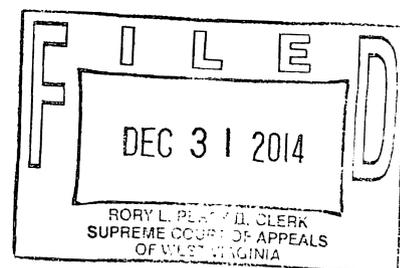


**IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
NO. 14-0799**



**BPI, INC.,  
PETITIONER**

**VS.**

**NATIONWIDE MUTUAL INSURANCE  
COMPANY,  
RESPONDENT**

**(On Certification of Questions from the United States District Court,  
Eastern District of Kentucky, Civil Action No. 7:12-cv-00139-ART)**

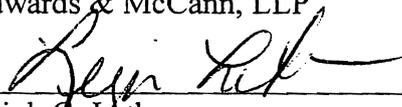
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**REPLY BRIEF FOR PETITIONER**

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Respectfully submitted,

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## ARGUMENT

### I. **Stare decisis is insufficient to apply an unsound and “legally flawed” interpretation of the 2011 Policy.**

Nationwide seeks an interpretation of the 2011 Policy using case law that this Court in *Cherrington v. Erie Ins. Property & Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013), declared to be “not legally sound” and “outdated . . . due to changing conditions, resulting in injustice.” *Id.* at 517. Just as it would have been an injustice to apply legally unsound principles to interpret the 2004 *Cherrington* policy, so would it be an injustice to use legally unsound principles to interpret the 2011 Policy in this case. *Stare decisis* considerations cannot save Nationwide from providing coverage under the 2011 Policy.

The same issue before the Court in *Cherrington* is before the Court now: whether defective workmanship causing property damage is an “occurrence” under a CGL insurance policy and whether Exclusion L applies if the damaged work or work out of which the damage arises was performed by a subcontractor. The insurance company in *Cherrington* asked for interpretation of its 2004 policy in accordance with the principles set forth in prior pronouncements of this Court, specifically: *Webster County Solid Waste Authority v. Brachenrich and Associates, Inc.*, 217 W.Va. 304, 617 S.E.2d 851 (2005) (Syllabus point 3); *Corder v. William W. Smith Excavating*, 210 W.Va. 110, 556 S.E.2d 77 (2001) (Syllabus point 2); *Eerie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 526 S.E.2d 28 (1999) (Syllabus point 2); and *McGann v. Hobbs Lumber Co.*, 150 W.Va. 364, 145 S.E.2d 476 (1965) (Syllabus point 2). The Court refused to interpret the 2004 Policy in accordance with this unsound precedent -- the same precedent that Nationwide now seeks to apply to the 2011 Policy in this case.

In *Cherrington*, this Court undertook an extensive analysis of the circuit court’s *interpretation* of the 2004 policy under this pre-*Cherrington* case law. The Court – in no uncertain terms – held that this Court’s previous *interpretation* of the CGL policies was erroneous and that the precedent upon which prior interpretations were based was not “legally sound.” *Id.* at 517. The Court held that *despite* the “doctrine of stare decisis, [which] is a guide for maintaining stability in the law, *we will part ways with precedent that is not legally sound.*” *Id.* (emphasis added). In reiterating that the pre-*Cherrington* case law should no longer be followed, the Court held: “[t]hus, ‘when it clearly is apparent that an error has been made or that the application of an outdated rule, due to changing conditions, results in injustice, deviation from that policy is warranted.’” *Id.* (quoting *Woodrum v. Johnson*, 210 W.Va. 762, 766 n. 8, 559 S.W.2d 908, 912 n. 8 (2001)). Nationwide’s “retroactive” argument would compel courts to erroneously interpret insurance contracts.

The Court made it very clear that an interpretation of CGL policies under the previously existing law would create an injustice that the Court was not willing to impose upon insureds – regardless of the existing law when the policies were written:

We recognize that a definite trend in the law has emerged since we rendered our determinative decision in *Corder* sufficient to warrant this Court’s reconsideration of the issues decided therein and that, if warranted, **a departure from this Court’s prior opinions would be consistent with this Court’s steadfast resolve to follow the law to achieve just, fair and equitable results.**

*Id.* at 517-18 (emphasis added). Thus, Nationwide’s argument that pre-*Cherrington* law should be applied to avoid re-writing the policy fails. The *Cherrington* Court did exactly that – it interpreted the 2004 Policy in a manner that was inconsistent with the law when the policy was written to avoid “injustice.” This case is no different, and Nationwide has not demonstrated why

an injustice should be rendered in this case by relying upon “outdated” and “legally unsound” precedent, when the Court refused to do so in *Cherrington*.

Thus, just as the *Cherrington* Court held that the 2004 Policy required “occurrence” to include defective workmanship under a CGL insurance policy, which resulted in a reformation of the insurance 2004 agreement, so should the Court hold here.

