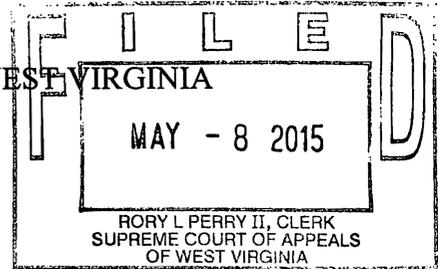


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel.
NATIONWIDE MUTUAL INSURANCE
COMPANY,

Petitioner,

v.

No. 15-0424

THE HONORABLE RONALD E.
WILSON, Judge of the Circuit Court of
Ohio County, West Virginia,

Respondent.

PETITION FOR WRIT OF PROHIBITION

(Circuit Court of Ohio County, West Virginia
Civil Action No. 10-C-175)

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TABLE OF CONTENTS

QUESTIONS PRESENTED.....1

STATEMENT OF THE CASE..... 1-7

SUMMARY OF ARGUMENT 7-8

STATEMENT REGARDING ORAL ARGUMENT AND DECISION8

ARGUMENT.....8

 A. STANDARD OF REVIEW 8-9

 B. THE CIRCUIT COURT ERRED BY FINDING THAT
 NATIONWIDE HAS A DUTY TO INDEMNIFY
 ITS INSURED FOR ANY DAMAGE THAT MAY BE
 RECOVERED AGAINST ITS INSURED.....9

 1. The Circuit Court failed to consider whether
 the damages that may be awarded as a result
 of the Plaintiffs’ negligence claim satisfies the
 definition of “property damage” or “bodily injury”
 so as to trigger coverage under the insuring agreement..... 9-13

 2. The Circuit Court failed to consider any exclusion in the
 policies which may apply to preclude coverage 13-16

CONCLUSION.....17

VERIFICATION.....18

TABLE OF AUTHORITIES

CASES:

Aluise v. Nationwide Mutual Fire Ins. Co., 216 W. Va. 498, 625 S.E.2d 260 (2005)12

Cherrington v. Erie Ins. Property & Casualty Co, 231 W. Va. 470,
745 S.E.2d 508 (2013)6, 8, 11, 12, 13,14,15,16

Crawford v. Taylor, 138 W. Va. 207, 75 S.E.2d 370 (1953)8

State ex rel. Hoover v. Berger, 199 W.Va. 12, 483 S.E.2d 12 (1996)9

State ex rel. Peacher v. Sencindiver, 160 W. Va. 314, 233 S.E.2d 425 (1977)8

State ex rel. Safeguard Products Intern., LLC v. Thompson, __S.E.2d __, 2015
WL 1127855 (W. Va.)9

State ex rel. Vineyard v. O'Brien, 100 W.Va. 163, 130 S.E. 111 (1925)8

Tackett v. American Motorists Ins. Co., 213 W. Va. 524, 584 S.E.2d 159 (2003)12

STATUTES:

West Virginia Code §53-1-11

OTHER AUTHORITIES:

West Virginia Constitution, Article VIII, §31

QUESTIONS PRESENTED

This Writ of Prohibition seeks review of a Memorandum Order of the Circuit Court of Ohio County, West Virginia, entered March 16, 2015, which denied Nationwide Mutual Insurance Company's request for declaratory relief with respect to coverage issues, and specifically held that "Nationwide has a duty to indemnify the insured for *any* damages that may be recovered against the insured." (Emphasis added). The Petition presents the following questions:

1. Whether the Circuit Court erred in failing to determine whether the damages that may be awarded as a result of the Plaintiffs' negligence claim satisfies the definition of "property damage" or "bodily injury" so as to trigger coverage under the policies' insuring agreements?
2. Whether the Circuit Court erred in failing to consider the application of any of the exclusions contained in the Nationwide policies which may act to preclude coverage?

STATEMENT OF CASE

This Petition arises out of a civil action now pending in the Circuit Court of Ohio County, West Virginia, before respondent, The Honorable Ronald E. Wilson, styled *Travis Nelson and Teresa Nelson v. Fred C. Hlad, individually and d/b/a Allstate Construction, and Nationwide Mutual Insurance Company v. Travis Nelson and Teresa Nelson and Fred C. Hlad, individually and d/b/a Allstate Construction.*, Civil Action 10-C-175. This Petition for Writ of Prohibition is filed pursuant to Article VIII, §3 of the West Virginia Constitution, granting this Court original jurisdiction in prohibition, and West Virginia Code § 53-1-1.

