded.

Q Did you ask anybody if that was intentional or accidental?

A No, I just know she told me they did the repairs. And I don't know "they" meaning that she helped Mr. Forssenius. I know she said Mr. Forssenius made the repairs and I don't know if she assisted or not.

Q Did you have any other evidence? We know you didn't ask the insureds. Did you have any other evidence as to whether it was accidental or intentional?

MR. BUCK: I'm going to object. I think that's a vague question, given the line of questions of various acts. Answer the question if you can.

BY MR. KING:

Q Okay. Fair enough. I'll ask you about the two that we've talked about. Did you have any evidence that the failure to disclose was accidental or intentional?

A Again, I don't know why they didn't disclose it. The --

Q So your answer is yes, you had evidence or, no, you didn't? I take it, no, you didn't, since you said you didn't know?

A Right.

Q All right. How about the negligent repairs, did you have any evidence as to whether that was accidental or intentional?

A No.

Q So what did you go by when you made this decision, just plaintiff's complaint?

A I went by my investigation and, again, I don't know why Mr. and Mrs. Forssenius failed to disclose repairs were made. I can't answer for them why they checked no, no repairs were made instead of checking yes. I don't know.

Q And what does your training at Nationwide tell you you do when that's the situation, when you don't know the answer to something what do you do?

A All I can say is, I relied on what they told me. They did not disclose the repairs.

Ross Deposition at pages 75-78 (Record 20).

Although this Court has sometimes inferred intent in sexual misconduct cases, see, e.g., Syllabus, *Horace Mann Insurance Company v. Leeber*, 180 W.Va. 375, 376 S.E.2d 581 (1988), it has never done so in any other context and Appellants submit that no such inference can be drawn here. Therefore, absent proof by Nationwide, its motion for summary judgment should have been denied.

**B. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT (COUNT I - DUTY TO DEFEND) BECAUSE THE DUTY TO DEFEND WAS NOT SUBJECT TO THE LIMITATION OF AN "OCCURRENCE".**

The insuring clause in Nationwide's policy stated:

We will pay damages the insured is legally obligated to pay due to an **occurrence**.<sup>22</sup>

We will provide a defense at our expense by counsel of our choice. We may investigate and settle any claim or suit. Our duty to defend a claim or suit ends when the amount we pay for damages equals our limit of liability.<sup>23</sup>

Note that, unlike the duty to pay, the duty to defend was not made subject to the condition of an "occurrence".

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<sup>22</sup>The bold type indicates a defined term in the policy. The definition will be discussed in the next section. Here the point is simply that there was no such condition with respect to the duty to defend.

<sup>23</sup>See page 12, Section II, Coverage E of the Elite II Homeowners Policy attached as Exhibit D to Nationwide's Motion for Summary Judgment filed December 24, 2003 (Record 53).

According to the copyright stamp, the aforesaid language is that of the Insurance Services Office (ISO) with copyright dates of 1975 and 1977<sup>24</sup> but, as was pointed out to the Circuit Court<sup>25</sup> the ISO, changed its form following the decision in *United States of America v. United States Fidelity & Guaranty Company*, 601 F.2d 1136 (10<sup>th</sup> Cir. 1979). In that case, the Tenth Circuit held:

Here the insuring clauses, both as to the duty to pay and the duty to defend, are broad. It is unclear whether the exclusion clause in the instant policy has any effect on the duty to defend, as opposed to the duty to pay. Such unclearness, in *Conner* was resolved in favor of the insured. So, in the instant case, such unclearness should be resolved in favor of the insured. If the insurance company wants to protect itself from this type of situation, it should be clearly stated that the exclusion clause applies to both the duty to pay and the duty to defend. The present policy does not so clearly state.

Id. at 1141. Thereafter, the ISO inserted the caveat: “[h]owever, we will have no duty to defend any claim to which this insurance does not apply”. Notwithstanding such decisions, and amendments by the ISO, Nationwide apparently continued to use the outdated form as of the 1993-1994 policy.

Although this Court has not directly addressed the foregoing point, you have said that any policy provision may be deemed ambiguous if courts in other jurisdictions have interpreted the provision in different ways:

A provision in an insurance policy may be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways. This rule is based on the understanding that “one cannot expect a mere layman to understand the meaning of a clause respecting the meaning of which fine judicial minds are at variance.” C. Marvel, *Division of Opinion Among Judges on the Same Court or Among Other Courts or Jurisdictions Considering the Same Question, as Evidence that a Particular Clause of Insurance Policy is Ambiguous*, 4 ALR 4<sup>th</sup>, 1253 Sec. II[A]

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<sup>24</sup>See pages 2 and 12 of the Elite II Homeowners Policy attached as Exhibit D to Nationwide’s Motion for Summary Judgment filed December 24, 2003 (Record 53).

<sup>25</sup>See Plaintiffs First Motion For Partial Summary Judgment filed March 31, 2004 (Record 145-149).

Fn. 5 *Murray v. State Farm Fire and Casualty Company*, 203 W.Va. 477, 509 S.E.2d 1 (1998). The various cases cited by the Tenth Circuit clearly demonstrate that the subject provision has been interpreted in different ways and, therefore, Appellants contend that they were entitled to partial summary judgment on the duty to defend.

**C. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' SECOND MOTION FOR PARTIAL SUMMARY JUDGMENT (COUNT I - DUTY TO DEFEND) BECAUSE NATIONWIDE DID NOT MEET ITS BURDEN OF ESTABLISHING THE FACTS NECESSARY TO DENY COVERAGE FOR LACK OF AN "OCCURRENCE".**

The term "occurrence" as used within the insuring clause is a defined term. According to Nationwide, the following definition was provided by endorsement<sup>26</sup>, to-wit:

Occurrence means bodily injury or property damage resulting from an accident, including continuous or repeated exposure to the same general conditions. The occurrence must be during the policy period.

