IN THE

# SUPREME COURT OF APPEALS OF WEST VIRGINIA

**State of West Virginia ex rel. NATIONWIDE PROPERTY & CASUALTY INSURANCE COMPANY, KENNETH R. CONAWAY, BETSY ROSS, and LISA MCGAHAN,**

**Petitioners,**

**vs.**

**HON. TOD J. KAUFMAN,** Circuit Court Judge of Kanawha County, West Virginia, **and CALEB BANKS,**

**Respondents.**

---

## PETITION FOR WRIT OF PROHIBITION

FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA
(CIVIL ACTION NO. 17-C-1737)

---

**J. Tyler Mayhew (WVSB #11469)**
**BOWLES RICE LLP**
**101 South Queen Street**
**Post Office Drawer 1419**
**Martinsburg, West Virginia 25402-1419**
**Tel: (304) 264-4209**
**Fax: (304) 267-3822**
**tmayhew@bowlesrice.com**

***Counsel for Petitioners Nationwide Property & Casualty Insurance Company, Kenneth R. Conaway, Betsy Ross, and Lisa McGahan***

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Rules**

**TO: THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

Nationwide Property & Casualty Insurance Company, Kenneth R. Conaway, Betsy Ross, and Lisa McGahan (collectively, "Nationwide") petition this Honorable Court for a writ of prohibition against the Honorable Tod J. Kaufman, in his capacity as judge of the Circuit Court of Kanawha County, West Virginia, and Caleb Banks ("Plaintiff") from enforcing the Circuit Court's *Order Granting Plaintiff's Motion for Adverse Inference Instruction* and its *Order Granting Plaintiff's Motion for Partial Summary Judgment (Plaintiff Has Substantially Prevailed)*.

## I. QUESTIONS PRESENTED

1. Whether the Circuit Court committed clear error and irremediably prejudiced Nationwide's right to a fair trial by granting Plaintiff's motion for an adverse inference jury instruction that Nationwide engages in a general business practice of violating the unfair settlement practice provisions of W. Va. Code § 33-11-4(9), based upon Nationwide's alleged spoliation of its "complaint register," the record of written complaints that an insurer must maintain for the West Virginia Insurance Commissioner pursuant to W. Va. Code § 33-11-4(10).

2. Whether the Circuit Court committed clear error and irremediably prejudiced Nationwide's right to a fair trial by granting Plaintiff's motion for partial summary judgment that he "substantially prevailed" on his insurance claim for purposes of obtaining extra-contractual damages under *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986).

## II. STATEMENT OF THE CASE

This case involves Nationwide's investigation and adjustment of Plaintiff's insurance claims following a highly suspicious fire on October 22, 2017 at his residence in Logan County, West Virginia. Before Nationwide could complete its investigation, Plaintiff sued Nationwide on

December 29, 2017, two weeks after submitting his proof of loss and barely two months after the fire, alleging that Nationwide failed to promptly investigate and pay his claim.

The suspicious circumstances surrounding the fire indicated that the "intentional acts" exclusion in Plaintiff's policy could apply to bar coverage. Plaintiff's residence simultaneously caught fire at two separate points of origin, on two different floors, and in completely separate areas of the structure. App. 620. In both locations, the fires were caused by electric space heaters that had been turned on, set to high, and placed near combustible materials. *Id.* The fire investigator hired by Nationwide later concluded that "the cause of the fire was the result of an intentional act," as did the State Fire Marshal, who is still investigating. App. 620, 622, 629.

Further, the evidence indicated that Plaintiff may have set the fires to pay for his upcoming move to Florida. Plaintiff left the residence just minutes before the fires began, was the last known person in the residence, and was the only person with keys to the residence. App. 646, 652, 656. The fire department did not notice signs of forced entry, and Plaintiff stated that he locked all of the doors and windows before leaving. App. 656, 673-676. Plaintiff owned the residence free and clear, and stood to collect four times what he paid for the residence in insurance money. App. 677-681. Plaintiff had also recently sold his businesses in the area and had begun the process of moving to Florida. App. 645, 663-665. Despite these circumstances, Plaintiff alleges that Nationwide conducted its investigation in bad faith, and delayed paying his insurance claim, because it took more than two months to fully investigate the suspicious circumstances of the fire.