In their original Complaint, Plaintiffs Travis Nelson and Teresa Nelson allege that, in January 2009, they met with Defendant Fred C. Hlad regarding the construction of a new home and entered into an oral agreement as to the price and a completion date of July 2009.

[Appendix 6; 30] Relying on the representations of Mr. Hlad regarding the July 2009 completion date, Plaintiffs sold their residence. [Appendix 7; 30] On July 22, 2009, after multiple requests, Plaintiffs and Mr. Hlad entered into a written contract for the construction of a new home to be located at 5 Miller Place in Bethlehem, West Virginia. [Appendix 7; 30] Plaintiffs claim they did not have an opportunity to review the written contract, and the allowances set forth therein, with legal counsel prior to signing it. [Appendix 7; 30] The contract provided for a total construction cost not to exceed \$320,000.00 with a completion date within 90 days, *i.e.* October 20, 2009. Plaintiffs obtained financing for the construction of the home and were allegedly advised by Mr. Hlad to lock in their interest rate, and the home would be completed within a 60-day period with a move-in date of November 6, 2009. [Appendix 7; 30-31]

On November 5, 2009, Mr. Hlad gave the Plaintiffs paperwork regarding overages incurred during the construction of the home. Plaintiffs claim they made numerous attempts to resolve the overage issue with Mr. Hlad, along with issues concerning the connection of certain utilities to the property, but that Mr. Hlad remained uncooperative and evasive and failed to provide them with a reasonable resolution. [Appendix 7-8; 31] Plaintiffs further allege that Mr. Hlad obtained draws on their construction loan totaling \$257,200.00, and failed to complete the construction of the home by the October 20, 2009, or the November 6, 2009, deadlines. [Appendix 8; 31] Despite taking draws on the construction loan, Mr. Hlad allegedly failed to pay various suppliers and subcontractors which resulted in the filing of a mechanics' lien in the amount of \$13,278.00 against the Plaintiffs' property. [Appendix 8; 31-32] Plaintiffs further claim that Mr. Hlad falsely represented to suppliers and contractors that he was unable to pay them because he had not received payments from the Plaintiffs. [Appendix 8-9; 32] At the time

of the filing of the Complaint on May 21, 2010, construction of the home had still not been completed. [Appendix 8; 31] Upon information and belief, the home has now been completed by other contractors retained by the Plaintiffs. [Appendix 31].

In Count I of the Complaint, Breach of Contract, Plaintiffs claim that Mr. Hlad breached the construction contract entered into on July 22, 2009, by failing to complete construction of the house in accordance with the terms of the contract. Plaintiffs further claim that Mr. Hlad provided false certifications to the bank which indicated that subcontractors and suppliers had been paid so that he could obtain additional draws from Plaintiffs' construction loan. [Appendix 9-10; 32-34] In Count II of the Complaint, Breach of the Covenant of Good Faith and Fair Dealing, Plaintiffs allege that Mr. Hlad failed to conduct himself in good faith and deal fairly and honestly with them in all matters relating to the construction of their home. [Appendix 10-12; 34-36] In Count III, Defamation, Plaintiffs allege that Mr. Hlad, and one or more of his employees, have falsely represented to suppliers and subcontractors that Plaintiffs had failed to pay them moneys due and owing under the construction contract. [Appendix 12-13; 36-37] In Count IV, Unfair and Deceptive Acts, Plaintiffs claim that the actions of Mr. Hlad constitute unfair and deceptive acts and practices in violation of West Virginia Code 46A-6-104. [Appendix 13; 37-38]

In Count V, Fraud and Intentional Misrepresentation, Plaintiffs allege that Mr. Hlad intentionally made representations to them that were false and/or made with reckless disregard as to veracity which played a substantial part in inducing them to enter into the construction contract. As a result of Mr. Hlad's alleged misrepresentations, Plaintiffs claim to have incurred, and will continue to incur, damages arising from the imposition of mechanics' liens filed by contractors and suppliers who furnished services or supplies for the construction of the home, but