**II. This case is distinguishable from *Dalton v. Doe*.**

Nationwide argues that just as the insured in *Dalton v. Doe*, 208 W.Va. 319, 540 S.E.2d 536 (2000), was precluded from obtaining insurance coverage, so should BPI be barred in this case. The facts in this case are distinguishable from *Dalton*, however. First, this case was timely filed on December 3, 2012, before *Cherrington* was decided. In contrast, the plaintiff in *Dalton* filed her claim for insurance benefits after the statute of limitations had expired and after publication of *Hamric v. Doe*, 201 W.Va. 615, 499 S.E.2d 619 (1997), the case cited by *Dalton* for the recovery of benefits. This is significant because “[a]s a general rule, judicial decisions are retroactive in the sense that they apply to both the parties in the case before the court and to all other parties *in pending cases*.” *Caperton v. A.T. Massey Coal Co.*, 225 W.Va. 128, 156, 690 S.E.2d 322, 350 (2009) (emphasis added). *Dalton* was not a pending case when *Hamric* was decided; this case was pending when *Cherrington* was decided on June 18, 2013.

Nationwide claims that the pendency of this case should be ignored because the case was pending in federal court in Kentucky rather than a West Virginia tribunal. Nationwide’s “other tribunal” defense fails to make a difference. Nationwide has not cited any authority in support of its position that the case must be pending in a West Virginia tribunal in order for the *Caperton* retroactivity rule to apply. Further, the federal court has determined that West Virginia law applies to this case based upon the significant number of connections between this case and the

State of West Virginia: the named insured in the contract, BPI, is incorporated under the laws of West Virginia and maintains its principal place of business in West Virginia; the insurance policy was issued through a West Virginia insurance agency; and the policy includes multiple West Virginia endorsements. [R. 163, p. 3, Memorandum Opinion and Order, JA 003].

Nationwide also cites *Bradley v. Appalachian Power Co.*, 163 W.Va. 332, 256 S.E.2d 879 (1979), in support of its argument that *Cherrington* should not be applied to this case. Under the first factor in *Bradley* – where there is a foreshadowing of the new rule – the balance weighs in favor of retroactivity. Nationwide ignores the national trend discussed in *Cherrington* in which a majority of courts had adopted the view that CGL policies provided coverage for defective work and in many states where courts had adhered to the minority view, state legislatures enacted legislation in line with the majority view:

As we have noted, many cases have emerged since this Court’s 2001 definitive holding in *Corder* considering whether defective workmanship is an “occurrence” under a policy of CGL insurance. To summarize these rulings, the courts adopting a majority view have concluded that the subject CGL policy provided coverage for the defective work. These states have enacted legislation requiring CGL policies to include coverage for defective work and/or injuries and damages attributable thereto. By contrast, since this Court’s decision in *Corder*, a minority of jurisdictions have adopted the position espoused by this Court therein to find that defective workmanship is not an “occurrence”; however, the decision of three of these courts have since been superseded by statutory enactments that specifically require CGL policies issued in those states to include coverage for defective workmanship and/or injuries and damages resulting therefrom.

*Cherrington*, 231 W.Va. at 480-81.

Nationwide is a national insurance company and presumably writes insurance contracts throughout the country. It is hard to conceive that in 2011, when this policy was written, Nationwide would not have been aware that in a majority of states CGL policies were being interpreted in this manner, including Nationwide’s own policies in those states.

This case is clearly distinguishable from *Dalton* and the decision not to allow an insured whose claim was barred by the statute of limitations to receive the benefit of retroactive application of a statutory interpretation with regard to uninsured insurance coverage in a case filed *after* the issue was decided by this Court. Here, this case was pending when *Cherrington* was decided, the claim for insurance benefits was timely made, and the decision of this Court to interpret CGL policies in accordance with a majority of courts deciding the issue could not have come as a surprise to Nationwide.

### **III. This case is distinguishable from *Corder*.**

Nationwide asserts that *Corder v. William W. Smith Excavating Co.*, 210 W.Va. 110, 556 S.E.2d 77 (2001), controls the determination of coverage if the Court relies upon the outdated and legally unsound pre-*Cherrington* law. *Corder*, however, is clearly distinguishable from this case. As set forth in BPI's prior Brief, *Corder* did not involve claims of defective workmanship of the subcontractor, nor did it involve the failure of a road and subsequent slide of materials that damaged the project and adjacent properties. As set forth in *Simpson-Littman Construction v. Erie Insurance Property & Casualty Ins. Co.*, 2010 WL 3702601 (S.D.W.Va. Sept. 13, 2010), defective work performed by the subcontractor constitutes an occurrence under the policy, since neither the subcontractor's failure to properly compact the soil, nor the sinking of the material, were intended, anticipated, or expected from the perspective of the insured. *Id.* at \*10. Therefore, even under pre-*Cherrington* law, ATC's claimed damages constitute an occurrence, since the allegedly defective work of BPI's subcontractor and the failure of the road were not intended, anticipated, or expected from BPI's perspective.

