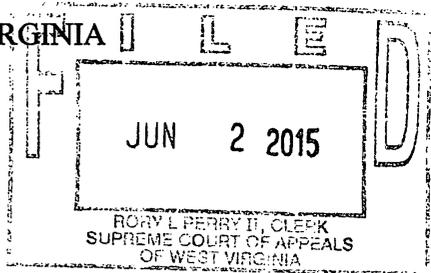


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



State of West Virginia ex rel., Nationwide Mutual Insurance Company, Intervenor Plaintiff Below, Petitioner,

vs.

Case No. 15-0424

Honorable Ronald E. Wilson, Judge of the Circuit Court of Ohio County, West Virginia; Travis Nelson and Teresa Nelson, Plaintiffs below; and Fred C. Hlad and Fred C. Hlad, d/b/a Allstate Construction, Defendant Below, Respondents.

**TRAVIS AND TERSA NELSONS' RESPONSE TO PETITION FOR WRIT OF PROHIBITION**

**SUMMARY OF FACTS**

In January of 2009, Respondents, Travis and Teresa Nelson, hereinafter "Plaintiffs", entered into an oral agreement with Defendant, Fred C. Hlad, individually, and d/b/a Allstate Construction, hereinafter "Defendant", to build their new home, with a completion date of July, 2009. On July 22, 2009, Defendant had Plaintiffs sign a written contract for the construction of their home to enable Defendant to obtain draws from Plaintiffs' bank. The Contract required Defendant to obtain commercial general liability insurance and comprehensive liability insurance for bodily injury and damages to the property arising out of and during operations under the contract. The completion date for construction of the home was set to be approximately October 20, 2009. The Contract included warranties of habitability and workmanlike construction. Under Section XV of the Contract, all attorneys' fees shall be paid by the non-prevailing party. Construction of Plaintiffs' home by Defendant spanned from March of 2009 to December of 2009. Defendant had a commercial general liability policy of insurance with Nationwide Mutual Insurance Company, Nationwide policy # ACP GLO 5712994598 and Nationwide policy # ACP GLO 5722994598, in effect and covering the Defendant at all times relevant to Plaintiffs' Amended Complaint and during the construction of Plaintiffs'

home. *See commercial general liability policies, attached hereto and incorporated herein as Exhibit 1.* Said policies were in effect from February 22, 2009 to February 22, 2010, and from February 22, 2010 to February 22, 2011, respectively. Also in effect were Nationwide policy #ACP CAF 5712994598 and ACP CAF 5722994598, umbrella policies in effect and covering the Defendant from February 22, 2009 to February 22, 2010 and from February 22, 2010 to February 22, 2011, respectively, at all times relevant to Plaintiffs' Amended Complaint and during construction of Plaintiffs' home. *See umbrella policies, attached hereto and incorporated herein as Exhibit 2.*

Plaintiffs incurred property damage to their home as a result of Defendant improperly selecting the location for Plaintiffs' foundation and defectively excavating the foundation of Plaintiffs' home, resulting in property damage to Plaintiffs' home and Plaintiffs' loss of use of their home and property. As a result of Defendant's defective workmanship, Plaintiffs incurred property damage to the foundation of their home resulting in cracks to the foundation which led to water coming into the home requiring significant repairs and resulting in Plaintiffs' loss of use of their home and property. Defendant's defective workmanship also caused property damage to the foundation of Plaintiffs' home resulting in the structural integrity of the home being compromised, requiring significant repairs and resulting in Plaintiffs' loss of use of their home and property. As a further result of Defendant's defective workmanship, Plaintiffs incurred property damage to the walls of their home resulting in uneven walls, doors and windows, all of which need repaired or replaced.