were not paid by Mr. Hlad. [Appendix 14-15; 38-40] Count VI, Conversion, alleges that Mr. Hlad's failure to complete construction of their home, and the taking of draws from Plaintiffs' construction loan without complying with the construction completion requirements, constitute conversion of the Plaintiffs' property. [Appendix 15-16; 40-41] In Count VII, Unconscionability, Plaintiffs contend that Mr. Hlad's conduct in inducing them to enter into the construction contract was unconscionable and in violation of West Virginia law. [Appendix 16-17; 41-42] And finally, in Count VIII, Injunctive Relief, Plaintiffs seek to preclude Mr. Hlad and his employees from making statements to the public, suppliers and subcontractors regarding their performance under the construction contract or this dispute. [Appendix 17-18; 42-43] Plaintiffs seek damages in excess of \$257,200.00 representing amounts obtained by Mr. Hlad through draws on their construction loan; damages arising from the filing of mechanics' liens against their property; damages incurred for amounts expended to obtain substitute housing; damages arising from the inability to convert their construction loan to a mortgage; damages for emotional distress, annoyance, inconvenience, embarrassment, loss of reputation, shame, humiliation, frustration and other general damages; and statutory damages, attorneys fees and costs. [Appendix 1-18; 29-46]

At the time of the construction of the Plaintiffs' home, Mr. Hlad was insured by Nationwide Mutual Insurance Company. [Appendix 47-360] However, in violation of the terms of the insurance policies, Mr. Hlad failed to notify Nationwide of the lawsuit and retained his own defense counsel. Upon information and belief, during the course of the litigation, that defense counsel withdrew from his representation of Mr. Hlad. Plaintiffs' counsel then notified Nationwide of the pending lawsuit and inquired if it would be willing to participate in mediation. In response to this inquiry, Nationwide provided a defense to Mr. Hlad under a reservation of

rights and participated in the mediation. That mediation was, however, unsuccessful, due in part to the intentional nature of the allegations set forth in the Complaint and the failure of the Plaintiffs to provide adequate information as to any property damage allegedly incurred.

Subsequent to the mediation, the Plaintiffs amended their Complaint to add a negligence count. In the Amended Complaint, Plaintiffs allege that Mr. Hlad negligently selected the location for, and negligently dug, the foundation of their residence which adversely impacted the structural integrity of the home, causing water leaks and property damages to the home. Plaintiffs further allege that Mr. Hlad negligently constructed their home in accordance with the care and competency required of a licensed contractor and, as a result, incurred damages including, but not limited to, the amounts necessary to “reconstruct, repair or replace all of the damages and deficiencies created by Mr. Hlad.” [Appendix 43-46] Nationwide intervened in the pending matter in order to seek a declaratory judgment as to its duties to provide a defense and/or indemnification under the Nationwide insurance policies issued to Mr. Hlad. [Appendix 47-360] Pursuant to a motion by Mr. Hlad’s counsel, the underlying action was stayed pending resolution of the declaratory judgment action.

Nationwide then sought discovery through interrogatories and requests for production of documents as to the property damage allegedly incurred by the Plaintiffs as a result of the negligent construction allegations. [Appendix 376-385] Plaintiffs had previously provided some unverified information as to the alleged damages to Nationwide via letter, but failed to respond or object to written discovery seeking more detail as to the damages allegedly suffered. [Appendix 371-392] In the meantime, Plaintiffs sought to depose the adjusters who had handled the case for Nationwide, and sought the production of Nationwide’s claim file and information

related to a similar case previously filed against Mr. Hlad.¹ [Appendix 400-403] Because Nationwide had not been notified of the Plaintiffs' claim or lawsuit prior to the institution of the underlying action, it objected to these depositions and discovery due to the fact that the information sought was protected by the attorney-client privilege and work product doctrine. Nationwide also maintained that the other case previously filed against Mr. Hlad had no relationship to any damages allegedly suffered by the Plaintiffs in this matter. As a result of these discovery disputes, Nationwide filed a Motion to Compel and a Motion for Protective Order to Limit the Scope of Discovery. [Appendix 371-392; 393-451]

While those motions were pending,² the Court issued an Order requiring the Plaintiffs to file proposed findings of fact and conclusions of law with respect to the declaratory judgment action, with a response thereto to be filed by Nationwide. The parties complied with the Court's Order and submitted their proposed findings of fact and conclusions of law as directed. [Appendix 647-662; 663-693]

On March 16, 2015, the Court issued its Memorandum Order Denying Nationwide Mutual Insurance Company's Request for Declaratory Relief in which the Court found that, under *Cherrington v. Erie Ins. Property & Casualty Co.*, 231 W. Va. 470, 745 S.E.2d 508 (2013), "the Nelson's [sic] have asserted a claims [sic] for damages that are not foreign to the risks insured against by Nationwide's CGL policies and Nationwide has a duty to indemnify its insured for *any* damages that may be recovered against the insured and Nationwide may not withdraw from its defense of the insured in this case." (Emphasis added). It was, therefore, ordered that "Fred C. Hlad, individually and d/b/a Allstate Construction is entitled to a defense

¹ Plaintiffs sought information regarding *Brenda L. Miller and Robert Diotti v. Fred C. Hlad, Individually and d/b/a Allstate Construction*, Civil Action Number 10-C-103, which had been filed in the Circuit Court of Marshall County. [Appendix 400-403; 405-421] That matter was resolved.

