

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**At Charleston**

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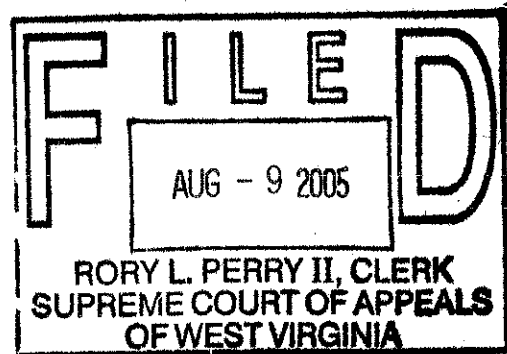
**THOMAS J. ALUISE and  
JACQUELINE B. ALUISE,**

*Appellants,*

v.

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

*Appellees.*



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*Appeal From The Circuit Court of Kanawha County, West Virginia  
Civil Action No. 03-C-1758*

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**Appellee's Brief**

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## II. PROCEDURAL HISTORY

The Appellants, Thomas J. Aluise and Jacqueline B. Aluise, seek review of an *Order Granting Motion for Summary Judgment* entered by the Circuit Court of Kanawha County court on July 22, 2004 (hereinafter referred to as the "July Order") and an *Order of Summary Judgment on Remaining Claims and Dismissal of the Action* entered by the Circuit Court on December 16, 2004 (hereinafter referred to as the "December Order").

The July Order granted Nationwide's Motion for Summary Judgment, finding that: 1) the seller/insureds' misrepresentations were not an "occurrence" under the policy of homeowners insurance; 2) the policy of homeowners insurance was not a warranty upon sale; and 3) Nationwide did not have a duty to defend a cause of action which is foreign to the risks covered by the insurance policy. The July Order also denied four of the Appellants' nine motions for partial summary judgment. The July Order became final on December 16, 2004, when the lower court entered the December Order.

The December Order granted Nationwide's Motion for Summary Judgment on All Remaining Claims, finding that Nationwide: 1) received notice of the claim; 2) promptly acknowledged the claim; 3) promptly investigated the claim; 4) correctly determined that there was no "occurrence" which might give rise to liability under the policy of insurance; and 5) timely notified its insured that there was no coverage and, thereafter, that there was no claim; and 6) had no duty to defend. The December Order also denied the Appellants' outstanding motions for partial summary judgment and dismissed the action.

The Appellants may have created confusion by filing two Petitions for Appeal from the underlying claim. Docket No. 32723 is an appeal of the July Order; Docket No. 32724 is an appeal of the December Order. By Order of June 7, 2005, this Court consolidated the matters for

argument.

Betsy A. Ross, a Nationwide adjuster, and Terry Ridenour, claims counsel for Nationwide, have been included as Appellees in the Appellant Brief. For simplicity, unless otherwise stated herein all the Appellees shall be collectively referred to as "Nationwide."

### III. STATEMENT OF FACTS

The Appellants, Thomas J. Aluise and Jacqueline B. Aluise ("the Aluises"), purchased a home in October 1994 from Christer Forssenius and Natalie Forssenius ("the Forsseniuses"). Complaint, Paragraph 3, Exhibits A & B. Prior to the sale of the home, the Forsseniuses executed and produced a *Seller's Property Disclosure* dated September 5, 1994, which stated that there were no structural problems with the home, that no substantial alterations had been made, and that there was no moisture or water problem in the basement or crawl space.

Complaint, Paragraph 3, Exhibits A & B. At the time of the sale, the Forsseniuses had a policy of homeowners insurance with Nationwide Mutual Fire Insurance Company (hereinafter referred to as "Nationwide") Complaint, Paragraph 3; Complaint, Paragraph 11, Exhibit K.

The Appellants' original Complaint, Civil Action 02-C-3223 (the "underlying action"), incorporated into this action as Exhibits A & B of the Complaint, states the following facts:

(1) after the purchase of the home, the Aluises began to notice minor cracking of fresh paint on the first floor and small amounts of moisture in the finished portion of the basement. (2) In December 2000, Jacqueline B. Aluise noticed a crack in the garage portion of the basement. (3) In June 2002, the Aluises hired contractors to repair cracks in the garage portion of the basement. When the work began, the contractors reported that the garage crack contained waterproofing sealer, evidencing previous repair efforts. (4) In July 2002, a licensed engineer

inspected the home and reported that structural movement had taken place on the front and side foundational walls. (5) In November 2002, a contractor removed the drywall in the finished portion of the basement in order to make structural reinforcements. “[T]here was evidence of the removal of previously existing furring strips, a convex bow in the block, and previous negligent efforts to reinforce same. Removal of the drywall further revealed prior negligent efforts to seal leaks created by the structural movement....It then became clear that the interior wall, which was approximately 5.5 inches to the interior of the original location of the block, had been so located to conceal the block failure.” Complaint, Paragraph 3, Exhibit A, paragraphs 19-20, Exhibit B, paragraphs 21-22.

In December 2002, the Appellants filed a civil action against a real estate agent, a home inspector, and the Forsseniuses in the Circuit Court of Kanawha County, West Virginia, Civil Action No. 02-C-3223 (underlying complaint). Upon notice from the Forsseniuses of the civil action, Nationwide acknowledged and investigated the claim, and on January 3, 2003, issued a timely denial of coverage letter, stating that “[o]ur investigation has revealed and the reason for the Denial of Coverage is that there is no liability coverage for the failure to disclose prior repairs or the repairs themselves.” Complaint, Paragraphs 3 & 4, Exhibit C.

On April 22, 2003, the Forsseniuses allowed judgment to be taken against them in the underlying action in the amount of \$34,000.00. Complaint, Paragraph 8, Exhibit G. The Forsseniuses assigned any first-party bad faith claims they may have had against Nationwide to the Aluises in exchange for a covenant not to execute on the judgment, thereby terminating any further personal exposure of the Forsseniuses. Complaint, Paragraph 9, Exhibits I & J.

In July 2003, the Appellants filed the instant action, a three-count Complaint against Nationwide Mutual Fire Insurance Company in the Circuit Court of Kanawha County, West Virginia, Civil Action No. 03-C-1758. The first count asserted a "first-party claim for breach of contract." Count two asserted a "first-party claim for Unfair Claims Settlement Practices." The third count asserted claims for "third-party claims for Unfair Claims Settlement Practices." In exchange for Nationwide's agreement not to seek removal to Federal Court, the Aluises' Complaint stipulated that damages would not exceed \$75,000. Complaint, Paragraph "Limitation of Damages," page 11. Stipulation, attached hereto as Exhibit 1.

In December 2003, following discovery, Nationwide filed a motion for summary judgment asserting that the misrepresentations made by the Forsseniuses to the Aluises during the sale of the home were not covered under the policy of insurance, that negligent or defective workmanship is specifically excluded under the policy of insurance, and that the policy of insurance does not cover damages for economic or contractual losses nor for emotional distress. Lastly, because the allegations in the Complaint were foreign to the risks covered by the policy of insurance, Nationwide asserted that it had no duty to defend the original action.

The Appellants, after conducting extensive discovery in 03-C-1758, filed a second Complaint against Nationwide, this time in the Circuit Court of Cabell County, West Virginia, Civil Action No. 04-C-00009. The Cabell County Complaint included additional defendants, Betsy A. Ross, a Nationwide adjuster, and Terry Ridenour, a general counsel for Nationwide. The Kanawha County and Cabell County civil cases were consolidated by Order of the Circuit Court of Kanawha County entered on April

28, 2004. By the April 2004 order, the bad-faith claims were bifurcated and stayed pending resolution of the coverage issues.