The day after the fire, on October 23, 2017, Plaintiff reported his claim to Nationwide. App. 685. The next day, on October 24, 2017, Betsy Ross, a Nationwide adjuster, met with Plaintiff at his residence. App. 687-688. The pending Fire Marshal's investigation precluded Ms. Ross from entering the residence and inspecting its contents. App. 688. Later that day, Ms. Ross

provided Plaintiff with three thousand dollars ($3,000.00) to immediately assist him with his financial needs during Nationwide's investigation of his claim. App. 642-643.

On October 25, 2017, Kenneth Conaway and Lisa McGahan, large loss adjusters, began adjusting Plaintiff's claim. Mr. Conaway adjusted the damage to the structure of Plaintiff's residence, and Ms. McGahan adjusted the damage to Plaintiff's personal property. That day, Mr. Conaway offered additional living expense ("ALE") benefits to Plaintiff to pay his living costs, which Plaintiff initially declined.[1] The following day, Mr. Conaway provided Plaintiff with two proof of loss statement forms so that he could comply with the terms and conditions of his policy.

On October 26, 2017, Mr. Conaway and Robert Sullivan, a fire investigator, met Plaintiff at his residence to examine the cause and origin of the fire and to obtain additional information from Plaintiff about his claim. App. 611. Mr. Sullivan inspected the residence and determined that the origin of the fire was suspicious (as did the local fire department, which reported it to Fire Marshal for investigation) because there were two points of origin for the fire. App. 612, 620. Mr. Sullivan's observations conflicted with Plaintiff's statements to Mr. Conaway that he turned off both space heaters prior to leaving the residence. App. 620, 658. Due to these discrepancies, Mr. Conaway referred Plaintiff's claim to Nationwide's Special Investigation Unit ("SIU").

On November 1, 2017, Steve Young, an SIU investigator, spoke with Plaintiff's neighbors, reviewed the fire department's investigation and explored Plaintiff's background. App. 690. Nationwide also requested, pursuant to Plaintiff's policy, that Plaintiff participate in an examination under oath ("EUO") about his claim. App. 691-692.

---

[1] Plaintiff later accepted Nationwide's offer to pay ALE benefits on November 29, 2017, consisting of $400 per month rent to Plaintiff's brother, with whom he was living. App. 705. Nationwide paid this amount from the date of the loss on October 22, 2017 through February 28, 2018, when Plaintiff relocated to Florida. *Id.* At Plaintiff's request, Nationwide subsequently increased its ALE benefit payments to $700 per month, and paid this amount from March 1, 2018 through the one-year anniversary of the fire per the terms of his policy. App. 505-507, 708.

Nationwide received Plaintiff's completed proof of loss form on December 11, 2017 and conducted his EUO as part of the SIU investigation on December 18, 2017. App. 33, 694-697. Three days later, on December 21, 2017, Nationwide, through counsel, informed Plaintiff's counsel that Nationwide had nearly completed its field investigation but was waiting on return of a necessary portion of the cause and origin investigation before making a coverage determination:

> Nationwide is nearing completion of the field portion of the claim investigation. They are still waiting on return of a necessary portion of the cause and origin investigation. I am aware that in anticipation of the receipt of that a conference has been set up for January 3, at which point a coverage determination is likely to be made ... In the meantime, Nationwide is continuing to cover Mr. Banks' ALE expenses while he continues to rent from his brother near to his current employment.

App. 698. The "necessary portion of the cause and origin investigation" was the test results for the two space heaters that caused the fire. App. 699-701. Plaintiff stated on several occasions that he turned off both space heaters. App. 658. The heaters were severely damaged by the fire and it was not possible to determine from a visual inspection if they had been turned off as Plaintiff claimed. App. 700. The test results would confirm whether Plaintiff's statements were true.