² The Circuit Court did not rule on the Motion to Compel or the Motion for Protective Order to Limit the Scope of Discovery.

and indemnification under the policies issued to the insured by Nationwide Mutual Insurance Company.” [Appendix 1-4] While Nationwide acknowledges it has a duty to defend,³ and possibly a duty to indemnify as to some of the damages allegedly incurred by the Plaintiffs, it contends that the Court erred in finding that Nationwide has a duty to indemnify for *any* damages that may be recovered against its insured without the benefit of an analysis of the exclusions that may apply to preclude coverage for some, or all, of the damages allegedly incurred, or discovery as to the types of damages allegedly incurred. Additionally, with the exception of the negligence, or defective workmanship, claim, the causes of action set forth in the Amended Complaint, for which damages may be awarded, do not constitute an “occurrence” resulting in “property damage” or “bodily injury” under the policies’ insuring agreements.

SUMMARY OF ARGUMENT

The Circuit Court failed to properly analyze and consider the coverage issues presented in this matter. The Memorandum Order Denying Nationwide Mutual Insurance Company’s Request for Declaratory Relief found that “the Nelson’s [sic] have asserted a claims [sic] for damages that are not foreign to the risks insured against by Nationwide’s CGL policies and Nationwide has a duty to indemnify its insured for *any* damages that may be recovered against the insured and Nationwide may not withdraw from its defense of the insured in this case.” (Emphasis added). In so holding, the Circuit Court failed to address the causes of action which are clearly not covered under the policies issued to Mr. Hlad, *i.e.*, breach of contract; breach of the covenant of good faith and fair dealing; defamation; unfair and deceptive acts in violation of West Virginia Code 46A-6-104; fraud and intentional misrepresentation; conversion; unconscionability; and injunctive relief. Further, while finding that the negligence, or defective workmanship, cause of action constitutes an “occurrence” under the policy, the Court failed to

³ Nationwide continues to defend Mr. Hlad under a reservation of rights.

analyze whether the damages allegedly incurred as a result thereof satisfy the definition of “bodily injury” or “property damage” under the policy. Finally, in ordering Nationwide to indemnify Mr. Hlad for any damages that may be awarded, the Circuit Court failed to consider whether any of the exclusions in the policies apply to preclude coverage for the losses allegedly resulting from the negligence claim. The Court’s Memorandum Order is, therefore, erroneous as a matter of law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 19 of the Rules of Appellate Procedure, the Petitioner believes that oral argument would benefit the decisional process and, therefore, requests that oral argument be scheduled for this Petition. The matter concerns the Circuit Court’s abuse of discretion in entering an order which is legally incorrect. The Petitioner asserts that, due to the lower tribunal’s misapplication of this Court’s decision in *Cherrington v. Erie Ins. Property & Casualty Co.*, 231 W. Va. 470, 745 S.E.2d 508 (2013), this case is appropriate for a signed opinion by the Court.

ARGUMENT

A. STANDARD OF REVIEW

This Court has previously stated that “[t]he writ of prohibition will issue only in clear cases, where the inferior tribunal is proceeding without, or in excess of, jurisdiction.” Syl., *State ex rel. Vineyard v. O’Brien*, 100 W.Va. 163, 130 S.E. 111 (1925); *see also* Syl. Pt. 1, *Crawford v. Taylor*, 138 W. Va. 207, 75 S.E.2d 370 (1953) (“Prohibition lies only to restrain inferior courts from proceeding in causes over which they have no jurisdiction, or, in which, having jurisdiction, they are exceeding their legitimate powers and may not be used as a substitute for writ of error, appeal or certiorari.”); Syl. Pt. 2, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E.2d 425 (1977) (“A writ of prohibition will not issue to prevent a simple abuse of discretion

by a trial court. It will only issue where the trial court has no jurisdiction or having such jurisdiction exceeds its legitimate powers. W. Va. Code 53-1-1.”).