Plaintiffs sustained additional property damage to their home as a result of Defendant installing a water drainage system defectively, which led to water leaking into their home causing property damage and resulting in Plaintiffs' loss of use of their home and property. As a result of Defendant defectively framing Plaintiffs' home, Plaintiffs sustained structural property damage to their home, resulting in uneven walls, doors and windows, which need repaired or replaced. Defendant defectively installed vinyl siding and flashing, causing further damages to Plaintiffs' home, including water damage, which resulted in Plaintiffs' continued loss of

use of their home and property. As a result of Defendant defectively framing Plaintiffs' home and defectively installing various cabinets, tile, skylights and other items, Plaintiffs sustained property damage to their home requiring these and other items to be repaired and/or replaced. Defendant defectively installed various doors, windows, walls, lights, gas lines, support beams, sewer lines and other items, causing yet more property damage to Plaintiffs' home, requiring these items to be repaired or replaced, and further depriving Plaintiffs of the ability to move into their home. Additionally, Defendant drove a bulldozer or other piece of equipment into the foundation of Plaintiffs' home, causing property damage to their foundation. As a result of Defendant's defective workmanship and negligence, Plaintiffs sustained actual property damage to their home totaling \$102,557.83.

Plaintiffs obtained financing for the construction of their new home from Main Street Bank in Wheeling, West Virginia. As is the case with most construction loans, Plaintiffs' loan was "interest only" payments during the construction of their home. As a result of Defendant's defective workmanship and property damage Defendant caused to Plaintiffs' home, Plaintiffs were significantly delayed in the ability to move into their home, causing them to lose the use of their home and property resulting in financial losses including interest payments to Main Street Bank, rental payments for housing for Plaintiffs and storage fees totaling \$32,280.22.

Under the terms of the Contract, Defendant was required to certify by affidavit that all materials and services for which a lien could be filed have been or will be paid or satisfied. Despite taking draws from Plaintiffs' bank in excess of \$257,000.00, Defendant failed to pay a multitude of subcontractors who worked on Plaintiffs' home and for various materials, resulting in Mechanic's liens being placed on Plaintiffs' home and requiring Plaintiffs to pay subcontractors over \$59,228.59 out of their own pocket. As these monies had already been withdrawn from Plaintiffs' loan account by Defendant to pay these subcontractors and was not

used for that purpose, Plaintiffs paid twice for the services of these subcontractors. Plaintiffs also incurred significant legal fees having to litigate any mechanic's lien(s) that were filed.

Petitioner's insured for Chapter 7 Bankruptcy, and the bankruptcy case is still pending. The automatic stay was lifted in or near March of 2013, allowing Plaintiffs to litigate their causes of action.

### PROCEDURAL HISTORY

Nationwide Mutual Insurance Company (Petitioner) has maintained throughout this litigation they have no duty to indemnify Plaintiffs for the various damages caused by their insured, claiming that "no coverage exists". Pursuant to an Order of the lower Court, the parties attempted to mediate Plaintiffs claims on March 27<sup>th</sup> of 2014. Believing these potential negotiations to be in good faith, Plaintiffs, after discussing the same with counsel for Petitioner, refrained from amending their Complaint to include a negligence count with the perceived understanding a settlement could be reached at mediation. In their mediation packet, Plaintiffs provide Petitioner, well in advance of the mediation, with a comprehensive chronology, with supporting documentation including bills, invoices, reports from later disclosed expert witnesses, and detailed information specifying the damages Plaintiffs' sustained at the hands of their insured (this very information had been provided to Nationwide Adjusters and attorneys on multiple occasions previously). After a nearly day long mediation at a financial expense to Plaintiffs, Petitioner again claimed there was "no coverage" for Plaintiffs' claims and negotiations terminated.

Plaintiffs again attempted to reach a good faith settlement with Petitioner shortly after said mediation and yet again provided information detailing the damages they sustained at the hands of their insured. Both parties at that time understood Plaintiffs would amend their Complaint if a settlement could not be reached. At all times during negotiations between the parties, Nationwide had all available information and supporting documents to support Plaintiffs' claims. Plaintiffs were again met with a response that "no coverage" existed for Plaintiffs' claims. After having exhausted all attempts at a resolution, Plaintiffs' proceeded to amend their

Complaint to include a count for negligence. Nationwide did not object to the Amended Complaint. *See Order, attached hereto and incorporated herein as Exhibit 3.*