The defining term "accident" was not further defined.

An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion. Syl. Pt. 7 *National Mutual Insurance, Co. v. McMahon & Son, Inc.* 177 W.Va. 734, 356 S.E.2d 488 (1987). Again, the

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<sup>26</sup>Not only has Nationwide not proven the facts necessary to deny coverage based on the putative definition, it failed to establish that the amendatory endorsement produced was actually attached to the policy. Although Endorsement 3199 is reflected in the declarations, 3199-92, the amendatory endorsement actually produced herein, was not. Moreover, Mia Rowe, then Director of Rates and Forms for the West Virginia Insurance Commissioner, testified that there was no evidence of either endorsement having been approved by the West Virginia Insurance Commission as required by law. (W.Va. Code Sec. 33-6-8). (Rowe deposition at pg. 36 - designated but not forwarded)

deposition testimony submitted to the Court below<sup>27</sup> clearly showed that Nationwide failed to meet its burden, to wit:

**Claims Manager Boyd**

Q Okay, I think what you're saying to me is that there's coverage for an occurrence, and occurrence is defined in part as an accident, and so indirectly you're telling me it didn't meet the definition of occurrence?

A Yes sir.

\* \* \*

Q Were there any facts about the Aluise versus Forssenius claim that you did not know at the time that you had these conversations?

A No sir.

\* \* \*

Q What was the cause of the foundation movement?

A I don't know the exact answer to that, sir.

Q Didn't get an expert to find out, is that correct?

A My understanding, I believe at the time of the inspection of the home there were a couple of engineers there.

Q There were lots of engineers there. None of them hired by Nationwide, is that correct?

A No sir, I don't believe so.

\* \* \*

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<sup>27</sup>Plaintiffs' Second Motion For Partial Summary Judgment filed March 31, 2004 (Record 150-161).

Q Mr. Boyd, you gave some testimony earlier that, in your judgment, what had occurred was not an accident. Can you tell me your definition of accident?

A Something unforeseen, sudden.

\* \* \*

Q Were the cracks unforeseen?

A I don't understand that, the question were the cracks unforeseen.

Q I'm using your definition of accident, or one of them. You defined accident by two terms, one of which was unforeseen. Were the cracks unforeseen, as you used that term defining accident?

A Using that definition then, did they see the cracks? I would assume that they did.

Q Who is they?

A The Forsseniuses.

Q Were the cracks after the Forsseniuses' repairs unforeseen?

MR. BUCK: Objection, assumes facts. Answer it, if you can.

A Repeat the question.

Q Were the cracks after the Forsseniuses' repairs unforeseen?

MR. BUCK: Same objection.

A Were the cracks unforeseen after the repairs? I still don't understand your question.

Q I don't really know how to make it any clearer. You gave me your definition of accident, you said it was unforeseen.

A Uh-huh.

Q I'm asking you were the cracks after the repairs unforeseen, as you used that term to define accident?

- A No, they weren't unforeseen.
- Q How do you know that? Did you ever ask Mr. Forssenius if he expected more cracks to develop?
- A No sir, I did not.
- Q Did you ever ask Mrs. Forssenius if she expected more cracks to develop?
- A No sir, I did not ask.
- Q Did you ever direct Betsy Ross to ask either Mr. or Mrs. Forssenius those questions?
- A Did I direct Betsy?
- Q Yes.
- A No sir, I did not.
- Q Were the cracks after the Forsseniuses' repairs sudden?
- MR. BUCK: Objection. Again, that assumes facts.
- Q Yes, that's exactly my point, there were questions of fact.
- MR. BUCK: My point is that your question is improper. Go ahead.
- A The question was were the cracks sudden?
- Q Yes.
- A I don't know that, sir.
- Q Was water coming into the basement after the repairs by the Forsseniuses unforeseen?
- A I can't answer that question either, sir.
- Q Was water coming into the basement after the Forsseniuses' repairs sudden?

A I cannot answer that question either, sir.

Q [...W]as the need to replace the wall after the Forsseniuses' repairs unforeseen?

A I guess it was unforeseen.

Q Was it sudden?

A That, I don't know, sir.

Q What do you do when there are questions that you don't know the answer to with respect to a duty to defend? Do you provide the defense, or do you deny it?

A If there's a question to the duty to defend, that is given to legal counsel to make that decision.

Q And how does legal counsel know the answers to those questions?

MR. BUCK: Objection, competency. Go ahead and answer the question, if you can.

A Can you repeat that again, please?

Q Sure. If you in the claims division had not done the investigation to get the answers to the questions, --

A Yes sir.

Q -- how does claims legal counsel make a decision?

A I really can't comment on claims legal counsel.

(Boyd deposition transcript, Record 22, at pages at 23, 28-35.)

**Claims Legal Counsel Ridenour**

Q What determines whether an act is accidental or not?

A Excuse me?

- Q What determines whether an act is accidental or not?
- A It's based on case law.
- Q What case law?
- A I don't know off the top of my head.
- Q What case law did you look at in order to make that decision in this case?
- A I don't believe I looked at a case law in regard to accident on this case?
- Q What determined in this case whether or not what occurred was accidental?
- A Attorney/client privilege.
- Q When you're determining coverage do you start with the complaint, assuming that it's reached that stage?
- A I don't generally make the coverage decision. I will review the complaint, yes, to make a recommendation.
- Q What do you understand the law to be with respect to the person who is doing that, are they to start with the complaint?
- A I don't know.
- Q Is there any requirement that it go beyond the four corners of the complaint?
- A I don't know.
- Q Are you familiar with the West Virginia Supreme Court decision of Cook v. Farmers & Mechanics?
- A Yes.
- Q Does that case answer the previous question?
- A No, because I can't remember the specifics.