The standard for issuance of a writ of prohibition when it is alleged a lower court is exceeding its authority has been stated as follows:

In determining whether to entertain and issue the writ of prohibition for cases not involving an absence of jurisdiction but only where it is claimed that the lower tribunal exceeded its legitimate powers, this Court will examine five factors: (1) whether the party seeking the writ has no other adequate means, such as direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in a way that is not correctable on appeal; (3) whether the lower tribunal's order is clearly erroneous as a matter of law; (4) whether the lower tribunal's order is an oft repeated error or manifests persistent disregard for either procedural or substantive law; and (5) whether the lower tribunal's order raises new and important problems or issues of law of first impression. These factors are general guidelines that serve as a useful starting point for determining whether a discretionary writ of prohibition should issue. Although all five factors need not be satisfied, it is clear that the third factor, the existence of clear error as a matter of law, should be given substantial weight.

Syl. Pt. 4, *State ex rel. Hoover v. Berger*, 199 W.Va. 12, 483 S.E.2d 12 (1996); Syl. Pt. 1, *State ex rel. Safeguard Products Intern., LLC v. Thompson*, __S.E.2d __, 2015 WL 1127855 (W. Va.).

Under these factors, a writ of prohibition is appropriate and warranted in this matter as the lower tribunal’s Memorandum Order is clearly erroneous as a matter of law.

B. The Circuit Court Erred By Finding That Nationwide Has A Duty To Indemnify Its Insured For Any Damages That May Be Recovered Against Its Insured.

- 1. The Circuit Court failed to consider whether the damages that may be awarded as a result of the Plaintiffs’ negligence claim satisfies the definition of “property damage” or “bodily injury” so as to trigger coverage under the insuring agreement.**

The Circuit Court’s Memorandum Order Denying Nationwide Mutual Insurance Company’s Request for Declaratory Relief is contrary to clearly established law. By finding that Nationwide has a duty to indemnify its insured for any damages that may be recovered against its

insured, the Court failed to recognize that there were counts other than the negligence or defective workmanship count alleged against Mr. Hlad in the Amended Complaint.

The Nationwide commercial general liability (CGL) policies issued to Mr. Hlad are occurrence-based policies which provide coverage for an occurrence resulting in property damage or bodily injury which takes place during the policy period and in the coverage territory. In their Amended Complaint, the Plaintiffs set forth causes of action for breach of contract; breach of the covenant of good faith and fair dealing; defamation; unfair and deceptive acts in violation of West Virginia Code 46A-6-104; fraud and intentional misrepresentation; conversion; unconscionability; and injunctive relief which clearly do not trigger coverage under the insuring agreement of the CGL policies. These counts do not meet the definition of an “occurrence”⁴ or result in either “property damage”⁵ or “bodily injury” as those terms are defined by the CGL policies. These allegations constitute intentional acts and any damages allegedly resulting therefrom, such as the amounts paid to Mr. Hlad and draws taken from the construction loan; interest on the construction loan; expenses for substitute housing; damages arising from mechanic’s liens; and statutory relief, are economic and contractual in nature and do not satisfy the definition of “property damage.” While damages may be awarded for these claims, no coverage exists for these claims under the Nationwide policies.

⁴ An “occurrence” is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” [Appendix 106]

⁵ “Property damage” is defined under the CGL policies as:

- a. physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the ‘occurrence’ that caused it.

[Appendix 107]

The Court did, however, address the Plaintiffs' negligence claim in its Memorandum Order but failed to analyze whether the damages allegedly resulting from this claim satisfy the definition of "bodily injury" or "property damage." In *Cherrington v. Erie Ins. Property & Casualty Co.*, 231 W. Va. 470, 745 S.E.2d 508 (2013), this Court found, for the first time, that

[d]efective workmanship causing bodily injury or property damage is an "occurrence" under a policy of commercial general liability insurance. To the extent our prior pronouncements in Syllabus point 3 of *Webster County Solid Waste Authority v. Brackenrich and Associates, Inc.*, 217 W.Va. 304, 617 S.E.2d 851 (2005); Syllabus point 2 of *Corder v. William W. Smith Excavating Co.*, 210 W.Va. 110, 556 S.E.2d 77 (2001); Syllabus point 2 of *Erie Insurance Property and Casualty Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 526 S.E.2d 28 (1999); and Syllabus point 2 of *McGann v. Hobbs Lumber Co.*, 150 W.Va. 364, 145 S.E.2d 476 (1965), and their progeny are inconsistent with this opinion, they are expressly overruled.

Id. at Syl. Pt. 6. The Court went on to explain that, in addition to finding that the allegedly defective workmanship complained of constitutes an "occurrence," it must also be determined whether the remainder of the policy's insuring clause has been satisfied, *i.e.*, whether "the claimed losses as a result of said 'occurrence' satisfy the definition of 'bodily injury'⁶ or 'property damage' so as to be covered under the subject policy." 231 W. Va. at 484, 745 S.E.2d at 522.