Plaintiffs requested and obtained a scheduling order to proceed with litigation of their claims, which was entered on August 15, 2014. Plaintiffs filed their expert witness disclosure in accordance with the Scheduling Order entered by the lower Court. The Scheduling Order provided a deadline to file a Declaratory Judgment action of September 30, 2014. Nationwide did not file a Declaratory Judgment action until October 2, 2014. Nationwide did not disclose their expert witnesses pursuant to the Scheduling Order of the lower Court, but rather moved to stay the Scheduling Order pending resolution of the Declaratory Judgment action. On March 16, 2015, The Honorable Ronald E. Wilson entered a Memorandum Order denying Nationwide's request for declaratory relief. Assuming this Order could have been appealed, a Notice of Intent to Appeal must have been filed within thirty (30) days of entry of this Order, or by April 14, 2015. Nationwide failed to timely file a Notice of Intent to Appeal by this date. On or about May 7, 2015, Plaintiffs' counsel contacted defense counsel (who is also employed by Petitioner) and advised that if the lower Court's Order could be appealed, a Notice of Intent to Appeal must have been filed by April 14, 2015. The following day, the subject Petition for Writ of Prohibition was filed.

#### STANDARD OF REVIEW

It is well settled law in West Virginia that "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 exceed its legitimate powers. W. Va. Code, 53-1-1. *State of W. Va. ex rel. Davidson v. Hoke*, 207 W. Va. 332, 532 S.E. 2<sup>nd</sup> 50 (2000), at Syl. Pt.1, *State ex rel. Peacher v. Sencindiver*, 160 W. Va. 314, 233 S.E. 2d 425 (1977) at Syl. Pt. 2.

"In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and

to the over-all economy of effort and money amount litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is not corrected in advance”. *State of W. Va. ex rel. Davidson v. Hoke*, 207 W. Va. 332, 532 S.E. 2<sup>nd</sup> 50 (2000), at Syl. Pt.2.

“Prohibition lies only to restrain inferior courts from proceedings 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 [a petition for appeal] or certiorari.” *State ex rel. Nationwide Mutual Insurance Company v. Marks*, 223 W. Va., 452, 676 S.E. 2d 156 (2009), at Syl. Pt. 1.

## ARGUMENT

### 1. Writ of Prohibition May Not Be Used as Substitute for Appeal

First and most significantly, this case does not merit this Court’s issuance of a writ of prohibition. As Nationwide acknowledges, they resolved a similar case in *Miller v. Hlad*, Civil Action Number 10-C-74, 10-C-103. Defendant Hlad was building the *Miller* house at exactly the same time he was building Plaintiffs’ home, on the same tract of land immediately adjacent to Plaintiffs’ home, and was covered by the same policies of insurance from which the settlement in the *Miller* case was paid. The damages sustained in the *Miller* case were similar or identical to the damages sustained by Plaintiffs in the instant case. The only significant difference appears to be that Plaintiffs in the instant case appear to have sustained significantly more damages at the hands of Petitioner’s insured. When Plaintiffs refused to settle with Petitioner for a small fraction of what their claims are worth, coverage became an issue. Petitioner filed their request for declaratory relief and the Circuit Court correctly ruled that coverage existed under the available policies of insurance for Plaintiffs’ claims. Petitioner continued to refuse to acknowledge coverage for Plaintiffs’ claims, while attempting to pay nominal sums to Plaintiffs in hopes they would settle for next to nothing. Petitioner failed

to timely file a Notice of Intent to Appeal the Circuit Court's ruling denying their claim for declaratory relief, and ruling that Petitioner must provide a defense and indemnify their insured, and are now disguising their attempt to appeal said ruling in the instant Petition for Writ of Prohibition. The law in West Virginia is clear that a writ of prohibition "may not be used as a substitute for [a petition for appeal] or certiorari." *State ex rel. Nationwide v. Marks, Id, at Syl. Pt. 1*. As such, Petitioner cannot be permitted to proceed with issues that could possibly have been appealed, disguised in the form of a writ of prohibition, and said Petition must be denied for this reason alone.