On March 31, 2004, the Aluises filed nine (9) motions for partial summary judgment asserting, first - duty to defend, second - duty to defend, third - breach of contract, fourth - breach of contract; fifth - breach of contract; sixth - general business practice; seventh - first-party claim under unfair claims settlement practices, eighth - third-party claim under unfair claims settlement practices, and ninth - violation of UTPA.

On June 16, 2004, the lower court heard oral argument on Nationwide's motion for summary judgment and Appellants' motions for partial summary judgment enumerated first through fourth. The July Order granted summary judgment in favor of Nationwide finding that the Forsseniuses' misrepresentations were not an "occurrence" under the Nationwide policy, that the policy of homeowners insurance was not a warranty upon sale, and that Nationwide did not have a duty to defend a cause of action which is foreign to the risks covered by the insurance policy. The July Order also denied the first four of the Appellants' nine motions for partial summary judgment.

In August 2004, Nationwide filed a motion for summary judgment on all remaining claims, asserting that the record unequivocally revealed that Nationwide had timely acknowledged and investigated the claim and that the claims were not covered under the policy of insurance and Nationwide, therefore, had no duty to defend. The December Order granted Nationwide's motion, thereby dismissing the action and denying the remaining outstanding motions for partial summary judgment filed by the Aluises.

#### IV. STANDARD OF REVIEW

“A circuit court’s entry of summary judgment is reviewed *de novo*.” Syllabus Point 1, *Painter v. Peavey*, 451 S.E.2d 755 (W.Va. 1994). The circuit court’s function when deciding on a motion for summary judgment is to determine whether a genuine issue exists for trial. *Id.* Syllabus Point 3. A circuit court’s decision to grant summary judgment is appropriate if the record as a whole “could not lead a rational trier of fact to find for the nonmoving party.” *Id.* Syllabus Point 4.

#### V. DISCUSSION

Appellants strategically focus on whether the insureds’ misrepresentation amounts to an intentional act so as to preclude coverage. While Nationwide stands by that argument, it is, in effect, only one of several reasons that coverage did not attach. The damages involved were outside the scope of covered losses under the policy. As will be further discussed below, a seller’s misrepresentation does not constitute an “occurrence” so as to trigger coverage under the Nationwide Homeowner’s Policy in question. To the extent Forssenius’ representations triggered Appellants’ claim, not the structural damage to the home, the damages sound in warranty. The insurance policy in question did not cover warranty damages. To the extent the underlying Complaint alleges negligent repairs, the policy in question specifically excludes losses resulting from defective workmanship, construction, and materials. In short, the allegations do not allege the type of “property damage” or “bodily injury” for which there is liability coverage.

Summary judgment based solely on an intentional act exclusion would have been

justified; however, Nationwide's decision to deny coverage, and the circuit court's decision to grant summary judgment, rely on much more than an intentional act exclusion. Appellant's arguments that questions of fact exist and that the innocent spouse doctrine should be applied are both based on Nationwide's intentional act argument. To the extent that the circuit court's decision was based on Nationwide's other arguments, Appellants' arguments regarding questions of fact and innocent spouse simply miss the mark.

Nationwide will respond to each of Appellants' Assignments of Error while stressing that the intentional act exclusion was neither its sole nor primary justification for denying coverage.

**A. IN GRANTING SUMMARY JUDGMENT THE CIRCUIT COURT  
CORRECTLY APPLIED WEST VIRGINIA RULE OF CIVIL PROCEDURE 56.**

Appellants assert that the Circuit Court's decision to grant summary judgment was a misapplication of Rule 56. Appellants contend that the circuit court should not have relied upon the Disclosure Statement, which was prepared in conjunction with the sale of the home and attached to Nationwide's Motion for Summary Judgment as Exhibit A, in determining whether a question existed for trial. However, under the precedents established by this Court, "upon motion for a summary judgment . . . all exhibits and affidavits and other matters submitted by both parties should be considered by the court." *Trafalgar House Const., Inc. v. ZMM, Inc.*, 567 S.E.2d 294, footnote 2 at 302 (W. Va. 2002). In fact, the Disclosure Statement relied upon by Nationwide was

actually included in the Complaint filed by the Aluises against Nationwide. See Aluises' Complaint, Paragraph 3, footnote 1, Exhibits A and B. The aforesaid written disclosures indicated as follows:

OTHER DISCLOSURES;

- 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 the basement or crawl space?  
 YES  NO  DO NOT KNOW

By operation of judicial admission, the Aluises are bound by those allegations contained in their pleadings.

Appellants set forth certain facts in their original complaint upon which the circuit court relied in its decision. Appellants' assertions in their pleadings act as judicial admissions. "Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 517 S.E.2d 763, 779 (W.Va. 1999). Once such an admission is made, that admission "will stop the one who made it from subsequently asserting any claim inconsistent therewith." *Id.*

As mentioned above in the Statement of Facts, Appellants' original underlying Complaint maintains that when Appellants hired contractors to repair the structural damage in the basement, the contractors uncovered evidence of negligent repair efforts

and an attempt to conceal the structural problems. Under *Trafalgar House*, Appellants may not now assume positions that contradict their previously made admissions.

Under Rule 56(c), the circuit court acted properly in relying upon Appellants' original complaint in making its summary judgment decision because the original complaint was attached as an exhibit to the complaint in the instant action.

Appellants state that "even the insurance policy was contested" and that "Defendant's denials both cited Endorsement 3199 but it produced Endorsement 3199-92." Appellants' Brief at 16. In fact, 3199 and 3199-92 are the same endorsement; the "92" designates the state in which the policy was written. The language is identical. Even if this could be considered an error by the circuit court, "the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of parties." *McAllister v. Weirton Hosp. Co.*, 312 S.E.2d 738, 743 (W.Va. 1983).

**B. THE CIRCUIT COURT WAS CORRECT IN FINDING THAT  
NATIONWIDE HAD NO DUTY TO DEFEND AND WAS CORRECT IN ITS  
DENIAL OF COVERAGE.**

An insurer's duty to defend only arises "if the claim stated in the underlying complaint could, without amendment, impose liability for risks the policy covers." *West Virginia Fire and Cas. Co. v. Stanley*, 602 S.E.2d 483, 490 (W.Va. 2004). In the case at bar, the circuit court correctly found that Nationwide did not have a duty to defend because the claims brought by Appellants were entirely outside of the Nationwide

Homeowner's Insurance Policy. Because Nationwide's argument that it had no duty to defend is based on the fact that the allegations in the complaint are outside the coverage of the policy, it follows that the arguments regarding the absence of a duty to defend equally apply to the circuit court's coverage decision.

In support of their assertion of a duty to defend, Appellants cite *Bruceton Bank v. U.S. Fid. & Guar. Ins. Co.*, 199 W. Va. 548, 486 S.E.2d 19 (1997). It should be noted that the language of the holding in *Bruceton Bank* was limited to a lender liability situation, unrelated to the case *sub judice*. Appellants also cite the non-controlling case of *U.S. v. U.S. Fid. & Guar. Co.*, 601 F.2d 1136 (C.A. Okl., 1979), for the proposition that the language of the ISO policy used by Nationwide does not limit the duty to defend to the happening of an occurrence. The holding in that case is more limited than Appellant suggests. Even in the event of an ambiguous obligation to defend, the *USF&G* case still requires the action against the insured be "of the general nature and kind of action covered by the policy." *Id.* at 1141. The Circuit Court correctly found that the liability coverage of a homeowner's policy is not intended to be a warranty upon sale.

Next the Petitioners rely upon *Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988), but only provide one of three general principals set forth in *Leeber*. The remaining two general principals should properly be included for this Court's consideration. The three general principals in *Leeber* are:

"[f]irst, if part of the claims against an insured fall within the coverage of a liability insurance policy and part do not, the insurer must defend all of the claims, although it might eventually be required to pay only some of the claims. Second, an insured's right to a defense will not be foreclosed unless such a result is inescapably necessary. **Thus, third, a liability insurer need not defend a case against the insured if the alleged conduct is entirely foreign to the risk insured against.**"

*Id.* 182 W. Va. at 378, 376 S.E.2d at 584 (citation omitted) (emphasis added).