Q Is that to say you are not familiar with Cook v. Farmers & Mechanics?

A If you want to say that, yes.

(Ridenour deposition transcript, Record 21, at pages 42-44.)

In *Farmers & Mechanics Mutual Insurance Co., v. Cook*, 210 W.Va. 394, 557 S.E.2d 801

(2001) you held:

When a complaint is filed against an insured, an insurer must look beyond the bare allegations contained in the third party's pleadings and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of the coverage that the insurer is obligated to provide. Syl., *Farmers & Mechanics Mutual Fire Insurance Co., of West Virginia v. Hutzler*, 191 W.Va. 559, 447 S.E.2d 22 (1994).

Under an intentional acts exclusion, a policyholder may be denied coverage only if the policyholder (1) committed an intentional act and (2) expected or intended the specific resulting damage.

When an intentional acts exclusion uses language to the effect that insurance coverage is voided when the loss was "expected or intended by the insured", courts must generally use a subjective rather than objective standard for determining the policyholder's intent.

*Id.* at. Syl. Pts. 6, 7 and 8.

Clearly, neither Adjustor Ross, Claims Manager Boyd or Claims Legal Counsel Ridenour came anywhere close to performing the necessary investigation and simply did not have the necessary facts to determine whether or not even the acts, let alone the damages, were expected or intended. Nationwide having completely failed to meet its burden of establishing the facts necessary to support its denial, partial summary judgement should have been granted in plaintiffs' favor.

**D. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' THIRD MOTION FOR PARTIAL SUMMARY JUDGMENT (COUNT I - BREACH OF CONTRACT) UNDER THE INNOCENT SPOUSE DOCTRINE.**

Although this Court has not specifically adopted the Innocent Spouse Doctrine by name, the holding in *Hawkins v. Glens Falls Insurance Company*, 115 W.Va. 618, 177 S.E. 442 (1934) certainly suggests that is the case<sup>28</sup>, and Appellants urge you to formally do so now<sup>29</sup>. The same request was made in the Court below<sup>30</sup> but the motion was denied. The truth is, it is not a foreign concept to the insurance industry. Again, note the testimony of Ross, Ridenour, and Boyd, as follows:

**ADJUSTER ROSS**

Q Okay. Let me switch topics. Have you ever heard of the Innocent Spouse Doctrine?

A Yes.

Q Before this case?

A Yes.

Q What does it mean to you?

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<sup>28</sup>In *Hawkins*, then Justice Kenna wrote: "Although the statement is undoubtedly based upon slender authority, because of the extremely limited number of cases in which the question has been directly presented as a matter of law, we believe that the general statement of the law contained in 14 Ruling Case Law, page 1223, is sound. We quote it: 'If, however the insured was insane when he destroyed the property, a recovery may be had, and the fact that the property was intentionally burned by the insured's husband, wife or agent does not defeat a recovery where the insured was not a party thereto'."

<sup>29</sup>Recently, in *Icenhour v. Continental Insurance Company*, 365 F. Supp. 743 (S.D.W.Va. 2004), Judge Copenhagen reviewed *Hawkins* as well as "the overwhelming weight of extra-jurisdictional authority elsewhere", and predicted that you would.

<sup>30</sup>Plaintiffs' Third Motion For Partial Summary Judgment filed March 31, 2004 (Record 161-167). See also hearing transcript (Record 245).

A It means because the husband or wife, the husband may do something the wife is unaware of and she would be innocent.

Q And if you have an innocent spouse situation, do you defend the innocent spouse, even if you believe there is no coverage as to the other?

A Again, it's a legal question. I don't know.

(Ross deposition transcript, Record 20, at pages 90-91).

### CLAIMS LEGAL COUNSEL RIDENOUR

Q What about the innocent spouse or the innocent insured doctrine. Were you familiar with it on January 20<sup>th</sup>, 2003?

A Yes.

Q What did you know about either the innocent spouse or the innocent insured doctrine?

A Just generally.

Q Had you ever read a case that involved those issues?

A I believe so.

Q What state or jurisdiction?

A It was in West Virginia.

Q Do you believe that to be the law in West Virginia?

A Yes.

(Ridenour deposition transcript, Record 21, at page 40).

## CLAIMS MANAGER BOYD

- Q Okay. How about something called the Innocent Spouse Doctrine? Have you ever seen any memos or bulletins on the Innocent Spouse Doctrine?
- A I'm sure that I have, but --
- Q What? Something internal, something external, what was it?
- A I can't recall. I know that I've heard about the Innocent Spouse Doctrine, yes sir.
- Q What is it?
- A Well, I guess in layman's terms, if you have two insureds and if there is someone that is innocent or doesn't know of damages, they're entitled to coverage.
- Q Exactly right.
- A Basically.
- Q When did you learn that?
- A I'm sorry, I can't say when I -- I don't recall when I've learned that.
- Q Before or after the conversations that you told me about with respect to the Aluisse case?
- A Oh, I would say that I learned that before.
- Q Okay, so you were fully aware of the Innocent Spouse Doctrine when you participated in those conversations?
- A Yes sir.
- Q And you understood that it was possible that if Mr. Forssenius knew about the damages, but Mrs. Forssenius didn't, that you might have a coverage obligation to Mrs. Forssenius even if you didn't to Mr. Forssenius, correct?
- A Kind of a long question. Can we break it up a little bit? Because I want to make sure I answer it correctly.
- Q You were fully aware at the time you participated in the coverage discussions, --

A Uh-huh.