On December 29, 2017, a week after being informed that Nationwide was nearing completion of its investigation and would likely make a coverage decision the following week, Plaintiff sued Nationwide for breach of contract, "common-law bad faith," violations of the West Virginia Unfair Trade Practices Act, W. Va. Code § 33-11-4(9) ("UTPA"), and punitive damages. App. 31-38. Plaintiff alleged that Nationwide failed to timely investigate and pay his insurance claim. At no time prior to or after filing suit on December 29, 2017 did Plaintiff make an offer to settle his fire loss or subsequent water loss claims within policy limits. In fact, Plaintiff's counsel refused to make a demand of any kind at any point prior to court-ordered mediation on August 12, 2019, and to this day has not made a demand within policy limits. App. 713.

On February 22, 2018, Mr. Sullivan completed his fire investigation and shared his analysis with Nationwide's coverage counsel, who completed his legal analysis of Plaintiff's claim and submitted it to Nationwide on March 2, 2018.[2] App. 611, 703. A week later, by letter dated March 9, 2018, Nationwide informed Plaintiff's counsel that it accepted coverage of Plaintiff's claim and made a written offer to settle the claim. App. 704-706. Plaintiff's counsel did not respond to this letter, despite multiple follow-up communications from Nationwide's counsel, until July 6, 2018, when he instructed Nationwide's counsel on how to make payment for the undisputed portions of Plaintiff's fire loss claim. App. 707. Nationwide paid the undisputed portion of Plaintiff's fire loss claim ten days later, on July 16, 2018. App. 709-710.

A week after Nationwide offered to pay Plaintiff's fire loss claim, Plaintiff's counsel notified Nationwide of a potential water loss claim. App. 710. Because Plaintiff had already filed suit, Nationwide could not inspect Plaintiff's residence to adjust his claim without obtaining approval from his counsel. Plaintiff's counsel eventually agreed to allow Nationwide to inspect Plaintiff's residence on August 8, 2018. App. 711. Nationwide completed its estimate of Plaintiff's water loss claim three weeks later and paid the claim on September 4, 2018. App. 712.

During discovery, Plaintiff sought, among other items, production of "the complete file of complaints against Defendant Nationwide required to be maintained pursuant to W. Va. Code § 33-11-4(10) for the time period required by W. Va. Code § 33-2-9." App. 94. Plaintiff also served Nationwide with a notice of Rule 30(b)(7) deposition requesting a corporate representative to testify on various topics, including "[t]he Complaint Register or Log maintained by Nationwide in connection with its operations in the State of West Virginia, as required by W. Va. Code § 33-

[2] Although the written report regarding the space heaters was not completed until March 8, 2018, the engineer who performed the testing verbally advised Mr. Sullivan of his findings prior to that date, allowing Mr. Sullivan to complete his investigation and submit his report. App. 618-619.

11-4(10)." App. 140. Nationwide objected to Plaintiff's requests, and Plaintiff subsequently moved to compel. App. 59-181. On May 14, 2019, the Circuit Court granted Plaintiff's motion to compel and ordered Nationwide to provide supplemental discovery information and to designate a corporate witness on Plaintiff's deposition topics. App. 241-245. On June 7, 2019, Nationwide provided supplemental discovery responses that included its complaint register. App. 567-572.