The Forssenius' claim against Appellants, upon which Appellants' claim against Nationwide is based, arose from the Forssenius' misrepresentation regarding the condition of the home and from negligent workmanship. The Forssenius' claim is foreign to the risk insured against and could not impose liability for risks against which the policy insures.

There are two logical causes of the Aluises' damage. One is misrepresentation of the condition of the home, and the other is negligent workmanship in the concealed repairs. (The record is clear that the "false wall" itself was well constructed.) A misrepresentation is not an "occurrence" under the policy. Further, the policy specifically excludes losses resulting from defective workmanship, construction, and materials. For all of these reasons, which are further explored below, the circuit court properly held that Nationwide was correct in its decision to deny coverage and to deny a defense.

### **1. The Type of Damages Sought are Not Covered by the Policy in Question**

The type of damages available for negligent misrepresentation and negligent workmanship are not covered under the policy. In cases very similar to the instant matter, both the Ninth and Eighth Circuits have held that a judgment for negligent misrepresentation is not a recovery for "property damage" within the meaning of the insurance policy. In the recent case of *St. Paul Fire & Marine Insurance Company v. Lippincott*, 287 F.3d 703 (8<sup>th</sup> Cir. 2002), the Thompsons sued the Lippincotts for fraud and rescission, alleging that the Lippincotts intentionally and negligently concealed structural damage to a house they sold to the Thompsons. Before listing the house for

sale, the Lippincotts patched a structural crack with spackling, covered a crack with carpet, and then filled a room with boxes, making it difficult to discover the cracks. As in the instant case, the Lippincotts completed a disclosure statement falsely representing that they were not “aware of any past or present cracks or flaws in the walls or foundations.” *Id.* at 705. The trial court entered judgment in favor of the Thompsons on the negligent misrepresentation claim. St. Paul brought a declaratory judgment action against the Lippincotts seeking a judicial determination as to whether the basic insurance policy and a personal umbrella policy covered the judgment against the Lippincotts.

The primary insurance policy covered “legal liability resulting from an occurrence in which there is actual accidental property damage.” *Id.* “Property damage” was defined as “damages to someone else’s property or its loss or destruction and the loss of its use.” *Id.* The umbrella policy defined “property damage” as damage to “tangible property or its loss or destruction” and “the loss of its use.” *Id.* The Court held that “[t]he plain meaning of ‘property damage’ under these policies is a tangible, that is, a physical or material, loss or destruction of property.” *Id.* The Court examined its earlier holding which concluded that “there is no ‘property damage’ unless and until the [occurrence causes] ‘physical injury to tangible property.’” *Id.*, quoting *Esicorp, Inc. v. Liberty Mut. Ins. Co.*, 266 F.3d 859, 862-63 & n.2 (8<sup>th</sup> Cir. 2001).

Accordingly, the Court in *Lippincott* held that:

“The Lippincotts’ negligent misrepresentations did not cause any property damage to the house. Neither did the Lippincotts’ actions to conceal the cracks in the house cause any property damage to the house. The structural flaws in the house constitute tangible property damages, but these flaws predate the occurrence of concealments and misrepresentations by which the Lippincotts incurred liability. The Thompsons’ judgment covered the intangible

losses incurred when the Thompsons relied to their economic detriment upon the Lippincotts' misrepresentations. These damages are pecuniary in nature and are not property damage within the meaning of the St. Paul insurance policies."

*Id.* at 706 (citations omitted).

The United States District Court for the Southern District of Mississippi has likewise held that an underlying complaint alleging pecuniary loss from misrepresentation did not fall within coverage for "property damage" within a homeowners' policy, notwithstanding the fact that the termite infestation itself was undoubtedly property damage. In *State Farm Fire and Cas. Co. v. Brewer*, 914 F.Supp. 140 (S.D. Miss. 1996), the Brewers sold their home to Massey. Closing occurred on December 18, 1992. Three days prior to closing, an insect report was issued which indicated that the property was termite-free. The Brewers' homeowner's policy was cancelled on December 14, 1992. Shortly after the Masseys took occupancy, they learned that the home was infested with termites. The Masseys sued the Brewers. The Brewers contacted State Farm who undertook the defense under a reservation of rights.

The State Farm policy provided the Brewers with coverage for "claim[s] made or . . . suit[s] brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence" for which the insured is legally liable. *Id.* at 142. The policy defined "property damage" as "physical damage to or destruction of tangible property, including loss of use of this property." *Id.*

State Farm cited numerous cases in which other jurisdictions have refused to find coverage under similar circumstances. See *Safeco Insurance Co. of North America v. Andrews*, 915 F.2d 500 (9<sup>th</sup> Cir. 1990); *Allstate Ins. Co. v. Morgan*, 806 F.Supp. 1460

(N.D.Cal. 1992); *Allstate Ins. Co. v. Chaney*, 804 F.Supp. 1219 (N.D.Cal. 1992); *Allstate Ins. Co. v. Hansten*, 765 F.Supp. 614 (N.D.Cal. 1990); *State Farm Fire and Cas. Co. v. Gwin*, 658 So.2d 426 (Ala. 1995); *Devin v. United Services Automobile Assoc.*, 6 Cal.App.4th 1149, 8 Cal.Rptr.2d 263 (1992); *Dixon v. National American Ins. Co.*, 411 N.W.2d 32 (Minn. 1987). As noted by the Court:

“These cases are virtually unanimous in their holdings that damages flowing from misrepresentation and/or fraud have no basis in property damage; rather, the only cognizable damages from such torts are economic and contractual in nature and as such do not fall within the scope of coverage afforded by policies like that of the Brewers.”

*Id.* at 142.

The Court thus held that the underlying state court action did not involve a claim for property damage within the meaning of the policy. *Id.*

“Rather, the Masseys’ claims sound in negligent and intentional misrepresentation and fraud. The damages which stem from such actions are pecuniary by their very nature. While it is true that the termite damage is clearly property damage, it is not damage for which Defendants are legally liable. The alleged misrepresentation of Defendants did not cause property damage. The termites caused the property damage.”

*Id.* at 142-43. The Court found that there was no proximate cause between the alleged misrepresentation which formed the basis for the underlying suit and the termite damage.

*Id.* at 143.

“The termite damage occurred prior to the alleged misrepresentation. If the termite damage had not already occurred, there could not have been a misrepresentation. The damage from the misrepresentation could not be the termite damage which had already occurred. For damages to be recoverable under the policy, the damages must be damages ‘for which defendant is legally liable.’”

*Id.* As noted by the Court, “it is . . . Hornbook law that a court cannot so construe a policy as to create coverage where there is none.” *Id.* at 144.

The Court of Appeals of Kansas referenced the *Brewer* case in holding as a matter of first impression that the buyers’ economic losses were not “property damage” caused by an “occurrence” under the sellers’ policy. In *Bush v. Shoemaker-Beal*, 26 Kan.App.2d 183, 987 P.2d 1103 (1999), the Bushes purchased a residence with undisclosed termite damage from Shoemaker and Beal. The Bushes obtained a default judgment based upon negligent misrepresentations by Shoemaker-Beal and commenced garnishment proceedings against State Farm. The trial court determined that certain policy exclusions precluded coverage. The Court of Appeals affirmed “because the economic losses sustained by Bush from . . . negligent misrepresentations are not ‘property damage’ caused by an ‘occurrence’ as those words are defined or used within the policy issued by State Farm.” *Id.* at 184.