2. Writ of Prohibition Cannot Issue to Prevent Abuse of Discretion

As this Court had stated, "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." *State ex rel. Davidson v. Hoke, Id. at Syl. Pt. 1*. Both parties in the instant action provided, at the Circuit Court's Order, their respective proposed findings of fact and conclusions of law. *See Plaintiffs' Proposed Order, Findings of Facts and Conclusions of Law, and Nationwide's Response, which are attached hereto and incorporated herein as Exhibits 4 and 5*. The Circuit Court issued is Memorandum Order ruling that Nationwide must provide a defense and indemnify the Defendant. *See Memorandum Order, attached hereto and incorporated herein as Exhibit 6*. Again, Nationwide failed to timely file any notice of intent to appeal said Order.

The *Davidson* Court went on to say "In determining whether to grant a rule to show cause in prohibition when a court is not acting in excess of its jurisdiction, this Court will look to the adequacy of other available remedies such as appeal and to the over-all economy of effort and money amount litigants, lawyers and courts; however, this Court will use prohibition in this discretionary way to correct only substantial, clear-cut statutory, constitutional, or common law mandate which may be resolved independently of any disputed facts and only in cases where there is a high probability that the trial will be completely reversed if the error is

not corrected in advance”. *State of W. Va. ex rel. Davidson v. Hoke*, at *Syl. Pt.2*. There is no statutory, constitutional or common law mandate at issue here, and certainly no substantial, clear cut statutory, constitutional or common law mandate at issue. This Court also noted in *Davidson* that “prohibition is an extraordinary remedy, the issuance of which is usually reserved for really extraordinary causes”. *Id*, citing *State ex rel Suriano v. Gaughan*, 198 *W.Va.* 339, 345, 480 *S.E. 2d* 548, 554 (1996). Finally, the *Davidson* Court noted that “it is well established that prohibition does not lie to correct mere errors and cannot be allowed to usurp the functions of appeal, writ of error, or certiorari..” , *Davidson*, at p. 55/337. As such, a writ of prohibition cannot be issued in the instant case.

### 3. Circuit Court Did Not Exceed its Authority

The issue in *State of W. Va. ex rel. Davidson v. Hoke* mirrors that of this case. In *Davidson*, the issue presented dealt with the Circuit Court’s ruling in a declaratory judgment action that insurance coverage existed to cover damages sustained by Mary Ellen Loy Mabe and Tommie C. Mabe as a result of the construction of their home. This Court noted in that case that “prohibition generally lies to correct only clear – cut or substantial errors of law, which violate a constitutional, statutory, or common law mandate”. *Id* at p. 54, 337, citing *Syl. Pts. 2&3, State Auto*, 204, *W.Va.* 87, 511 *S.E. 2d* 498. In applying that standard to the facts in that case, this Court concluded that the legal issues in that case did not fall with the “rubric of readily-apparent errors of law.” *Id* at p. 54/336. The *Davidson* Court went on to say “Petitioner Davidson has not based his request for relief upon either a constitutional mandate or a statutory provision to demonstrate the wrongfulness of the circuit court’s ruling. Neither can in be argued that this controversy is governed by a controlling common law precedent.” *Id*, 54, 337. That facts and issues of law presented in *Davidson* are clearly on point with those in the instant case. In *Davidson*, this Court did not believe the Circuit Court exceeded its authority, and such is the case in the instant action. As such it must follow that a writ of prohibition cannot issue.

### 4. Discovery Issues

Petitioner claims Plaintiffs did not comply with discovery and did not provide detailed information relative to their damages. This is patently inaccurate. Plaintiffs provided Petitioner with detailed information detailing their extensive damages on multiple occasions, as early as December 18, 2013. *See letter from Plaintiffs' counsel to Defense counsel, attached hereto and incorporated herein as Exhibit 8.* On February 14, 2014, prior to the scheduled mediation, Petitioner acknowledge having this information, and, more significantly, acknowledged that coverage existed to cover Plaintiffs' claims. In an email to Plaintiffs' counsel, Jason Garrett, the claims adjuster handling Plaintiffs' claims at the time, stated "I have had a chance to review the damages spreadsheet with our coverage counsel (Donna Quesenberry). Our review has revealed there are damages allegedly sustained by Mr. & Mrs. Nelson that are potentially covered under Mr. Hlad's policy." *See email of February 25, 2014, attached hereto and incorporated herein as Exhibit 7.* Interestingly, Jason Garret was removed from the handling of this claim not long after this email and Jeffrey Horner became the claims adjuster. Jason Garret is believed to have adjusted the claim in *Miller v. Hlad*, and ultimately paid a sizeable settlement for that claim. This is precisely why Plaintiffs were desirous of taking both claims adjuster's depositions. Nationwide unilaterally ignored Plaintiffs' Notice of Deposition *Duces Tecum*, which clearly would have shed light on Nationwide's position relative to coverage, particularly in light of the settlement in the *Miller* case.