Following the Circuit Court's May 14, 2019 discovery order, Plaintiff's counsel changed the subject of his Rule 30(b)(7) deposition topic relating to the complaint register to "the process by which Nationwide maintains its Complaint Register and the steps taken to confirm that the Complaint Register documents all of the written communications to Nationwide primarily expressing a grievance about or related to Nationwide's claims handling." App. 564. Nationwide agreed to produce a corporate representative on this topic. During the deposition, Plaintiff's counsel pointed out that the complaint register Nationwide produced did not include auto complaints even though Nationwide writes auto policies. App. 574-575. Nationwide's representative also could not determine from the face of the document if it included "third-party" complaints made by non-policyholders. App. 576. Plaintiff's counsel, however, did not ask a single question about any of the homeowners complaints he did receive, and in fact had previously told Nationwide that he had no intention of pursuing discovery about the specifics of those complaints: "I do NOT want a witness who is designated to testify ... as to the specifics of the individual matters identified on the Complaint Register." App. 246-333, 564.

After the deposition, Plaintiff's counsel did not request that Nationwide supplement its production with the complaint register for auto or "third-party" complaints, or otherwise attempt to confer with Nationwide about any perceived deficiencies in its complaint register. Instead, nearly two months later and after the close of discovery, Plaintiff filed a motion for adverse

inference, claiming that Nationwide failed to produce "directly relevant" evidence of its business practices. App. 56-57, 334-361. In response, Nationwide reviewed the complaint register it produced and determined that it had been generated in June 2018, when this case was pending in federal court, and had been limited at that time to only first-party homeowners policy complaints because Plaintiff's lawsuit involves a first-party homeowners claim. Nationwide subsequently supplemented its production by producing a new complaint register that includes complaints for all lines of insurance, including auto and "third-party" complaints. App. 557, 577-591.

On September 4, 2019, the parties appeared for a pretrial conference. Although there were numerous motions pending, the Circuit Court chose to take up only Plaintiff's motion for adverse inference and motion for partial summary judgment, and third-party defendant Heritage Restoration's motion for dismissal (filed the day before).[3] As to his motion for partial summary judgment on his claim for *Hayseeds* damages, Plaintiff's counsel admitted in court that he did not make a demand within policy limits, dooming his claim as a matter of law:

> THE COURT: Did you make a demand?
>
> MR. KESNER: Judge, at that point there wasn't something to demand.

App. 745. As to his motion for adverse inference, Plaintiff's counsel argued for the first time that Nationwide's complaint register did not comply with W. Va. Code § 33-11-4(10), and incorrectly represented to the Court that Nationwide's corporate representative admitted that its complaint register violated the statute:

> I asked [Nationwide's corporate representative], "Why doesn't this have the communications that are sent by attorneys and by claimants to file handlers?" She acknowledged, "We don't record those. There is no mechanism by which we record those." Even though 33-11-4[10] expressly requires them to do so.

[3] The Court denied Heritage's motion but Nationwide is not challenging that ruling.

App. 771-772. Plaintiff's counsel did not ask this question or anything similar and Nationwide's representative did not give this response. To the contrary, Nationwide's representative testified that its adjusters had "a couple of options" to include complaints they receive on Nationwide's complaint register. App. 306-307. There is also no evidence that the Insurance Commissioner, for whom Nationwide maintains its complaint register and who periodically reviews it for compliance with West Virginia law, has ever found Nationwide's complaint register to be incomplete or insufficient. As to both of Plaintiff's motions, the Circuit Court nonetheless ruled from the bench, without any supporting reasoning, that it was granting Plaintiff's motions and directed Plaintiff's counsel to submit written findings and conclusions to support those rulings. App. 789-790. The Circuit Court ultimately entered Plaintiff's submitted proposed orders, verbatim, on October 16, 2019. App. 1-30.

## III. SUMMARY OF ARGUMENT

The Circuit Court committed multiple, clear errors of settled law when it granted Plaintiff's Motion for Adverse Inference Instruction and Plaintiff's Motion for Partial Summary Judgment. The Circuit Court's rulings, if not corrected prior to trial, will irremediably prejudice Nationwide's ability to defend against Plaintiff's "bad faith," UTPA, and punitive damages claims by taking away from the jury its duty to consider the evidence and decide whether Nationwide acted reasonably in handling Plaintiff's insurance claims.