Q You're with me so far?

A I'm with you so far.

Q -- that it was possible that one of the Forsseniuses might know of the potential for damage and therefore not be covered, right?

A Yes sir.

Q But you were also aware that it was possible that one of the Forsseniuses might not know and therefore you might owe him or her coverage?

A No sir.

Q Okay, help me out. You've told me you understood the Innocent Spouse Doctrine, you've told me that you know that means that even if one knew, the other is entitled to coverage, --

A Yes sir.

Q -- but when I asked you specifically about the Forsseniuses, you tell me no. Why?

A If I recall, Betsy spoke to Mrs. Forssenius when the claim was first called in.

Q Understood. And is it your testimony that Mrs. Forssenius said that she knew all along that one day the Aluises were going to have to replace that wall?

A That is not my testimony, sir.

(Boyd deposition transcript, Record 22, at page 50 line 7 through 52 line 10).

Various other jurisdictions have also allowed recovery by an innocent spouse: In *Richards v. Hanover Insurance Co.*, 250 Ga. 613, 299 S.E.2d 561 (1983), an innocent co-insured was allowed to recover under an insurance policy where the insurer intended the obligations of the co-insureds to be joint or several. In *American Economy Insurance Co. v. Liggett*, 426 N.E.2d 136 (Ind. App. 1981), an innocent spouse was allowed recovery of one-half of the insured loss within policy limits.

In *Lovell v. Rowan Mutual Fire Insurance Co.*, 302 N.C. 150, 274 S.E.2d 170 (1981), the unilateral act of a husband did not bar recovery by his wife. In *Delph v. Potomic Insurance Co.*, 95 N.M. 257, 620 P.2d 1282 (1980), the Court found both the residence and the insurance policy to be community assets and each spouse had a vested and equal interest in both assets with the result that the wife was entitled to recover up to one-half of the policy limits notwithstanding that the husband had set the fire. In *Ryan v. MFA Mutual Insurance Co.*, 610 S.W.2d 428 (Tenn. App. 1980) the Court found that the innocent spouse's interest was severable and therefore recovery was proper. In *Morgan v. Cincinnati Insurance Co.*, 411 Mich. 267, 307 N.W.2d 53 (1981), under a contract analysis, recovery by an innocent co-insured was also allowed.

Appellants emphasize that they were not asking the Circuit Court to find, as a matter of law, that Mrs. Forssenius was innocent. Instead, they only asked the Court to find that because Mrs. Forssenius may later have been determined to be innocent, Nationwide had a duty to defend her until that answer was determined. Appellants now request that this Court do so instead.

**E. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' FOURTH MOTION FOR PARTIAL SUMMARY JUDGMENT (COUNT I - BREACH OF CONTRACT) UNDER THE DOCTRINE OF WAIVER.**

To the extent that the Circuit Court had found breach of contract under Plaintiffs' First, Second or Third Motions for Partial Summary Judgment, plaintiffs also asked, in a Fourth Motion for Partial Summary Judgment, that the Court enter judgment against the insurer for the amount of the confessed judgment by its insureds. Specifically, plaintiffs contended that Nationwide having wrongfully denied coverage necessarily waived the right to control the defense, and is now bound by the judgment which resulted. No response was filed by Nationwide.

Waiver, as it relates to the conduct of an insurer, was addressed by this Court in *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987). There, the carrier actually provided a defense, but did so without reservation of rights, and was therefore later barred from asserting any contract exclusion.

Within a couple of years, you again looked at the issue from the opposite perspective where, like here, coverage was denied from the outset. Specifically, in *Berry v. Nationwide Mutual Fire Insurance Co.*, 181 W.Va. 168, 381 S.E.2d 367 (1989)<sup>31</sup>, Nationwide refused to pay for damage to the plaintiffs' home denying that the same was due to nearby blasting operations (a covered peril). The Berrys then brought suit both against the blasting company and their homeowners insurer, and, on the morning of trial, settled their tort claim against the blasting company but sought to proceed against their homeowners carrier for breach of contract. Nationwide contended that the settlement with the blasting company voided its right of subrogation, in contravention of the insurance contract, and therefore it further contended that plaintiffs' claim under the policy was then barred. The trial court disagreed, as did the jury, and on appeal to this Court you upheld the verdict, again finding that contract defenses had been waived.

More recently, you answered a certified question from the United States Court of Appeals for the Fourth Circuit and held that when an insurer denies coverage to an insured, it waives its right to assert additional, previously unstated, reasons for denying coverage during subsequent litigation if the insured establishes that the insurer intentionally relinquished a known right. *Potesta v. United States Fidelity and Guaranty Company*, 202 W.Va. 308, 504 S.E.2d 135 (1998). Appellants contend

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<sup>31</sup>Same defendant as in this case.

that having opted not to defend, Nationwide clearly knew that it was giving up the right to control the defense, and should now be bound by the judgment that resulted.

This Court has not had the opportunity to review a confessed judgment by a tortfeasor, with an assignment of the claim against his or her insurer, following an insurer's wrongful refusal to defend. That exact scenario was, however, recently addressed by one of our federal district courts. In *Johnson v. Acceptance Insurance Company*, 292 F.Supp.2d 857 (2003), Judge Stamp did find a breach of the insurance contract, based upon a wrongful failure to defend, upheld the validity of the assignment<sup>32</sup>, and found the insurer liable for the confessed judgment albeit only up to the policy limit (not an issue herein since the \$34,000.00 judgment is less than the \$100,000.00 liability limit under the Nationwide policy). Appellants now formally request that you do the same.