The policy defined “occurrence” as “an accident, including exposure to conditions, which results in . . . property damage.” *Id.* “Property damage” was defined as “physical damage to or destruction of tangible property, including loss of use of this property.” *Id.* The Court employed a cause and effect analysis:

“The above definitions unambiguously require a cause and effect analysis; that is, what was the occurrence that resulted in damage to the insured property?”

*Id.* at 184. The Court first observed that the above-stated provisions of the State Farm policy are not ambiguous. *Id.* Because this was a case of first impression, the Court looked to other jurisdictions for guidance.

“[N]umerous other jurisdictions have considered this issue and decided that a homeowner’s policy with similar language does not afford coverage for an insured’s

negligent misrepresentations as to the condition of the property.”

*Id.* at 185, citing *State Farm Fire and Cas. Co. v. Brewer*, 914 F.Supp. 140, 142 (S.D.Miss. 1996), and the cases cited therein.

The Court agreed with the reasoning in *Brewer* and held that there was no coverage under the State Farm policy “because the damage to the conveyed property was not caused by the negligent misrepresentations of Beal. The damage was caused by termites. We further hold there is no coverage because *Bush* seeks economic damages, not property damages.” *Id.* at 184.

The Supreme Court of Wisconsin, in *Smith v. Katz*, 226 Wis.2d 798, 817, 595 N.W.2d 345 (1999), recognized “that the majority view in the cases is that misrepresentations and omissions do not produce ‘property damage’ as defined in insurance policies. They produce economic damage.” *Id.*, citing *Safeco Ins. Co. of America v. Andrews*, 915 F.2d 500, 502 (9<sup>th</sup> Cir. 1990); *Hamilton Die Cast, Inc. v. United States Fidelity & Guar. Co.*, 508 F.2d 417 (7<sup>th</sup> Cir. 1975); *Allstate Ins. Co. v. Morgan*, 806 F.Supp. 1460, 1464-65 (N.D.Cal. 1992); *Allstate Ins. Co. v. Chaney*, 804 F.Supp. 1219, 1222 (N.D.Cal. 1992); *Allstate Ins. Co. v. Hansten*, 765 F.Supp. 614, 616 (N.D.Cal. 1991); *Liberty Mut. Ins. Co. v. Consolidated Milk Producers’ Ass’n.*, 354 F.Supp. 879 (D.N.H. 1973); *Devin v. United Services Automobile Assoc.*, 6 Cal.App. 4<sup>th</sup> 1149, 1158, 8 Cal.Rptr.2d 263, 269 (1992); *Giddings v. Industrial Indem. Co.*, 112 Cal.App.3d 213, 219, 169 Cal.Rptr. 278, 281 (Cal.Ct.App. 1980); *Hartford Accident & Indem. Co. v. Case Found Co.*, 10 Ill.App.3d 115, 294 N.E.2d 7, 13-14 (1973); *Dixon v. National American Ins. Co.*, 411 N.W.2d 32, 33-34 (Minn.Ct.App. 1987); and *State Farm Lloyds and State Farm Fire and Casualty Co. v. Kessler*, 932 S.W.2d 732, 737

(Tex.Ct.App.-Fort Worth 1996).

The cases discussed above illustrate the principle that homeowner's policies like the one issued by Nationwide in the case at bar do not insure against damages that result from misrepresentation, be it negligent or intentional. Damages that result from misrepresentation, like those alleged by Appellants, are contractual damages. The policy in question insured against property damages, which sound in tort. Therefore, the complaint is entirely outside the scope of the policy, and no duty to defend exists.

## **2. The Complaint Does Not Allege an "Occurrence" under the Terms of the Policy**

The policy in this case provides:

We will pay damages the insured is legally obligated to pay due to an occurrence . . .

(See **Exhibit D** attached to Nationwide's Motion for Summary Judgment, Section II, Coverage E, page 12.)

"Occurrence" is defined in the Amendatory Endorsement 3199 as follows:

**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.

(See **Exhibit E** attached to Nationwide's Motion for Summary Judgment, Definitions, page 1.)

"Bodily injury" is defined as:

**"Bodily Injury"** means bodily harm, sickness or disease, including resulting care, loss of services and death.

(See **Exhibit D** attached to Nationwide's Motion for Summary Judgment, Definitions,

page 2, number 1.)

“Property damage” is defined as:

“**Property damage**” means physical injury to or destruction of tangible property. This includes resulting loss of its use.

(See **Exhibit D** attached to Nationwide’s Motion for Summary Judgment, Definitions, page 3, number 6.)

“Accident” is not defined in the policy.

Although West Virginia has not addressed the issue of whether a seller’s misrepresentation is an “occurrence” or an “accident,” the majority of courts which have considered this issue have held that a seller’s misrepresentation is not an occurrence and is thus not covered by a policy of insurance.<sup>1</sup> In *Lawyer v. Succession of Kountz*, 716 So.2d 493, 1997-2701 (La.App. 4 Cir. 7/29/98), the Plaintiff alleged that the residence was infested with termites as of the date of sale, and that the Defendants had “covered up” such condition. The Plaintiff contended that the Defendants were liable for misrepresentation in the sale of the property. The Defendants filed a third party demand against Metropolitan Property Casualty Insurance Company and State Farm Fire & Casualty Company, alleging that the homeowner’s insurance covered them for the acts and liability alleged by the Plaintiff. The insurance companies denied coverage, indemnity and a defense. The trial court denied the insurance companies’ motions for summary judgment, but the Court of Appeal reversed.

The Metropolitan policy defined “occurrence” as “an accident, including continuous or repeated exposures to substantially the same general harmful conditions,

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<sup>1</sup> The following synopsis of case law is only representative of the majority opinions, and is not intended to be a complete compendium of same.

resulting in bodily injury or property damage during the term of the policy.” *Id.* at 6-7.

“Property damage” was defined as “physical damage to or destruction to tangible property, including loss of use of this property.” *Id.* at 7.

The State Farm policy defined “occurrence” as “an accident, including exposure to conditions, which results in a bodily injury; or . . . property damages . . . during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one occurrence.” *Id.* “Property damage” meant “physical damage to or destruction of tangible property, including loss of use of this property.” *Id.*

The Court, in *Succession of Kountz*, held that the act of a sale does not constitute an “occurrence” under the personal liability coverage provisions. *Id.* at 9. One of the Defendants’ claims against the insurers was based on the Plaintiff’s claims of breach of warranty in selling the property with hidden defects and the alleged misrepresentation of the Defendants during the act of sale of the residential property. The Court stated

“We find that the trial court was clearly wrong in determining that the termite damage was the “occurrence” which established coverage for plaintiffs (sic) claims. The defects in the property which allegedly existed prior to the basis of plaintiffs (sic) suit (the sale) cannot be considered an “occurrence” sufficient to trigger coverage for plaintiff’s demands under the express terms of the homeowner’s policies.” *Id.* at 9-10.

The Court reasoned that under the policy terms, the defendants were only entitled to coverage for an occurrence which caused bodily injury or property damage. “The misrepresentation alleged in plaintiff’s suit did not cause the termite (property) damages, rather, the alleged misrepresentation occurred during the sale of the property and *after* the termite damage had already occurred.” *Id.* at 11 (emphasis in original). Thus, the Court deemed any damages suffered by the Plaintiff to be pecuniary in nature - damages due to

the diminished value of a home infested with termites. *Id.* “[T]he plaintiff’s negligent and/or intentional misrepresentation claims by their very nature are not for ‘property damage’ and therefore do not fall within the scope of coverage afforded by the homeowner’s insurance policies.” *Id.* The Court found that the property damages and bodily injury allegedly suffered by the Plaintiff were due to her purchase of the property. *Id.* at 12.