5. Miscellaneous Issues/Coverage

Petitioner wants this Court to review the underlying insurance policies and facts of this case and essentially overrule the Circuit Court's order that there is in fact coverage for Plaintiffs' claims under the applicable policies of insurance. Although Plaintiffs do not believe Petitioner is entitled to a writ of prohibition for the reasons detailed above, it is incumbent upon Plaintiffs to address the coverage issues propounded by Petitioner.

Nationwide policy # ACP GLO 5712994598 and Nationwide policy # ACP GLO 5722994598, under the Commercial General Liability Coverage Form, Section 1, paragraph 1, read in pertinent part: “Insuring Agreement - a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. We will have the right and duty to defend the insured against any “suit” seeking those damages.” Subsection b reads in pertinent part: “This insurance applies to “bodily injury” and “property damage” only if: (1) the “bodily injury” or “property damage” is caused by an “occurrence” that takes place in the “coverage territory” and (2) the “bodily injury” and “property damage” occurred during the policy period.” Nationwide policy # ACP GLO 5712994598 and Nationwide policy # ACP GLO 5722994598 were in effect and covering the Defendant at all times relevant to Plaintiffs’ Amended Complaint and during the construction of Plaintiffs’ home. Said policies were in effect from February 22, 2009 to February 22, 2010, and from February 22, 2010 to February 22, 2011, respectively.

“Property damage” under Nationwide policy # ACP GLO 5712994598 and Nationwide policy # ACP GLO 5722994598 is defined as “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 of use shall be deemed to occur at the time of the “occurrence” that caused it.”

“Bodily injury” under Nationwide policy # ACP GLO 5712994598 and Nationwide policy # ACP GLO 5722994598 is defined as “bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.”

“Occurrence” under Nationwide policy # ACP GLO 5712994598 and Nationwide policy # ACP GLO 5722994598 is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.”

Nationwide policy # ACP GLO 5712994598 and Nationwide policy # ACP GLO 5722994598 under Subsection 2b of “Exclusions” reads in pertinent part: “Contractual Liability – “Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. *This exclusion does not apply to liability for damages: (1) That the insured would have in the absence of the contract or agreement”.*

Nationwide policy # ACP GLO 5722994598 is the same policy as Nationwide policy # ACP GLO 5712994598, with the exact coverage language and the exact definitions, with these policies being in effect from February 22, 2009 to February 22, 2010, and from February 22, 2010 to February 22, 2011, respectively. These policies covered the Defendant and were in effect at all times relevant to Plaintiffs’ Amended Complaint and all times during construction of Plaintiffs’ home.

Nationwide policy #ACP CAF 5712994598 and ACP CAF 5722994598 are umbrella policies in effect and covering the Defendant from February 22, 2009 to February 22, 2010 and from February 22, 2010 to February 22, 2011, respectively, at all times relevant to Plaintiffs’ Amended Complaint and during construction of Plaintiffs’ home, and have identical coverage language and definitions.

Nationwide policy #ACP CAF 5712994598 and ACP CAF 5722994598 read, in pertinent part, “Under Coverage A, we will pay on behalf of the “insured” that part of loss covered by this insurance in excess of the total applicable limits of “underlying insurance” provided the injury or offense takes place during the Policy Period of this policy. The terms and conditions of underlying insurance are, with respect to Coverage A, made a part of this policy except with respect to: a. any contrary provision contained in this policy; or b. any provisions of this policy will apply.” “Under Coverage B, we will pay on behalf of the “insured” damages the “insured” becomes legally obligated to pay by reason of liability imposed by law or assumed under an “insured contract” because of “bodily injury”, “property damage” or “personal and advertising injury” covered by this insurance which takes place during the Policy Period and is caused by an “occurrence”.