**F. THE CIRCUIT COURT ERRED IN DENYING PLAINTIFFS' FIFTH MOTION FOR PARTIAL SUMMARY JUDGMENT (COUNT I - BREACH OF CONTRACT) UNDER *HAYSEEDS* .**

Again, to the extent that the Circuit Court had found a breach of contract under Plaintiffs' First, Second or Third Motions for Partial Summary Judgment, then plaintiffs also asked the Court to rule, as a matter of law, with respect to entitlement to *Hayseeds* damages. Nationwide did not respond.

In Syl. Pt. 1 *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986), you held:

Whenever a policyholder substantially prevails in a property damage suit against its insurer, the insurer is liable for: (1) the insured's reasonable attorney fees in

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<sup>32</sup>Specifically, after reviewing other types of cases in which assignments had been upheld or stricken by this Court, Judge Stamp predicted that you would approve the same.

vindicating its claim, (2) the insured's damages for net economic loss caused by the delay in settlement, and damages for aggravation and inconvenience.

In this case, those first party damages would normally go to Nationwide's insureds, Mr. and Mrs. Forssenius. As a part of the settlement, however, the same were assigned to plaintiffs.<sup>33</sup>

In addition to the black letter law set forth in the aforesaid syllabus point, *Hayseeds* went into great analysis with respect to such damages. Unlike other courts that had awarded such damages based upon concepts of what was reasonable or unreasonable, good faith or bad faith, this Court found the same to be an automatic add-on in the event that an insured substantially prevails on the contract claim. *Id.* at S.E.2d 80. Last term, you reiterated the same and further specifically held that attorney fees are a question of law for the judge. Syl.Pt. 5 *Richardson v. Kentucky National Insurance Company*, 216 W.Va. 464, 607 S.E.2d 793 (2004). Damages for net economic loss or aggravation and inconvenience, are believed to be questions of fact for the jury to determine. Accordingly, in the motion for partial summary judgment below, plaintiffs simply asked the Court to award attorney fees based on the amount of the judgment which, plaintiffs also prayed, had been granted under their Fourth Motion for Partial Summary Judgment.

**G. THE CIRCUIT COURT ERRED IN ITS WHOLESALE RELIANCE UPON THE DISCOVERY COMMISSIONER AND REFUSAL TO ALLOW A HEARING OR RECORD TO BE MADE FOR THIS COURT'S REVIEW.**

Though possibly moot if you do not reverse based upon any of the foregoing assertions of error, Appellants implore this Court not only reverse as to them, but also another issue that cries out for your guidance. Specifically, Appellants complain about the lack of input with respect to the

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<sup>33</sup>Assignment attached to plaintiffs' Complaint (Record at 1-11) as Exhibit I.

Order referring discovery disputes to a Discovery Commissioner<sup>34</sup>, his refusal to allow a record, his recommendations<sup>35</sup>, and the Circuit Judge's ultimate adoption of the same without hearing on the objections<sup>36</sup>.

Generally, it seems, that the use of special masters or commissioners is perceived as a necessity arising out the evermore technical nature of modern day discovery and the time required to resolve such disputes. The problem is that there aren't any specific rules<sup>37</sup> and the procedures employed vary dramatically, not only from county to county but from circuit judge to circuit judge, particularly in Kanawha County where there are seven circuit judges and even more discovery commissioners, each with different procedures.<sup>38</sup> In the case of this Circuit Judge, the parties are not given any input, or even right to object with respect to the particular commissioner selected, and

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<sup>34</sup>See Order entered December (sic) 8, 2004, filed by the Clerk January 8, 2004 (Record at 24-25).

<sup>35</sup>See Report of Commissioner dated January 30, 2004 (Record at 127-133) and Plaintiffs' Objections thereto (specifically requesting a hearing) dated February 6, 2004 (Record at 134-141).

<sup>36</sup>See Order dated February 25, 2004 (Record at 142-144).

<sup>37</sup>W.Va.R.Civ. P. 16(c) provides that, at a pretrial conference, the circuit judge may determine the advisability of referring matters to a commissioner or a master. This is the only mention in the West Virginia Rules of Civil Procedure to the appointment of a special master or commissioner. Federal Rules provide additional procedures through the luxury of the U. S. Magistrate system. See, Fed. R. Civ. Proc. 72.

<sup>38</sup>Conversely, when mediation came into vogue, this Court promulgated specific uniform rules for any court ordered mediation (now T.C.R 25). Among other things the mediation rules provide for an objection period prior to the effect of the referral. They also provide for selection of the mediator by the parties or, if ordered, whenever possible, referral is to be to a mediator who will serve without fee (Kanawha County provides the SWARM program).

yet they are expected to bear the cost of the same regardless.<sup>39</sup> More egregiously, the Court selected Discovery Commissioner refused to allow a record to be made stating that, if there was disagreement with the recommendations, objections should be filed, and a hearing would be set before the Circuit Court and a record made at that time. Unfortunately, although objections were timely filed, and a hearing specifically requested<sup>40</sup>, none was granted, and the recommendations of the commissioner were summarily adopted. Had a hearing been granted, of course, the entire proceeding before the Commissioner would have been for naught, as there was no record to refer to and the Circuit Judge would have had to begin anew.