“The only connexity between the plaintiff and the insured home is through the act of sale. To find coverage existed in this case would be to find that based on an act of sale, a homeowner’s insurer becomes the warrantor of the condition of the insured property. This is not the type of coverage which is contemplated by these homeowner’s policies, and we therefore find that the present policies unambiguously exclude coverage for plaintiff’s demands.”

*Id.* Thus, as a matter of law, the insurers had no duty to indemnify or provide a defense to the Defendants. *Id.* at 13.

Shortly after deciding the *Kountz* case, the Court of Appeal of Louisiana addressed the same issue in *Harding v. Wang*, 729 So.2d 9, 1998-1865 (La.App. 4 Cir. 2/3/99). In that case, the Wangs sold their home to Harding. Pursuant to the contract, the Wangs had a termite inspection performed. Although the termite report indicated that the house had no signs of termite infestation or damage, Harding discovered termites and termite damage shortly after he took occupancy of the house. Harding filed suit against the Wangs alleging, *inter alia*, intentional and negligent misrepresentation and breach of contract. The Wangs filed a third-party demand against Allstate seeking indemnity and a defense.

The trial court dismissed the Wangs’ third-party demand against Allstate with

prejudice. On appeal, the Court of Appeal of Louisiana affirmed the trial court. The Court of Appeal examined its earlier holding in *Lawyer v. Succession of Kountz, supra*, and held that Allstate had no duty to indemnify and/or to provide a defense in Harding's suit against the Wangs for negligent misrepresentation. 729 So.2d at 12.

In *Allstate Ins. Co. v. Chaney*, 804 F.Supp. 1219 (N.D.Cal. 1992), the United States District Court disregarded the argument that, because the damages resulting from the misrepresentation were not intentional, the act constituted an "accident." The Chaney's sold their home to Matson who alleged that the Chaney's misrepresented certain facts to induce her to purchase the property. The Matson complaint alleged, *inter alia*, intentional and negligent misrepresentation, breach of contract, and intentional and negligent infliction of emotional distress.

Allstate insured the Chaney's under a homeowner's insurance policy which stated that "Allstate will pay for damages which an insured person becomes legally obligated to pay because of bodily injury or property damage arising from an accident covered by part of this policy." *Id.* at 1220. "Property damages" was defined as "physical injury to or destruction of tangible property, including loss of use resulting from such physical injury or destruction." *Id.* Allstate accepted the Chaney's' defense under a reservation of rights.

The *Chaney* Court held that the causes of action for negligent misrepresentation and negligence were not covered under the policy. *Id.* at 1222. The Court further held that the policy did not provide coverage for the type of damages sought by Matson.

Courts in Texas, like the majority of jurisdictions, hold that as a matter of law, misrepresentations do not fall within the plain meaning of the definition of an occurrence in the context of an insurance policy. *Freedman v. Cigna Ins. Co. of Texas*, 976 S.W.2d

776 (Tx. 1998). In *Freedman*, the Freedman's sold their home to the Marxes. After buying the house, the Marxes noticed that the roof leaked and part of the roof subsequently collapsed. The Marxes sued the Freedmans after learning that the roof had needed repairs while the Freedmans lived there. The Freedmans asked their insurers, Cigna and Insurance Company of North America (ICNA), to defend them, but the insurers refused. The Freedmans eventually settled with the Marxes, and then sued Cigna and ICNA.

The policies defined "occurrence" as "an accident, including exposure to conditions, resulting in bodily injury or property damage during the policy period." *Id.* at 778. The Court referred to *Black's Law Dictionary* and noted that an accident is commonly defined as an unexpected happening without intention or design. *Id.* The Court also noted that "[a]s a matter of law, fraudulent promises, misrepresentations, and untrue statements do not fall within the plain meaning of the definition of an occurrence." *Id.*

The Court of Appeals found that the occurrence for which the Marxes sued the Freedmans was not the roof's collapse, but rather, the Freedmans' misrepresentations about the condition of the roof. *Id.* Thus, the Court held that

"[t]he Freedmans' failure to make disclosures about the roof was the basis of the Marxes' lawsuit. On the face of the Marxes' pleadings, the event for which the Freedmans sought coverage was an intentional act, and not an 'accident.' The Freedmans sought coverage for their statements to the Marxes, not for the roof's collapse."

*Id.* Accordingly, the factual allegations made by the Marxes against the Freedmans did not allege an "occurrence" under the insurance policies, and the insurers thus did not owe

the Freedman's a duty to defend. *Id.* at 778-79.

In an earlier case, the Court of Appeals of Texas, in *State Farm Lloyds v. Kessler*, 932 S.W.2d 732 (Tex. 1996), held that the damages suffered by the purchasers did not result from an occurrence or loss under the policy, which defined an occurrence as an accident. The Fannings alleged that the Kesslers told them the property had no drainage or foundation problems, when in reality it had severe draining and foundation problems. State Farm defended the Kesslers, subject to its right to assert grounds for non-coverage.

The State Farm homeowner's policy stated coverage would be provided "[i]f a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence to which this coverage applies . . ." *Id.* at 734. "Occurrence" was defined in the policy to mean "an accident including exposure to conditions, which results in bodily injury or property damage during the policy period." *Id.* "Property damage" meant "injury to, destruction of, or loss of use of property." *Id.*

In regard to the "property damage" issue, the Court acknowledged that the Fannings' petition did describe drainage and foundation problems. However, the Court held that they were not property damages for which the Kesslers were liable because the Fannings did not assert that the Kesslers injured or destroyed the property, or caused the resulting loss of use. *Id.* at 737.

Instead, the Fannings allege that the Kesslers misrepresented the problems. The Kesslers' alleged misrepresentations did not *cause* the drainage and foundation problems; those problems existed before negotiations began.

*Id.* (emphasis in original). Although the Fannings alleged economic damages, those damages arose because of the Kesslers' alleged misrepresentations about the property and

because the Fannings did not get the property they bargained for. *Id.* Thus, the Court held that the economic damages were not property damages as defined by the policies. However, even if some of the economic damages could fall within the definition of property damage, the Court noted that “courts uniformly hold that those resulting from misrepresentation do not.” *Id.*, citing *State Farm Fire & Casualty Co. v. Brewer*, 914 F.Supp. 140, 142-43 (S.D.Miss. 1996) (holding that termite damage does not fall within the meaning of property damage because the alleged misrepresentations did not cause the damage; the termites did); *Allstate Ins. Co. v. Morgan*, 806 F.Supp. 1460, 1464 (N.D.Cal. 1992) (holding that claims which allege negligent misrepresentation and failure to disclose are seeking economic damages, not property damages within insured’s policy); *Qualman v. Bruckmoser*, 163 Wis.2d 361, 471 N.W.2d 282, 285 (1991) (holding that pecuniary damages are not property damages under insured’s policy).

Although the Kesslers argued that the cause of the Fannings’ alleged damages was the improper drainage of the property, the Court observed that the improper drainage occurred *before* the Fannings’ causes of action accrued. *Id.* at 739 (emphasis in original). “Damages do not precede their cause. The Kesslers’ alleged misconduct triggered the Fannings’ claims, not the improper drainage.” *Id.*

“To fit the cause of action into the definition of ‘occurrence,’ we would have to violate the plain-meaning of contract interpretation and stretch ‘conditions’ to include voluntary, wrongful acts of the insured. This we are not willing to do.”

*Id.*

In *State Farm Fire and Casualty Co. v. Gwin*, 658 So.2d 426 (Ala. 1995), the Supreme Court of Alabama held that reliance on the home sellers’ alleged representations concerning the home’s condition was not an “occurrence” within the meaning of the

insurance policy.

The policy provided that State Farm would provide coverage “[i]f a claim is made or suit is brought against an insured for damages because of bodily injury or property damage to which this coverage applies, caused by an occurrence . . .” *Id.* at 427.