The Circuit Court erred by failing to examine the losses allegedly resulting from the defective workmanship claim to determine whether they satisfied the definition of "bodily injury" or "property damage." At least some of those alleged damages clearly do not constitute "property damage." For instance, damages which are economic and contractual in nature, such as the financial losses, interest payments, and rental and storage fees allegedly incurred by the Plaintiffs as a result of the delay in the ability to move into their home do not constitute

⁶ "Bodily injury is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time."

“property damage.” See, e.g., *Aluise v. Nationwide Mutual Fire Ins. Co.*, 216 W. Va. 498, 625 S.E.2d 260 (2005) (holding damages resulting from misrepresentation and/or fraud have no basis as property damage as damages from such torts are economic and contractual in nature). Furthermore, any damages which may have been incurred as a result of the mechanics’ lien, and any expenses incurred to pay subcontractors and suppliers are also economic and contractual in nature and do not constitute property damage as the term is defined by the policies. As such, Nationwide has no duty to indemnify its insured for any losses resulting from defective workmanship which do not meet the definition of “property damage.”

Plaintiffs also seek damages for “bodily injury” as a result of emotional distress, annoyance, aggravation, inconvenience, embarrassment, humiliation and loss of reputation in the community. While such damages may be recovered, if proven, they do not meet the definition of “bodily injury” required to trigger coverage. The definitional language in the policy “clearly contemplates that such mental afflictions do not, in and of themselves, constitute bodily injury but rather only if they ‘result[] as a consequence of the bodily injury, sickness or disease.’” *Tackett v. American Motorists Ins. Co.*, 213 W. Va. 524, 532, 584 S.E.2d 159, 166 (2003). More recently, this Court, in *Cherrington*, noted that while Ms. Cherrington alleged that she had been “subjected to emotional distress,” she did not allege that she had suffered a “bodily injury, sickness or disease” as a result of the alleged defective workmanship. Recognizing prior holdings, the Court reiterated that “[i]n an insurance liability policy, purely mental or emotional harm that lacks physical manifestation does not fall within the definition of ‘bodily injury’ which is limited to ‘bodily injury, sickness or disease.’” 231 W. Va. at 484, 745 S.E.2d at 522 (quoting Syl. Pt. 1, in part, *Smith v. Animal Urgent Car, Inc.*, 208 W. Va. 664, 542 S.E.2d 827 (2000)). Therefore, because Ms. Cherrington did not indicate that her alleged emotional distress had

physically manifested itself, the Court found that she had not sustained a “bodily injury” to trigger coverage under the contractor’s CGL policy.

Like *Cherrington*, the Plaintiffs have failed to allege that their claims of emotional distress, annoyance, aggravation, inconvenience, embarrassment, and humiliation had any physical manifestation. As such, they have not sustained “bodily injury” necessary to trigger coverage under the Nationwide policies. The ruling by the Circuit Court that Nationwide has a duty to indemnify its insured for any damages that may be recovered is, therefore, erroneous as a matter of law.

2. The Circuit Court failed to consider any exclusion in the policies which may apply to preclude coverage.

Once it has been determined that the provisions in the insuring agreement are satisfied, the policy exclusions must be examined to determine if any of those exclusions apply to preclude coverage. In the case at hand, when finding that Nationwide had a duty to indemnify Mr. Hlad for *any* damages recovered against him,⁷ the Circuit Court failed to consider any exclusions which may act to preclude coverage under the policy.

With *Cherrington* as precedent, it is clear that several exclusions in the Nationwide CGL policies apply to preclude coverage for the losses claimed by the Plaintiffs. Exclusion *l*, Damage To Your Work provides:

“Property damage” to “your work”⁸ arising out of it or any part of it and included in the “products-completed operations hazard”.

⁷ Because the Plaintiffs failed to participate in discovery and the Circuit Court failed to rule on Nationwide’s Motion to Compel, it cannot be discerned exactly what losses allegedly incurred by the Plaintiffs as a result of defective workmanship meet the definition of “property damage” or “bodily injury.”