Special masters or commissioners have been used to hear discovery disputes in this State for at least nine years. See, *Daily Gazette Co. v. West Virginia Development Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996). Recently, this Court specifically cited their use for in-camera inspection of documents asserted to be privileged. See *State ex rel. Allstate Insurance Co. v. Madden*, 215 W.Va. 705, 601 S.E.2d 25 (2004); *State ex rel. Westfield Insurance Co. v. Madden*, 216 W.Va. 16, 602 S.E.2d 459 (2004). Still more recently you referenced special masters and commissioners as “pro-tempore part-time judges” subject to judicial ethical obligations. See *State ex rel. Mantz v. Zakaib*,

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<sup>39</sup>Costs were assessed against Nationwide, and so plaintiffs lack standing to challenge the same, but the Court might also need to be aware that such costs can be significant and yet the parties have no input in that determination either. By way of example, this writer notes that there was previously a petition pending for Writ of Mandamus which, while not asserting the cost as error, attaches two recommended decisions by a discovery commissioner with bills of \$650.00 and \$2,200.00 just on the issues of whether plaintiff was entitled to two depositions and certain documents previously redacted. *State ex rel State Farm v. Steptoe*, No. 32555 (since dismissed). It should also be noted that in that same proceeding, although again not the basis for the relief sought, the judge had to resort to contempt proceedings just to get the commissioner to issue his recommendations.

<sup>40</sup>See Plaintiffs’ Objections to Commissioners Report filed February 6, 2004 (Record at 134-141).

\_\_\_ W.Va. \_\_\_, 609 S.E.2d 870 (Dec. 2, 2004). Nonetheless, you have not, for the most part, addressed the procedures to be employed.

Normally, special masters or commissioners merely make recommendations to the circuit judges, who then issue the final orders. See *Beto v. Stewart*, 213 W.Va. 355, 582 S.E.2d 802 (2003); *Roberts v. Consolidation Coal Co.*, 208 W.Va. 218, 539 S.E.2d 478 (2000); *Daily Gazette Co. v. West Virginia Development Office*, 198 W.Va. 563, 482 S.E.2d 180 (1996). In *Beto* and *Daily Gazette*, clearly, the Circuit Court held a hearing after it received the commissioner's recommendations. More recently, in *State ex rel Wausau Business Insurance v. Madden*, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (May 5, 2005), you held that, with respect to privileged matters, the circuit judge is to perform a thorough off-the-record examination of any recommendations by the discovery commissioner. Of course, Appellants have no way of knowing what Judge Berger may have done off the record but there is no transmittal or other documentation indicating that the documents alleged to be privileged were forwarded to her and certainly no findings by her that the elements for applicability of the privilege were met.

Moreover, none of the aforesaid cases seem to consider the significant concerns this Court previously recognized in the analogous context of divorce commissioners. See, *Nagy v. Oakley*, 172 W.Va. 569, 309 S.E.2d 68 (1983). There, you wrote:

...The collective experience of the members of this court instructs us that the use of commissioner varies widely among the fifty-five counties. In busy circuits the reference of contested divorces to commissioners may be a blessing because it both speeds the resolution of the case referred and prevents clogged dockets and consequent delays in handling other civil matters. ...

Nonetheless, we have strong reservations about the extensive use of commissioners by the circuit courts. Certainly a rate of forty dollars an hour is not an unreasonable fee for a skilled lawyer who is providing his own logistical support – secretary, office space, telephone, postage, etc. But it is also apparent that if the commissioner

devotes two eight-hour days taking testimony and preparing a report, his fee will be six hundred and forty dollars, which is a burdensome expense for the ordinary domestic litigant. And we are mindful that when judges hear cases themselves there is every incentive to expedite the proceedings, while a similar incentive may not be present when a commissioner takes testimony and the meter is ticking minute by minute.

Notwithstanding our reservations, it is still difficult to develop hard and fast rules concerning when cases should be referred to commissioners. Obviously, where both parties wish to expedite the matter and are willing to pay reasonable commissioner's fees to avoid delay, everyone concerned is well served by an order of reference. Where, on the other hand, it is a real burden to the parties to pay commissioners' fees, the circuit court has an obligation to hear the case itself because of the clear mandate concerning free access to the courts of W. Va. Const. Art. III §17. Furthermore, to the extent that political patronage traditions of yesteryear survive and commissioners are paid for performing what amount to ceremonial functions, we disapprove of such practices and will prohibit them when they are called to our attention.

We do not establish a rule limiting the appointment of commissioners to instances where all of the parties agree because in many instances one party will wish to avoid judgment by delay. In a similar vein, it is also not possible to enjoin our circuit judges to hear contested cases in person whenever a party alleges that reference to a commissioner will be a financial burden. A mere preference on the part of the litigants that the circuit court hear a case in order to avoid additional costs cannot be allowed to foreclose reference any more than a mere preference not to pay the statutorily requested filing fee will result in the waiver of that fee. When, however, an objection to an order of reference because of a lack of money is combined with an objective showing of financial hardship, the circuit court should place the case on its own docket.

The issues in *Nagy* have not gotten any easier with time and here they are compounded by the additional problem of no record made anywhere for this Court's review. The Court cannot be expected to cure all the system's ills in the context of the *Aluise* case but, on behalf of them, I do ask that you review the written objections filed with the Circuit Judge (Record at 134-141) and, if you do not have sufficient record to consider the merits, then remand the same with directions to make

a record, with specific findings and conclusions, sufficient for any subsequent review by this Court, not just in this case but in all cases.