“Occurrence” was defined in the policy as “an accident, including exposure to conditions, which results in bodily injury or property damage during the policy period. Repeated or continuous exposure to the same general conditions is considered to be one occurrence.”

*Id.* “Property damage” was defined as “physical damage to or destruction of tangible property, including loss of use of this property....” *Id.* The Court stated that for property damage to come under the coverage of the policy, there must have been an “occurrence” as defined by the policy. *Id.* at 428.

The Court found the reasoning in *United States Fidelity & Guaranty Co. v. Warwick Development Co.*, 446 So.2d 1021 (Ala. 1984) persuasive. In that case, the Court held that “[t]here was no evidence in this case that a misrepresentation by Warwick caused physical injury to or destruction of tangible property. 658 So.2d at 428 (emphasis in original).

“A majority of courts have held that in order to have liability under the terms of such a policy the ‘occurrence’ must arise during the policy period, for it is the insurance that is in force at the time of the property damage that is applicable rather than insurance that was in force when the work was performed. See, e.g., *Deodato v. Hartford Ins. Co.*, 143 N.J. Super. 396, 363 A.2d 361 (1976); *Singsaas v. Deiderich*, 307 Minn. 153, 238 N.W.2d 878 (1976); *Oceanonics, Inc. V. Petroleum Distributing Co.*, 280 So.2d 874 (La.Ct.App. 1973), *aff’d*, 292 So.2d 190 (La. 1974)....

[A]s a general rule the time of an “occurrence” of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time the

complaining party was actually damaged.”

*Id.*, citing *Muller Fuel Oil Co. v. Insurance Company of North America*, 95 N.J. Super. 564, 232 A.2d 168 (1967), quoted in *Deodato v. Hartford Ins. Co.*, 363 A.2d at 365; see also Annot., 57 A.L.R.2d 1385.

The Court in *Gwin* thus concluded that any alleged misrepresentations made by the Gwins did not *cause* the property damage which the Dobsons alleged, and that any emotional distress related to the alleged misrepresentations would have occurred *after* the termination of the policy. *Id.* (emphasis in original).

California is also among the majority of jurisdictions which hold that a homeowner’s policy covering only bodily injury or property damage does not provide coverage for alleged misrepresentations claimed by the purchasers. In *Allstate Insurance Company v. Morgan*, 806 F.Supp. 1460 (N.D.Cal. 1992), the Court held that the type of damages available for misrepresentation, failure to disclose, and negligence were not covered under the homeowner’s policy because it provided coverage only for bodily injury or property damages. *Id.* at 1463. “The damages alleged...are for economic or contractual losses and do not fall within the definition of ‘property damage’ under the policy.” *Id.*

The Court in *Morgan* also examined whether there was an “accident” within the meaning of the policy and concluded that there was not. In order for coverage to exist, there must have been an “occurrence” under the policy. *Id.* In this case, the damages sought would have had to arise from an “accident.” *Id.* Under California law, “an accident refers to ‘an unexpected, unforeseen, or undesigned happening or consequence from either a known or unknown cause.’” *Id.* at 1465 (citation omitted). Furthermore, “a

loss does not become ‘accidental’ simply because the insured did not intend to cause the injury.” *Id.* (citation omitted). Thus, the Court held that the defendants’ assertion that the alleged misrepresentations were unintentional and therefore accidental in nature to be without merit. *Id.* “[N]egligent misrepresentations do not constitute ‘accident’ for insurance coverage purposes.” *Id.* (citations omitted).

In *Safeco Ins. Co. of America v. Andrews*, 915 F.2d 500 (9<sup>th</sup> Cir. 1990), the court held that allegations that the real estate was not as valuable or as desirable as represented due to various defects in the property did not constitute an “occurrence” under the insurance policy. *Id.* at 502. The purchaser alleged that the seller had misrepresented the condition of the property, which was later discovered to have unstable earth problems, as well as defective and inadequate electrical wiring and plumbing, and a leaky basement. As a result of these undisclosed conditions, the value and desirability of the property had been materially affected. The policy in question defined “occurrence” as an “accident . . . which results . . . in bodily injury or property damage.” *Id.* The Ninth Circuit noted that even though the condition of the property was an element of the underlying suit, it was not the *cause* of the damages. *Id.* (emphasis in original). The cause of damage was the seller’s alleged misrepresentations, which were held not to be an “occurrence” under the policy. *Id.*

The underlying claim in the case at bar was based on contractual claims. The event upon which the Aluises’ claim against the insureds is based is the insureds’ misrepresentation regarding the condition of the house. The policy in question limits the definition of “occurrence” to bodily and property damage; the appellants’ alleged injuries are contractual in nature and, therefore, foreign to the risks covered by the policy.

Any property damage that existed in the home existed before the making of the misrepresentations which are the theory of recovery. Damages cannot precede their cause. The misrepresentations triggered the Aluises' claims, not the actual property defects. That the underlying facts deal with defects in the property sold does not change the nature of the claim asserted by the Aluises against the Forsseniuses. Nor does it change the risks against which the policy insured. Any damages suffered by the Aluises are due to their purchase of the subject property. The only connection between the Aluises and the home is through the act of the sale. As a matter of public policy, "to find coverage existed in this case would be to find that based on an act of sale, a homeowner's insurer becomes the warrantor of the condition of the insured property. This is not the type of coverage which is contemplated by these homeowner's policies . . ." *Kountz, supra*, at 12.

The Nationwide policy provides that an "occurrence" must arise during the policy period. As noted by the Court in the *Gwin* case, *supra*, as a general rule, the time of an "occurrence" of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed, but the time the complaining party was actually damaged. By their own admission, the Aluises did not notice any property defects until "several years" after the sale of the property. This is well after the expiration of the Nationwide policy, and is thus outside its coverage period.

### **3. The Nationwide Policy Specifically Excludes Defective Workmanship, Construction, and Materials**

The Amendatory Endorsement 3199, Section 1 (Exclusions), page 3, specifically

excludes:

- a. a fault, weakness, defect or inadequacy in the:
  - (1) specifications, planning, zoning;
  - (2) design, workmanship, construction, materials;
  - (3) surveying, grading, backfilling;
  - (4) development or maintenance;of any property on or off the residence premises whether intended or not....

(See **Exhibit E**, attached to Appellee's Motion for Summary Judgment.)

As set forth above, the Forsenniuses admit that they performed the following construction and/or maintenance work on the subject property: specifically, Christer Forssenius (1) patched or sealed the outside of the block on the right side facing the front of the house; (2) placed wooden supports on the interior of the block in the finished portion of the basement; (3) patched or sealed the interior of the block in the finished portion of the basement; and (4) installed the drywall in the finished portion of the basement.

The Aluises discovered that the new drywall had been installed approximately 5.5 inches to the interior of the original location of the block, "negligently" concealing the block failure and any continued movement from view. (See **Exhibit F** attached to Appellee's Motion for Summary Judgment, paragraph numbered 22.) The Forsenniuses admitted that Mr. Forssenius performed the drywall work in the basement. The work performed by Mr. Forssenius may be a direct cause of the defects complained of by the Aluises. As noted in the Nationwide policy, the policy specifically excludes a fault,

weakness, defect or inadequacy in the design, workmanship, construction, materials, development or maintenance, whether intended or not. Thus, the policy excludes any damages which may arguably have been caused by Mr. Forssenius' negligent construction and/or repairs of his own home prior to sale.