⁸ “Your work” is defined by the policy as” (1) Work or operations performed by you or on your behalf; and (2) Materials, parts or equipment furnished in connection with such work or operations.” “Your work” includes “(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of ‘your work’ and (2) The providing of or failure to provide warnings or instructions.” [Appendix 108]

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

[Appendix 97] With respect to the identical policy language examined in *Cherrington*, the Court stated as follows:

We find the language in Exclusion L to be plain and conclude that, by its own terms, ***Exclusion L excludes coverage for the work of Pinnacle*** [the contractor] but does not operate to preclude coverage under the facts of this case for work performed by Pinnacle’s subcontractors. . . Here, the parties do not dispute that the majority of the construction and completion of Ms. Cherrington’s home was done at the behest of Pinnacle by its subcontractors.

Id. 231 W. Va. at 486, 745 S.E.2d at 524.

Because of the failure of the Plaintiffs to participate in discovery in this matter, it is unknown what, if any, of the work performed by subcontractors resulted in property damage. It is clear, however, Exclusion *l* clearly precludes coverage for any property damage claimed by the Plaintiffs as a result of the work performed by Mr. Hlad.

Additionally, Exclusion *m* in the Nationwide policies, Damage To Impaired Property Or Property Not Physically Injured, provides:

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of a sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

[Appendix 97] Interpreting identical exclusionary language, the *Cherrington* Court stated:

The plain language of Exclusion M explicitly states that it applies to preclude coverage for two reasons: (1) a shortcoming in “your product” or “your work” and (2) an issue arising from the insured’s or the insured’s agent’s failure

to perform his/her contractual obligations. With respect to this first criterion, *i.e.*, a shortcoming in “your product” or “your work,” as we noted in the foregoing section, the vast majority of the construction work performed on Ms. Cherrington's home was not completed by Pinnacle, itself, but by its subcontractors. By definition, “your work,” as it is used in Exclusion M, contemplates either “[w]ork or operations performed by you” or “[w]ork or operations performed . . . on your behalf.” As such, Exclusion M, on its face, precludes coverage for the very same work of subcontractors that Exclusion L specifically found to be covered by the subject policy. To adopt the rationale of the circuit court and Erie would produce an absurd and inconsistent result because, on the one hand, Exclusion L of the policy provides coverage for the work of subcontractors, while, on the other hand Exclusion M bars coverage for the exact same work. We do not think that it is reasonable to construe two policy exclusions according to their plain language when the operative effect of this exercise results in such incongruous results. In short, we do not subscribe to an insurance policy construction that lends itself to the mantra: what the policy giveth in one exclusion, the policy then taketh away in the very next exclusion. Accordingly, we find that the first provision of Exclusion M does not operate to bar coverage for the work performed by Pinnacle's subcontractors.

Moreover, we find that Exclusion M does not operate to bar coverage pursuant to its second proviso: an issue arising from the insured's or the insured's agent's failure to perform his/her contractual obligations. The parties do not contend that the construction and structural damages to Ms. Cherrington's home resulted from breach of contract or failure to perform contractual obligations, nor has Erie argued that this proviso of Exclusion M applies to deny coverage in this case.

231 W. Va. at 487-88, 745 S.E.2d 525-26 (Citations omitted).

As previously stated, because of the failure of the Plaintiffs to participate in discovery in this matter, it is unknown what, if any, of the work performed by subcontractors resulted in property damage. As such, the rationale used in *Cherrington* to find that this exclusion did not apply to preclude coverage does not apply to the present case; the exclusion would apply to any property damage resulting from the alleged defective workmanship performed by Mr. Hlad. And unlike *Cherrington*, the Plaintiffs in the present matter do contend that much, if not all, of alleged damages resulted from Mr. Hlad's breach of contract or failure to perform his contractual obligations. In addition to specifically alleging breach of contract in their Complaint and Amended Complaint, the Plaintiffs have also claimed damages resulting from the alleged breach

of the construction contract. Specifically, Plaintiffs claim that they incurred expenses, such as rent and interest, as well as payments to various subcontractors and suppliers as a result of Mr. Hlad's alleged breach of contract. As such, Exclusion *m* clearly excludes coverage for some, if not all, of the alleged damages claimed by the Plaintiffs.