**H. THE CIRCUIT COURT ERRED IN RELYING ON NATIONWIDE'S MISINTERPRETATION OF WEST VIRGINIA LAW AND IN GRANTING ITS MOTION FOR SUMMARY JUDGMENT ON ALL REMAINING COUNTS**

As might be imagined, without the benefit of much specifics by the Court, a dispute arose as to the wording of the Order. Again without hearing, defense counsel's order was apparently signed by the Judge on December 16, 2004, and filed by the Clerk on December 20, 2004.

The order states in part:

114 CSR 14 defines "claim" as a communication made to an insurer "of an occurrence which might give rise to liability under a policy or contract." 114 CSR 14-2.3 defines a first party claim as "arising out of the occurrence... covered by such policy or contract." 114 CSR 14-2.8 defines a third-party claim as "a claim against an individual who is insured under a policy or contract." The Court finds that as of January 6, 2003, Nationwide had correctly determined that there was no "occurrence which might give rise to liability under [its] policy or contract" and, thereafter, there was no existing "claim" as defined by the regulations. By its prior order of July 22, 2004, this Court found that the events described in the underlying complaint (*Aluise v. Forssenius*) did not state an "occurrence" under the Nationwide West Virginia policy. (Record at 73)

In other words, in submitting such an order, defendants sought to superimpose the purported technical definition of the term "occurrence" contained in the policy on the Legislature's household use of the term in its Regulation, and conclude that if there isn't an "occurrence", then the claim is not covered by the West Virginia Unfair Trade Practices Act or the Regulations promulgated thereunder. Further, Nationwide reasoned, and the Circuit Court accepted, that once the denial letter goes out, there is no longer a claim, and neither the Act nor Regulations apply for that reason.

Indeed, in the penultimate paragraph the Order states:

Under the facts established by the record herein and set forth in the memoranda of the parties, the Court finds there is no genuine issue of material fact nor a trial worthy issue. Nationwide's denial of coverage was proper and was timely. Subsequent to January 6, 2003, no claim was pending which would invoke application of the Unfair Trade Settlement Practices [sic] of W.Va. Code § 33-11-4(9). The plaintiff having produced no evidence from which a reasonable finder of fact could return a verdict in plaintiffs' favor, the Court **GRANTS** summary judgment in favor of the defendants on all remaining counts; **DENIES** plaintiffs' outstanding motions for partial summary judgment and **ORDERS** that this matter be, and the same hereby is, **DISMISSED** with prejudice. (Record at 74-75)

That, despite this Court's rulings (1) that one need not substantially prevail on the contract question in order to have a cognizable claim for violation of the West Virginia Unfair Claim Settlement Practices Act, *McCormick v. Allstate*, 197 W.Va. 415, 475 S.E.2d 507 (1996), (2) that even conduct after litigation ensues is still actionable under W.Va. Code § 33-11-1 to 10, syl.pt. 9 *Barefield v. DPIC Companies, Inc.*, 215 W.Va. 544, 600 S.E.2d 256 (2004), and (3) discovery has to be taken with respect to the extracontractual issue before the same can be summarily dismissed, see Sec. III.A., *Drake v. State Farm Mutual Automobile Insurance Company*, 216 W.Va. 574, 609 S.E.2d 191 (2004).

Fortunately, Nationwide itself has made the lesson clear for all. In the unanimous opinion written by Justice Maynard, this Court recently stated:

The defendants also find support for their position in what they call the fundamental premise that all bad faith litigation emanates from the contractual obligation created between an insurance company and its insured. They assert that because [adjustor] Tarley was not a party to the insurance policy entered into between Nationwide and Ms. Taylor, there can be no cause of action against Ms. Tarley. We disagree. In *Jenkins*, this Court made clear that the Unfair Trade Practices Act "creates a positive duty, this duty is independent of any insurance contract, and a cause of action may be maintained based on violation of the statutory duty. 167 W.Va. 601, 280 S.E.2d at 255.

Nationwide relied on an earlier dissent by Justice Davis in *Jordasche Enterprises v. National Union Fire Insurance Company of Pittsburgh, PA*, 204 W.Va. 465, 513 S.E.2d 692 (1998) but

neglected to point out that the violations asserted by Plaintiffs were not limited to the sections of the Act which Justice Davis felt necessarily required coverage as a pre-requisite.

Simply put, whether, for example, Nationwide or its adjustor failed to respond to communications within 15 working days<sup>41</sup> is either true or not true, regardless of whether there is coverage under the contract. That is, even if there is no coverage, a **claimant**<sup>42</sup> is entitled to a response and the Act, and Legislative Rules promulgated thereunder, so require.

In summary, the order bears no resemblance to the UTPA pronouncements of this Court, is clearly erroneous, and Appellants now pray that it be reversed. It should also be noted that in granting summary judgment "as to all remaining counts", the Circuit Court also struck the two new contractual counts (Virginia policy and Indiana policy) added in the Cabell County complaint then consolidated. The Circuit Court's reasoning as to the Virginia policy was that it was identical to the West Virginia policy previously ruled upon (Record at 273). Therefore, to the extent that this Court reverses as to the West Virginia policy, Appellants ask that you also reverse as to the Virginia policy. With regard to the Indiana policy, the Circuit Court found that plaintiffs failed to produce any evidence of an Indiana policy, but that was because the Court ruled on Nationwide's motion as to all remaining counts before any discovery was taken as to the newly added counts, then consolidated. Therefore, to the extent that this Court finds that discovery should have been allowed, Appellants ask that the summary judgment as to the Indiana policy be reversed as well.

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<sup>41</sup>Required by W. Va. Code 33-11-4(9)(b) as further defined in 114 W.Va. CSR 14-5.3.