Based on the above case law and a plain reading of the policy in question, the injuries alleged by the Appellants are not the risks insured against by the insureds' homeowner's policy and could not have been covered under the policy. Further, the misrepresentation upon which the underlying claim is based does not constitute an "occurrence" under the language of the policy. The circuit court's Order Granting Summary Judgment stated that a duty to defend exists if the allegations in the complaint "are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." Order Granting Summary Judgment at 4. The circuit court was convinced that the underlying complaint could not reasonably be covered by the terms of the policy. Therefore, the circuit court correctly applied West Virginia law in its decision that Nationwide had no duty to defend.

### **C. APPLICATION OF THE INNOCENT SPOUSE DOCTRINE IS INAPPROPRIATE IN THE CASE AT BAR**

Appellants urge this court to adopt the innocent spouse doctrine, which prevents a spouse from being denied coverage based on the intentional act of another. Because coverage was properly denied based on reasons in addition to the insureds' intentional act, there is no reason for this court to rule on the innocent spouse doctrine at this time. Even so, the innocent spouse doctrine "is applied predominantly, if not exclusively, in

arson cases to permit an innocent co-insured to recover when another co-insured engages in misconduct after the policy is issued.” *Shepherd v. Foundation Life Ins. Co. of Ark.*, 1994 WL 706552, 3 (Ark.App. 1994).

**D. APPLICATION OF THE DOCTRINE OF WAIVER IS INAPPROPRIATE IN THE CASE AT BAR**

Appellants’ Motion for Partial Summary Judgment based on the Doctrine of Waiver was denied because, based on the circuit court’s other decisions, that motion was pointless. Under the Doctrine of Waiver, an insurer that improperly denies a defense is bound by any judgment against the insured. The circuit court found, and the record shows that it was correct in doing so, that Nationwide’s decision to deny coverage and a defense was correct. Therefore, there was no reason for the court to grant Appellants’ motion.

**E. THE CIRCUIT COURT PROPERLY DENIED APPELLANTS’ MOTION FOR PARTIAL SUMMARY JUDGMENT UNDER HAYSEEDS**

To receive Hayseed’s damages, the policyholder must “substantially prevail” in an action against an insurer under a property damage claim. *Hayseeds, Inc. v. State Farm Fire & Cas. Co.*, 352 S.E.2d 73, 80 (W.Va. 1986). Appellants did not substantially prevail against Nationwide; therefore, the circuit court made the correct decision regarding Hayseeds.

**F. THE CIRCUIT COURT'S RELIANCE ON THE DISCOVERY COMMISSIONER WAS APPROPRIATE.**

The argument regarding appointed discovery commissioners is moot. Nonetheless, Nationwide will address the issues raised by the Aluises.

Following depositions and exchange of documents, several discovery motions were filed. Upon review of the motions and written memorandum, the Circuit Court referred the matter to Charles Hurt, Esquire.

On January 28, 2004, the Special Commissioner Hurt conducted a hearing regarding the discovery disputes of the parties. Thereafter, the special commissioner submitted his *Report of Commissioner* to the lower court. The Circuit Court directed the parties to submit written objections to the commissioner's recommendation. The Aluises and Nationwide filed their respective objections to the report. On February 25, 2004, the lower court considered the motions, memorandums, reports and objections.

The Appellants argue that they had no input or right to object to the selection of the special commissioner; however, this argument is deceiving in that Appellants never objected to Mr. Hurt's appointment. The special commissioners are bound by the Code of Judicial Conduct. In *State ex rel. Mantz v. Zakaib*, 609 S.E.2d 870 (W.Va.2004), this Court heard argument by parties who sought disqualification of the discovery commissioners based on questioned impartiality. *Id.* Parties have as much discretion to seek appellate review of the conduct of a special commissioner as they do of the conduct of a judge. See Code Jud.Conduct, Canon 6A.

The Aluises cite *Nagy v. Oakley*, 172 W. Va. 569, 309 S.E.2d 68 (1983) in support of their argument opposing the appointment of special discovery commissioners.

However, the Court's concerns in the *Nagy* case were directed at special commissioners to hear domestic cases. Those concerns and arguments have become moot, in that West Virginia now has Family Court Judges.

The lower court considered the report of the commissioner, as well as the objections submitted by all the parties. Had the lower court determined that a hearing was warranted, that hearing would have been heard *de novo*, as the hearing conducted by the discovery commissioner was not recorded. Not surprisingly, the Aluises argue both sides of this controversy as well. The Aluises argue that discovery commissioners should not be appointed, but that the hearings before discovery commissioner should be recorded. In fact, the discovery commissioner hearings are not recorded and if the lower court determines that a hearing before the court is warranted, the discovery hearing is *de novo*. Many circuit courts rule upon discovery motions without oral presentations. Trial courts routinely decide discovery disputes based upon written memoranda alone. In this case, the trial court had the benefit of the original motions, memoranda of law, the commissioner's recommendations, and the parties written responses to the commissioner's recommendations.

In recent years, this Court has consistently recognized the authority of a circuit court judge to appoint special masters and discovery commissioners. See *Beto v. Stewart*, 213 W. Va. 355, 582 S.E.2d 802 (2003). See also, *State ex rel Mantz*, 609 S.E.2d 870 (citing Code Jud.Conduct, Canon 6A).

"The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. . . Absent a few exceptions, this Court will review evidentiary and

procedural rulings of the circuit court under an abuse of discretion standard.” *Beto*, 213 W. Va. at 359, 582 S.E.2d at 806 (quoting Syl. Pt. 1, *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995)). “[A] circuit court necessarily abuses its discretion if it bases its ruling on an erroneous assessment of the evidence or an erroneous view of the law.” *Id.* 213 W. Va. at 359-60, 582 S.E.2d at 806-07 (quoting *Cox v. State*, 194 W. Va. 210, 218 n. 3, 460 S.E.2d 25,33 n.3 (1995)).

The lower court did not abuse its discretion in reviewing the discovery motions and memoranda, appointing a discovery commissioner, considering the report of the commissioner, considering the objections filed by the parties to such report, and adopting the report of the commissioner. Aside from disputing the process itself, which was within the discretion of the lower court, the Petitioners do not make any specific allegations of abuse or error.

#### **G. THE CIRCUIT COURT WAS CORRECT IN ITS HOLDINGS REGARDING THE UNFAIR TRADE PRACTICES ACT.**

Appellants argue that the circuit court’s summary judgment in favor of Nationwide regarding Appellants’ UTPA claim was improper; however, Appellants have failed to allege conduct by Nationwide that would violate that act. Indeed, the circuit court, upon reviewing the pleadings, attachments, and various motions put forth by the parties, determined that “Nationwide’s denial of coverage was proper and was timely” in its December Order Granting Summary Judgment. Appellants assert that a plaintiff does not need to substantially prevail on the underlying contract case to have a claim under the Unfair Claim Settlement Practices Act. Regardless, the plaintiff still

must introduce evidence that the Act was violated, which Appellants did not.

Appellants' contention that bad faith claims arise outside any contractual claims is irrelevant given that Nationwide's claims handling was timely and proper and that no other UTPA violations are alleged.

First-party "bad faith" claims are torts predicated on the insurance carrier's wrongful denial of insurance benefits to the policyholder. See *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73 (1986); *Landmark Baptist Church v. Brotherhood Mut. Ins. Co.*, 199 W.Va. 312, 484 S.E.2d 195 (1997); *McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 475 S.E.2d 507 (1996); *Marshall v. Saseen*, 192 W.Va. 94, 450 S.E.2d 791 (1994). For a policyholder to bring a common law bad faith claim against his insurer, the policyholder must first substantially prevail against his insurer on the underlying contract action. *Jordache v. Nat. Union*, Syl. Pt. 6, 204 W.Va. 465, 513 S.E.2d 692 (1998). See also *Davidson v. American Freightways*, 25 S.W.3d 94, 100 (KY 2000). (Absent a contractual obligation to pay a claim, there simply is no viable bad faith cause of action).