Finally, Exclusion *j*, Damage to Property, in pertinent part, excludes coverage under the CGL policies for property damage to: “(5) That particular part of real property of which you or any contractors of subcontractors working directly or indirectly on your behalf are performing operations, if the ‘property damage’ arises out of those operations; or (6) That particular part of any property that must be restored, repaired or replaced because ‘your work’ was incorrectly performed on it” Paragraph (6) “does not apply to “property damage” included in the “products-completed operations hazard.” [Appendix 96] The language in Exclusion J, which is plain and unambiguous and by its own terms, excludes coverage for any property damage to real property arising out of the work or operations of Mr. Hlad and his subcontractors,⁹ and to any property that must be restored, repaired or replaced because Mr. Hlad's work was incorrectly performed on it. The Plaintiffs specifically allege in their negligence count that they incurred damages which include amounts necessary to “reconstruct, repair or replace all of the damages and deficiencies created by Mr. Hlad,” The Circuit Court, therefore, erred by failing to consider the application of these exclusions in the present case. As such, the Memorandum Order issued by the Circuit Court is erroneous as a matter of law.¹⁰

⁹ While this Court may decide that Exclusion *j* does not apply to exclude coverage for work performed by subcontractors as it did in *Cherrington* with regard to exclusions *l* and *m*, the exclusion clearly excludes property damage to real property for work performed by Mr. Hlad and to property damage to any property that must be restored, repaired or replaced because Mr. Hlad's work was performed incorrectly.

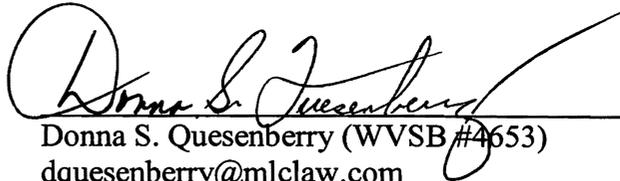
¹⁰ Though not addressed herein, the Circuit Court also failed to consider any prejudice to Nationwide as a result of Mr. Hlad's failure to promptly notify it of the claim or lawsuit pursuant to the policy conditions.

CONCLUSION

For the foregoing reasons, Petitioner Nationwide Mutual Insurance Company, respectfully requests that this Honorable Court issue a rule to show cause why the Court should not grant this Petition for Writ of Prohibition, and reverse the Circuit Court's Memorandum Order Denying Nationwide Mutual Insurance Company's Request for Declaratory Relief

**NATIONWIDE MUTUAL INSURANCE
COMPANY**

By Counsel

A handwritten signature in black ink, appearing to read "Donna S. Quesenberry", is written over a horizontal line. The signature is fluid and cursive.

Donna S. Quesenberry (WVSB #4653)

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VERIFICATION

STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

The undersigned deposes and says that the contents of the foregoing PETITION FOR WRIT OF PROHIBITION are true to the best of her information and belief and to the extent they are based upon information and belief, she believes them to be true.

Donna S. Quesenberry
Donna S. Quesenberry (WVSB #4653)
Counsel for Petitioner Nationwide Mutual
Insurance Company

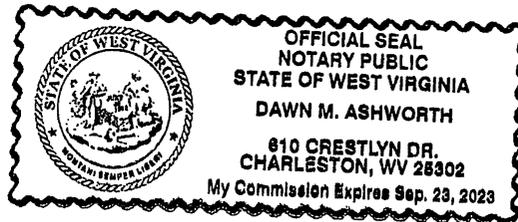
STATE OF WEST VIRGINIA

COUNTY OF KANAWHA, to-wit:

Subscribed and sworn to before me by Donna S. Quesenberry on this the 8th day of May, 2015.

Dawn M. Ashworth
Notary Public

My commission expires: September 23, 2023



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel
NATIONWIDE MUTUAL INSURANCE
COMPANY,

Petitioner,

v.

No. _____

THE HONORABLE RONALD E.
WILSON, Judge of the Circuit Court of
Ohio County, West Virginia,

Respondent.

CERTIFICATE OF SERVICE

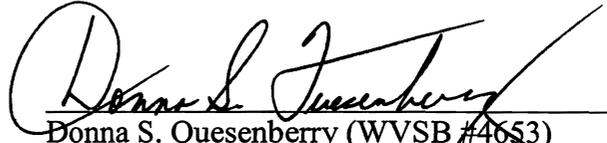
I, Donna S. Quesenberry, counsel for Petitioner Nationwide Mutual Insurance Company, do hereby certify that on May 8, 2015, I served a true and correct copy of the foregoing **“PETITION FOR WRIT OF PROHIBITION”** and **“APPENDIX”** upon all counsel/parties of record, by depositing the same in the regular United States mail, postage prepaid, sealed in an envelope, and addressed as follows:

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Hancock County Courthouse
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102 Court Street
New Cumberland, WV 26047

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*Attorney for Defendant Fred C. Hlad and
Fred C. Hlad d/b/a Allstate Construction*

A handwritten signature in black ink, appearing to read "Donna S. Quesenberry", written over a horizontal line.

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