<sup>42</sup>Note that the denial letters relied upon by Nationwide, and attached to its motion, were sent only to the insureds' counsel and not to the claimants or their counsel. Moreover, plaintiffs' complaint cites communications to which there was no response to anyone although some of those allegations were contained in Count VIII of the consolidated Cabell County Complaint never reviewed by Judge Berger.

**I. THE CIRCUIT COURT ERRED IN FAILING TO CONSIDER, MAKE SEPARATE FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND IN DENYING PLAINTIFFS' SIXTH, SEVENTH, EIGHTH AND NINTH MOTIONS FOR PARTIAL SUMMARY JUDGMENT.**

Plaintiffs' Sixth, Seventh, Eighth and Ninth Motions for Partial Summary Judgment dealt with Counts II and III, the first party and third party unfair claim settlement practices claims, set forth in the original Kanawha County complaint <sup>43</sup> Nowhere does the Circuit Court's order address the substance of any of those motions and nowhere does it make any findings of fact or conclusions of law with respect thereto.

Plaintiffs' Sixth Motion for Partial Summary Judgment (Record at 175-180) dealt with the applicability of the doctrine of collateral estoppel on the issue of general business practice based upon prior judicial determination. Since the filing of the petition and argument herein you have issued your opinion in the case of *Holloman v. Nationwide Mutual Insurance Company*, \_\_\_ W.Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (June 21, 2005). There, Justice Benjamin, writing for a unanimous Court held:

Collateral estoppel will not apply in a statutory cause of action for violation of W.Va. Code §33-11-4(9) to establish an insurer's "general business practice" where there is credible evidence on the record in the action at bar that the insurer altered its general business practice between the time the insurer handled the claim undelying the prior general business practice finding and the time the claim or claims at issue in the subsequent litigation were handled.

*Id* at Syl Pt. 4.

In this instance there was no affidavit or other response to the motion nor was there any evidence of any kind on that point in the record. Accordingly, Appellants ask that this Court reverse, finding that partial summary judgment on the issue of general business practice should have been

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<sup>43</sup>Nationwide did not file a specific response to any of said motions, jut its general cross motion as to all remaining counts (Record at 251-258).

granted or, alternatively, reverse finding that Nationwide should not have been granted summary judgment and direct that the Circuit Court to make specific findings of fact and conclusions of law on that issue.

Plaintiffs' Seventh Motion for Partial Summary Judgment (Record at 181-186) set forth deposition testimony wherein certain first party violations of W. Va. Code 33-11-4(9) were admitted and also argued, to the extent Appellants prevail on any of their coverage assertions, other violations would be inherent. To the extent this Court feels it can review the same and rule at the appellate level, we ask that you reverse and direct that partial summary judgment be entered for Appellants. In the alternative, if you determine that the record is insufficient, we ask that you reverse the summary judgment for Nationwide and direct the Circuit Court to make specific findings of fact and conclusions of law as to the evidence already adduced against Nationwide, and allow discovery as to any violations by the individual defendants added by the Cabell complaint, then consolidated, and as to whom the discovery stay was never lifted.

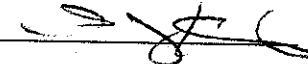
Plaintiffs' Eighth Motion for Partial Summary Judgment (Record at 187-199) was likewise predicated upon what Appellants contend were irrefutable violations of W. Va. Code 33-11-4(9) (and, indeed, Nationwide did not even try), this time in the third party context. Again, Appellants ask that this Court review the same and ascertain if it can determine based upon this record whether the Circuit Court Order should be reversed with directions that partial summary judgment be entered for Appellants, or reverse the summary judgment for Nationwide and direct the Circuit Court to make specific findings of fact and conclusions of law as to the evidence already adduced against Nationwide, and allow discovery as to any violations by the individual defendants added by amendment and as to whom the discovery stay was never lifted.

Plaintiffs' Ninth Motion for Partial Summary Judgment arose under W.Va. Code 33-11-4(10), i.e., failure to maintain a complaint register in compliance with the aforesaid statute, which relates just to the insurer and not the individual defendants and so no additional discovery is necessary. Unfortunately, there is still the problem that the Circuit Court did not make any findings or conclusions. On this point, however, Appellants contend the record is clear, so much so that Nationwide did not even attempt to refute the same, except by way of its general cross motion to dismiss all counts.

Apparently, having been erroneously persuaded by the defense that neither the Act nor the Regulations applied prior to January 6, 2003, because there was no "occurrence", nor after January 6<sup>th</sup> because there was no "claim", The Circuit Court simply didn't address any of the foregoing motions except to say that they were denied. As this Court has previously pointed out, a Circuit Court's order must set out factual findings sufficient to permit meaningful appellate review. Findings of fact, by necessity, include those facts which the Circuit Court finds relevant, determinative of the issues, and undisputed. Syl. Pt. 3, *Fayette County National Bank v. Lilly*, 199 W.Va. 349, 484 S.E.2d 232 (1997), cited again recently in Justice Maynard's concurring and dissenting opinion in *Moore v. CNA*, 215 W.Va. 286, 599 S.E.2d 709 (2004). Absent that, Appellants feel they were denied their day in Court and ask to be heard here instead.

Respectfully Submitted,

THOMAS J. ALUISE and  
JACQUELINE B. ALUISE

By 

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CERTIFICATE OF SERVICE

I, Vincent J. King, hereby certify that a true and accurate copy of "Petition for Appeal" was provided to the following counsel for all defendants by depositing the same in United States First Class Mail this 8th day of June, 2005, to-wit:

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