First and third-party claims for violations of the West Virginia Unfair Claims Settlement Practices Act, §33-11-4(9) are predicated on an insurer's failure to, in good faith, affect a prompt and equitable settlement of a covered claim. See, *Jenkins v. J.C. Penny Cas. Ins. Co.*, 280 S.E.2d 252 (1981); *Robinson v. Continental Cas. Co.*, 185 W.Va. 244, 405 S.E.2d 470 (1991); *State ex. rel. State Farm Fire & Cas. v. Madden*, 192 W.Va. 155, 451 S.E.2d 721 (1994).

The West Virginia Supreme Court of Appeals addressed the issue of common law "bad faith" claims in *Jordache Enterprises, Inc. v. National Union Fire Insurance*

*Co. of Pittsburgh*, 204 W.Va. 465, 513 S.E.2d 692 (1998) wherein it held that once it is determined that coverage does not exist, any claims for breach of contract or first-party "bad faith" cannot be maintained because "there is now no underlying contractual duty on which to base such a claim." *Id.* at 710. In the instant case, the homeowner's policy exclusion clearly precluded coverage for Aluises original action against the Forssenius'. It is undisputed that the claim was reported to Nationwide. Therefore, because there was no coverage for the misrepresentations or negligent repairs made by the Forssenius', all claims for breach of contract and first-party "bad faith" must be dismissed with prejudice.

The *Jordache* Court also held that, unlike in a first-party "bad faith" claim where a Plaintiff must show that she substantially prevailed on the underlying contract claim to recover extra-contractual damages, a person suing for violations of the Unfair Claims Settlement Act need not show that she "substantially prevailed." *Id.* at 712, citing *Hayseeds, Inc. v. State Farm & Cas.*, 177 W.Va. 323, 352 S.E.2d 73 (1986). The Court continued by stating that under *Jenkins* there is no requirement that one substantially prevail, it is however required that liability and damages be settled previously or in the course of the *Jenkins* litigation. *Jenkins* instead predicates entitlement to relief solely upon violation of the West Virginia Unfair Trade Practices Settlement Act, W.Va. Code §33-11-4(9), where such violation arises from a "general business practice" on the part of the insurer. Syl. Pt. 9, *McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 426 S.E.2d 507 (1996).

Most provisions of W.Va. Code §33-11-4(9) implicitly require that one must first establish coverage before one can bring an action under the statute. In Justice

Davis' *Jordache* opinion, concurring in part and dissenting in part, she states that "[a] fair reading of (b), (c), (d), and (f) requires any reasonable person to conclude that "coverage" must exist for them to be viable [causes of action]." *Id.* at 717. She continued by stating that provision (e) encompasses two types of claims: (1) failing to affirm coverage timely and (2) failing to deny coverage timely and that, from her reading of the majority's opinion and the record below, it appeared that the Plaintiff's claim in *Jordache* was based upon the insurer's failure to timely "affirm" coverage. *Id.* Consequently, Justice Davis argued that because the majority found that there was no coverage, the Court should have upheld the Circuit's grant of summary judgment and declined remand. *Id.* However, in spite of Justice Davis' assertion that the claim being asserted could only be that of the insurer's failure to timely "affirm" coverage, the majority did not actually make specific findings regarding what claims may or may not be viable without coverage. As Justice Davis noted, a viable claim under §33-11-4(9) may be maintained without a finding that there is coverage under provision (e), failure to timely "deny" coverage. *Id.* at 718. Thus, because the majority Court did not make any specific findings, the majority Court may be presumed to have remanded the case back to the trial level for a determination as to whether the insurer failed to timely deny coverage.

Any other interpretation of law would lead to absurd results. If the law is read to allow Plaintiffs to sue for statutory "bad faith" after a timely determination that there was no coverage under the policy, trial courts would be inundated with frivolous first and third-party claims. Indeed, under those circumstances, absolutely anyone would have standing to sue an insurer for statutory "bad faith" because a party would no

longer have to show that the insurer acted in “bad faith” with regard to an existing coverage. Such an interpretation would obviously raise due process concerns because insurers would inevitably, and continuously, be sued solely for past violations, or alleged violations, in cases involving unrelated Plaintiffs in unrelated circumstances. If no nexus to coverage is required, then anyone can sue an insurer for any perceived violation of the statute, without limitation.

Consequently, the only way one without coverage may assert a statutory “bad faith” claim against an insurer is when one sues for failure to timely respond to a claim and “deny” coverage. Therefore, the only way the Aluises can maintain a statutory “bad faith” claim is to show that Betsy Ross and Nationwide failed to timely investigate and deny the Forssenius’ request for a defense. In this case both the investigation and the denial were prompt and timely.

The regulations promulgated by the Insurance Commissioner in West Virginia Code of State Regulations, Title 114, Rule 14, state that “every insurer, upon receiving notification of a claim shall, within fifteen (15) working days, acknowledge the receipt of such notice unless payment is made within such period of time.” However, as is evidenced by the record, Betsy Ross and Nationwide were notified of the Aluise action on December 16, 2002 and acknowledged the claim the same day. Thereafter, Nationwide investigated and timely denied indemnity by letter dated January 3, 2003. (See **Exhibit “D”** attached to Nationwide’s Motion for Summary Judgment, claim file notes of December 16, 2002, **Exhibit “B”** “Denial of Coverage”). Suit was subsequently filed on December 23, 2002. Nationwide was informed of the legal action on January 9, 2003 and denied coverage for the defense on January 20,

2003. (Exhibit "C" attached to Motion for Summary Judgment, "Denial of Defense").

Therefore, because Nationwide and Betsy Ross timely investigated and denied the Forssenius' inquiries regarding coverage within fifteen (15) working days, and because there is no coverage upon which to assert any other claim under the Unfair Claims Settlement Practices Act, the circuit court properly determined that Appellants cannot maintain a claim for statutory "bad faith." Pursuant to *Jordache supra.*, all first party causes of action were extinguished by the finding of no coverage.

#### H. NO PERTINENT UNANSWERED QUESTIONS OF FACT REMAIN

Appellants have already taken the position that "the interior wall, which was approximately 5.5 inches to the interior of the original location of the block, had been so located to conceal the block failure." The lower court did not need to infer that the actions of the Forsseniuses were intentional. The Aluises asserted that fact in their pleadings and the Aluises by operation of judicial admission are estopped from taking any position inconsistent therewith. *Wheeling-Pittsburg Steel Corp.*, 205 W. Va. 286, 517 S.E.2d 763.

Nonetheless, regardless of whether the misrepresentations by the Forsseniuses were **intentional** misrepresentations or **accidental** misrepresentations, neither were an "occurrence" under terms of the policy of insurance and neither presented damages which are covered under the policy. Any questions of fact regarding intent would be moot, as the damages alleged in the complaint are foreign to the risks insured against by the policy. Thus, the lower court properly granted the motion for summary judgment.

For the foregoing reasons, Nationwide respectfully requests this Court affirm

the decisions of the circuit court granting Nationwide's Motion for Summary Judgment and denying Appellants' Motion for Summary Judgment.

Respectfully Submitted,

**NATIONWIDE MUTUAL FIRE  
INSURANCE COMPANY**  
By Counsel

**MARTIN & SEIBERT, L.C.**

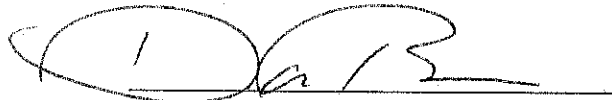
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**CERTIFICATE OF SERVICE**

I, Dale A. Buck, Counsel for the Defendant, hereby certify that I served a true copy of the foregoing *Nationwide Mutual Fire Insurance Company's Appellee's Brief* upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 8<sup>th</sup> day of August, 2005.

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