Nationwide policy #ACP CAF 5712994598 and ACP CAF 5722994598 define “bodily injury” as “physical injury, sickness or disease to a person and, if arising out of the foregoing, mental anguish, mental injury, shock or humiliation, including death at any time resulting therefrom” and define “occurrence” as “with respect to bodily injury or property damage, liability, an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” These policies define “Property damage” as “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 of use shall be deemed to occur at the time of the “occurrence” that caused it.”

Defendant slandered Plaintiffs by falsely represented to subcontractors and materialmen that he was unable to pay them because Plaintiffs failed to pay him, despite Plaintiffs having paid Defendant over \$257,000.00 obtained from draws from Main Street Bank to pay the same. Plaintiffs suffered annoyance, inconvenience, aggravation, humiliation, embarrassment, emotional distress and loss of reputation in the community, which manifested themselves physically, as a result of Defendant slandering Plaintiffs by falsely representing to subcontractors and materialmen that Plaintiffs failed to pay him. Under Nationwide policy # ACP GLO 5722994598 and Nationwide policy # ACP GLO 5712994598, Coverage B – Personal and Advertising Injury Liability reads in pertinent part: “1. Insuring Agreement **a**. We will pay those sums that the insured becomes legally obligated to pay as damages because of “personal and advertising injury” to which this insurance applies. We will have the right and duty to defend the insured against and “suit” seeking those damages.” “Personal and advertising injury” is defined as “injury, including consequential “bodily injury”, arising out of one or more of the following offenses: **d**. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person or organization’s goods, products or

services.” All of these damages Plaintiffs’ sustained were at the hands of Petitioner’s insured and are covered under the language contained in the policies.

Under *Cherrington v. Erie Insurance Property and Casualty Company*, 231 WV 470, 745 S.E. 2d 508 (Syl. Pt. 6.), all of the defective workmanship performed by the Defendant or his agents on Plaintiffs’ home is considered an “occurrence” under the policies. Additionally, all of the Plaintiffs’ property damages to their home as a result of the defective workmanship of the Defendant is considered “property damage” caused by an “occurrence” under these policies, which triggers coverage under those policies. Furthermore, as a direct result of the defective workmanship (“occurrence”) of Defendant and the property damages caused by said occurrence, Plaintiffs were prevented from moving into their home, thereby incurring financial damages from the loss of use of their home and property, i.e. interest payments to Main Street Bank, rental payments for a residence and storage fees, which constitutes “property damage” as defined by the policies which triggers coverage under those policies for these damages. The interest payments made to Main Street Bank and rental and storage fees, were the result of the loss of use of Plaintiff’s home from Defendant’s or his agents’ defective workmanship. Plaintiffs could not move into their home because of the repairs that needed done to the home, requiring Plaintiffs to live in a small rental home (they had sold their existing home), put most of their belongings in storage, and continue to pay interest only payments to Main Street Bank as their loan could not be converted to a mortgage loan until the home was completed. Consequently, these damages fall under the definition of “property damage” (loss of use) under these policies.

Petitioner seems confused by the very language of its own insurance policies. Petitioner would have this Court believe that the very policies of insurance issued by Petitioner to its insured, ***do not cover work done by its insured***. This contention is absurd. “An insurance policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties.” *Cherrington*, at Syl. Pt. 5. *Cherrington* goes on to say “An insurance company seeking to avoid

liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.” *Id at Syl. Pt. 10.*, and more significantly “Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.” *Id at Syl. Pt. 11.* Although not surprising, Petitioner appears to claim that it does not provide coverage for the very individual/business it purports to insure. Furthermore, any defective work by a subcontractor acting on behalf of the Defendant causing damages to Plaintiffs’ home constitutes an “occurrence” under the Nationwide policies which triggers coverage of those policies for said damages. *Cherrington, at p.483/521.* Accordingly, whether any work done on Plaintiffs home was done by the insured or subcontractors acting on his behalf is immaterial, as clearly work done by either is covered under the Petitioner’s insurance policies. Petitioner is, and has been, attempting to hind behind the language of their insurance policies to avoid paying on Plaintiffs’ claims.