The Circuit Court's *Order Granting Plaintiff's Motion for Adverse Inference Instruction* is clearly wrong and should be prohibited by this Court because there is no basis for giving an adverse inference jury instruction. An adverse inference instruction is "an extreme sanction that should not be given lightly," *In re Ethicon, Inc. Pelvic Repair Systems Product Liability Litigation*, 299 F.R.D. 502, 525 (S.D. W. Va. 2014), because of "the danger that such an instruction permitting an

adverse inference may add a fictitious weight to the case of the proponent of the instruction." *McGlone v. Superior Trucking Co., Inc.*, 178 W. Va. 659, 665, 363 S.E.2d 736, 742 (1987).

The Circuit Court's finding that Nationwide failed or refused to maintain a complete "complaint register" as required by W. Va. Code § 33-11-4(10), and therefore deprived Plaintiff of evidence demonstrating Nationwide's business practices, is simply incorrect. There is no basis for giving an adverse inference instruction in this case because Nationwide produced its complete complaint register in discovery as requested, and the Insurance Commissioner (who reviews Nationwide's complaint register every five years for compliance with West Virginia law) has never found Nationwide's complaint register to be incomplete or out of compliance with the statute. Furthermore, Plaintiff was not deprived of evidence in this case: Plaintiff undeniably received a complete copy of all complaints maintained by Nationwide about first-party homeowners insurance claims (such as this case), and had an opportunity to pursue discovery of those complaints, yet did absolutely nothing with that information to discover evidence of Nationwide's business practices. Plaintiff did not ask a single question in a deposition about any complaint on Nationwide's complaint register, did not require Nationwide to produce a single claim file other than his own, and has not disclosed any expert opinions about Nationwide's claims handling in other cases. In fact, Plaintiff never intended to actually take discovery about any matter listed on Nationwide's complaint register: "I do NOT want a witness who is designated to testify ... as to the specifics of the individual matters identified on the Complaint Register."

The Circuit Court's error is particularly egregious because Nationwide's complaint register is not relevant or admissible evidence. Even assuming Nationwide's complaint register did not comply with W. Va. Code § 33-11-4(10) (it does comply), there is no private cause of action for violations of that statute; its sole purpose is to create a statistical record of the volume of customer

service complaints received by Nationwide so the Insurance Commissioner can perform periodic market conduct examinations under W. Va. Code § 33-2-9. Moreover, Nationwide's complaint register is simply a list. It is not evidence that any of the complaints on that list are valid, or that Nationwide engages in a general business practice that violates the unfair claim settlement practices provisions of W. Va. Code § 33-11-4(9). It is not even admissible at trial because it does not meet the baseline admissibility requirements of Rule 404(b) of the West Virginia Rules of Evidence. It is not a basis for finding that Nationwide is liable to Plaintiff on any of his claims, let alone a basis for giving an adverse inference instruction to a jury.

The Circuit Court's *Order Granting Plaintiff's Motion for Partial Summary Judgment (Plaintiff Has Substantially Prevailed)* is also clearly wrong and should also be prohibited by this Court because Plaintiff cannot "substantially prevail" on his insurance claim for purposes of his claim for *Hayseeds* damages. "[I]n order to substantially prevail, a policyholder must first make a reasonable demand within the policy limits." *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). Plaintiff never made a demand within policy limits either before or after suing Nationwide on December 29, 2017, and in fact refused to make any kind of demand prior to mediation on August 12, 2019. Furthermore, Plaintiff's stated reasons for filing suit are not supported by evidence and are in fact directly contradicted by the evidence. The Circuit Court also erred by improperly assuming the role of factfinder on critical questions of fact governing Plaintiff's motion, and further compounded its error by making incorrect findings as to those facts.

## IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary in this case. The Circuit Court committed multiple, clear errors of settled law when it granted Plaintiff's motions. Nationwide therefore requests that the Court dispense with oral argument in this matter and issue a memorandum decision prohibiting the Circuit Court from enforcing its orders granting Plaintiff's motions. However, in the event the

Court determines that oral argument should be held in this case, Nationwide respectfully requests an opportunity to appear and present argument to the Court.