#### IV. Damages to Third-Party Rising Son Ministries is Covered as an Occurrence.

Nationwide's reliance upon *Westfield Ins. Co. v. Carpenter Reclamation, Inc.*, 2014 U.S. Dist. LEXIS 130752 (S.D. W.Va. Jul. 11, 2014), appeal docketed, No. 14-2027 (4<sup>th</sup> Cir. Appeal docketed Sept. 25, 2014), in support of its argument that damage to third-party Rising Son Church does not qualify as an occurrence is misplaced. In fact, *Westfield supports* BPI's position that *Cherrington* is not limited to policies written *after Cherrington* was issued in June 2013.

As a preliminary matter, even if *Westfield* supported Nationwide's position (and it does not), the district court decision has been appealed to the Fourth Circuit Court of Appeals, where it has been fully brief and remains pending. Also, *Westfield* is distinguishable in a number of ways.

First, there was no issue in *Westfield* regarding damage to a third-party's property as a result of the defective workmanship. There was no consequential damage as a result of the defective workmanship – either to the site where the work was being performed or to a third-party. The issue of damage to third-parties caused by defective workmanship is, however, squarely addressed in *Erie Ins. Property and Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 526 S.E.2d 28, 34 (1999). The “stucco application” illustration in *Pioneer* explaining why damages to third-parties are covered is directly applicable to the loss sustained by Rising Son Church. *Westfield* simply has no application with regard to coverage regarding the damages to Rising Son Church.

Second, at no time did the *Westfield* Court adopt Nationwide's “retroactive” theory as a basis for denying coverage. The Court – as it should have – understood the principles of *Cherrington* to be applicable to the 2010-2011 policy under review in that case. The Court

simply found the facts to be distinguishable. If the Court understood *Cherrington* to be applicable only to policies issued after June 2013, the *Cherrington* analysis would not have been necessary.

Third, there is a significant distinction between the type of damages at issue in *Cherrington* and *Westfield* that is not present in this case. The alleged defective workmanship in *Westfield* was caused by a specific act, over blasting, which the court described as a “quasi-intentional” act. *Westfield*, 2014 U.S. Dist. Lexis at \*59. The insured’s customer was seeking to recover the costs to remediate the over blasting, to prevent damages that can result from over blasting. The insured was not seeking to recover damages resulting from the defective work. In *Cherrington*, the defective workmanship caused damage to the home – an uneven concrete floor, water infiltration through the roof and chimney joint, a sagging support beam, and numerous cracks in the drywall walls and partitions throughout the house. *Cherrington*, 745 S.E.2d at 513. Here, the resulting property damage from the alleged defective workmanship is the road failure and physical damage from the slide to the church’s property and facilities.

There is another distinction between *Westfield* and *Cherrington* that is not present in this case. The *Westfield* Court found *Cherrington* to be inapplicable because the parties specifically contemplated that over blasting could occur during the blasting process, and the contract provided for a certain type of fill to be used by the contractor in that event. The customer claimed that the insured/construction company failed to follow that specific remedial course of action after over blasting, necessitating the customer to incur costs to have the work performed. There was no separate property damage from the over blasting: no road slide, no slip, no damaged structures. There was only the over blasting and remediation of the over blasting,

which the court specifically found not to constitute property damage, but a breach of contract issue.

Nationwide claims that that this case too is simply one of breach of contract and not property damages. Nationwide analogizes the specific over blasting/fill provision in the *Westfield* contract with the requirements in the BPI/American Tower Contract “to maintain adequate drainage at all times” and for “[c]ontractor to be responsible for repair and/or cleanup of any and all damages resulting from filtration from the construction site.” These general performance provisions are simply not analogous to the contract *specific remediation provisions* present in the Westfield contract. A finding that there is no “occurrence” under a CGL because the contract sets forth general standards and a requirement for the contractor to repair and clean up damages resulting from defective workmanship will have the practical effect of eviscerating CGL coverage from defective workmanship – a result that *Cherrington* sought to remedy. See *Cherrington*, 231 W.Va. at 483 (“Finally, we find our prior prescriptions limiting the scope of the coverage afforded by CGL policies to exclude defective workmanship to be so broad in their blanket pronouncement that a policy of CGL insurance may never provide coverage for defective workmanship as to be unworkable in their practical application.”)

### CONCLUSION

Based on the foregoing, BPI requests this Court to find the ruling announced on June 13, 2013, in *Cherrington* is applicable in this case so that the road collapse alleged to be caused by faulty workmanship constitutes an occurrence under the 2011 Nationwide Policy. If *Cherrington* is not applicable, damages caused by the alleged faulty workmanship of BPI’s subcontractor constitutes an occurrence under previous West Virginia law. Finally, any damages caused to the third-party neighboring property owner are a covered event under that policy.

Respectfully submitted,

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A handwritten signature in black ink, reading "Leigh Latherow", written over a horizontal line.

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing Reply Brief of Petitioner was placed in the United States mail, postage prepaid, addressed to the following:

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This the 30<sup>th</sup> day of December, 2014.



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