Plaintiffs’ maintained throughout this litigation that their emotional distress, annoyance, aggravation, inconvenience, embarrassment and humiliation physically manifested themselves, making them “bodily injuries” under Petitioner’s policies of insurance, which triggers coverage of those policies for said damages. *Cherrington, at p. 484/522.* Plaintiffs alleged emotional distress in their Amended Complaint and asserted the requisite manifestation in their Proposed Order, Findings of Fact and Conclusions of Law, and must be afforded the opportunity to litigate their claims. Minimal discovery has taken place in the underlying action, namely as a result of Petitioner refusing to acknowledge coverage, consequently Plaintiffs have not had the opportunity to litigate this or any other portions of their claims. Nationwide policy #ACP CAF 5712994598 and ACP CAF 5722994598 define “bodily injury” as “physical injury, sickness or disease to a person and, if arising out of the foregoing, mental anguish, mental injury, shock or humiliation,...”. Clearly, the language in this policy distinguishes between physical injury and sickness in its definition of “bodily injury”, and further

distinguishes between physical injury and mental anguish. As such, Plaintiffs must be permitted to litigate this portion of their claims as the language in Petitioner's policy purports to provide coverage.

Defendant was contractually obligated to pay all monies for materials and labor owed to materialmen and subcontractors. Failure of Defendant to pay these monies resulted in the Plaintiffs' loss of use of their home and property, which constitutes "property damages" (loss of use) under the policies. Failure of Defendant to pay these monies resulted in Plaintiffs' suffering emotional distress, annoyance, aggravation, inconvenience, embarrassment and humiliation which physically manifested themselves making them "bodily injuries" under the insurance policies, which triggers coverage of those policies for said damages. *Cherrington, at p.484/522*. In the alternative, Nationwide policy #ACP CAF 5712994598 and ACP CAF 5722994598, under Coverage B, specifically provide coverage for damages *the Defendant becomes legally obligated to pay by reason of liability imposed by law, regardless of the existence of a contract*, including all monies for materials and labor owed to materialmen and subcontractors not paid by Defendant after having Defendant was paid by Plaintiffs. Petitioner's insured was legally obligated to pay the various subcontractor and materialmen, and as such, there is coverage for the insured's failure to pay them.

#### Questions Presented

The first question presented by Petitioner were whether the Circuit Court erred in failing to determine the definition of property damage and bodily injury so as to trigger coverage in this action. The Circuit Court did not fail to do this. The Circuit Court stated on page 3 of its Order the definitions of property damage, bodily injury, and occurrence and went on to rule that said damages resulting therefrom are not foreign to the risks insured against by Nationwide's policies, and that Petitioner has a duty to indemnify its insured.

The only other question presented was whether the Circuit Court erred in failing to consider any exclusion. Based on the Circuit Court's Order, it is clear the Court did not rule that any exclusions apply in the instant action.

Again, the questions Petitioner presents (errors by the Circuit Court) are not corrected by such an extraordinary remedy as a writ of prohibition. Petitioner claims that the “Memorandum Order issued by the Circuit Court is erroneous as a matter of law”. As stated in *State of W. Va. ex rel. Davidson v. Hoke*, 207 W. Va. 332, 532 S.E. 2<sup>nd</sup> 50 (2000), “it is well established that prohibition does not lie to correct mere errors and cannot be allowed to usurp the functions of appeal, writ of error, or certiorari..”, *Davidson*, at p. 55/337. As such, a writ of prohibition cannot issue in this action.

### CONCLUSION

For all of the foregoing reasons, the Plaintiffs and Respondents herein, Travis Nelson and Teresa Nelson respectfully request this Court deny Petitioner’s Petition for Writ of Prohibition, and for any further relief this Honorable Court deems appropriate.

Respectfully submitted by,

Travis and Teresa Nelson,  
Plaintiffs and Respondents,

By:   
Of Counsel

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**CERTIFICATE OF SERVICE**

I, Brian A. Ghaphery, Esquire, do hereby certify that a true copy of the foregoing Plaintiffs'/Respondents Response to Petition for Writ of Prohibition is being served upon the below listed counsel by First Class mail, this 1st day of June, 2015.

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