## V. ARGUMENT

### A. ORIGINAL JURISDICTION IS PROPER.

A writ of prohibition "shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has no jurisdiction of the subject matter in controversy, or, having such jurisdiction, exceeds its legitimate powers." W. Va. Code § 53-1-1. This Court examines five factors when determining whether to entertain and issue a writ of prohibition:

> (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.

Syl. Pt. 4, in part, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 483 S.E.2d 12 (1996). These factors are general guidelines, and all five factors need not be satisfied for a writ to issue; however, the existence of clear error as a matter of law is given substantial weight. *Id.*

As discussed in more detail below, this Court should issue a writ of prohibition in this case because the circuit court's orders are clearly wrong and irremediably prejudice Nationwide's right to a fair trial by effectively prohibiting it from defending against Plaintiff's "bad faith," UTPA, and punitive damages claims. Forcing Nationwide to go through an expensive, complex trial that is highly likely to be reversed on appeal is not an adequate remedy for the circuit court's errors. *See State ex rel. Frazier v. Hrko*, 203 W. Va. 652, 510 S.E.2d 486 (1998) (original jurisdiction proper to challenge denial of motion for summary judgment because trial court's ruling was clearly

erroneous and as a result the parties would be compelled to go through an expensive, complex trial that was highly likely to be reversed on appeal).

## B. THE CIRCUIT COURT'S ORDERS ARE SUBJECT TO *DE NOVO* REVIEW.

The Circuit Court's orders granting Plaintiff's motion for adverse inference and motion for partial summary judgment are reviewed *de novo*. *See Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 372, 524 S.E.2d 879, 888 (1999) (whether grounds exist for giving an adverse inference instruction is a legal question). *See also* Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994) (rulings on motions for summary judgment are reviewed *de novo*).

## C. THE CIRCUIT COURT COMMITTED CLEAR ERROR AND IRREMEDIABLY PREJUDICED NATIONWIDE'S RIGHT TO A FAIR TRIAL BY GRANTING PLAINTIFF'S MOTION FOR AN ADVERSE INFERENCE INSTRUCTION.

### 1. The Circuit Court clearly erred by finding that grounds exist for giving an adverse inference jury instruction.

The Circuit Court's *Order Granting Plaintiff's Motion for Adverse Inference Instruction* is clearly wrong because there is no basis for giving an adverse inference instruction in this case. An adverse inference instruction is "an extreme sanction that should not be given lightly," *In re Ethicon, Inc. Pelvic Repair Systems Product Liability Litigation*, 299 F.R.D. 502, 525 (S.D. W. Va. 2014), because of "the danger that such an instruction permitting an adverse inference may add a fictitious weight to the case of the proponent of the instruction." *McGlone v. Superior Trucking Co., Inc.*, 178 W. Va. 659, 665, 363 S.E.2d 736, 742 (1987). The Circuit Court found that "Defendant Nationwide failed and/or refus[ed] to maintain a complete list of complaints, as required by W. Va. Code § 33-11-4(10)." App. 9. As a result, the Circuit Court intends to instruct the jury that "it may infer the existence of Defendant's general business practice in violation of West Virginia's Unfair Trade Practices Act, W. Va. Code § 33-11-4(9)." App. 12.

This is clear error. Nationwide did not destroy or otherwise spoliate its "complaint

register," the "record of all complaints which it has received since the date of its last examination under section nine, article two of this chapter." *See* W. Va. Code § 33-11-4(10). Nationwide produced a complete copy of its complaint register in discovery, and there is no evidence that the Insurance Commissioner has found Nationwide's complaint register to be incomplete or out of compliance with the statute. Furthermore, Plaintiff never intended to use Nationwide's complaint register to discover admissible evidence of Nationwide's business practices. In fact, Plaintiff's counsel explicitly informed Nationwide "I do NOT want a witness who is designated to testify ... as to the specifics of the individual matters identified on the Complaint Register." App. 564.

**i. Nationwide did not spoliate evidence. Plaintiff admittedly received a complete copy of Nationwide's complaint register in discovery.**

West Virginia only recognizes two grounds for giving an adverse inference jury instruction: (1) if there is an unjustified failure by a party in a civil case to call an available material witness at trial; or (2) for spoliation of evidence. *See, e.g.*, Syl. Pt. 2, *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999); Syl. Pt. 3, *McGlone v. Superior Trucking Co., Inc.*, 178 W. Va. 659, 363 S.E.2d 736 (1987).[4] Spoliation of evidence means the "destruction, mutilation, or significant alteration of potential evidence for the purpose of defeating another person's recovery in a civil action." Syl. Pt. 10, *Hannah v. Heeter*, 213 W. Va. 704, 584 S.E.2d 560 (2003). Plaintiff's motion for adverse inference fails as a matter of law because Nationwide simply did not destroy or otherwise spoliate its complaint register, and Plaintiff is currently in possession of a complete copy of Nationwide's complaint register as to all of its insurance lines.

It is undisputed that, on June 7, 2019, Nationwide produced in discovery a copy of its complaint register as to first-party homeowner complaints, such as this case, and that Plaintiff had

[4] The first ground for giving an adverse inference jury instruction does not apply because this case has not gone to trial, so it is not possible for Nationwide to have failed to call an available material witness.

that document in his possession when his counsel deposed Nationwide's corporate representative. App. 332-333, 567-572. Indeed, Plaintiff admitted in his motion that "Nationwide produced a list of what appear to be first party homeowners complaints." App. 339. Although Nationwide's initial production inadvertently omitted complaints under unrelated and irrelevant lines of insurance, such as auto complaints, Plaintiff made no effort to address this with Nationwide after the deposition and Nationwide quickly produced the information after Plaintiff filed his motion. App. 577-591. Furthermore, Plaintiff cannot dispute that he now possesses Nationwide's complete complaint register as to all of its insurance lines.

Perhaps recognizing that Nationwide did, in fact, produce its complete complaint register for all lines of insurance as requested, at the pretrial conference Plaintiff's counsel went outside of his briefing and argued instead that the manner in which Nationwide maintains its complaint register does not comply with W. Va. Code § 33-11-4(10). Specifically, Plaintiff's counsel argued that Nationwide's complaint register does not comply with the statute because Nationwide allegedly does not include complaints sent to adjusters, as opposed to the company:

> I asked [Nationwide's corporate representative], "Why doesn't this have the communications that are sent by attorneys and by claimants to file handlers?" She acknowledged, "We don't record those. There is no mechanism by which we record those." Even though 33-11-4[10] expressly requires them to do so.

App. 771-772. To begin with, this factual representation was untrue. Plaintiff's counsel did not ask this question or anything similar and Nationwide's representative did not give this response. To the contrary, Nationwide's representative testified that its adjusters had "a couple of options" to include complaints they receive on Nationwide's complaint register:

> Q. How does that letter [to a claim adjuster] get on this list?
>
> A. He has a couple of options. He could send it directly over to myself ... or he could log an entry within the claims system to

> identify that he has a complaint, which would automatically create a case within our application.

App. 306-307. Nationwide's representative did testify she could not determine, "based on this list," if any of the listed complaints "was passed on by a claim adjuster," App. 307, but that is because Nationwide is not required by law to include the source of a complaint on its complaint register. *See* W. Va. Code § 33-11-4(10) ("This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these claims, and the time it took to process each complaint.").

Additionally, Plaintiff's argument is contrary to the requirements of the statute. The purpose of W. Va. Code § 33-11-4(10) is to create a statistical record of customer service complaints so the Insurance Commissioner can conduct periodic market conduct examinations of ***insurance companies***. Accordingly, the statute only requires an "***insurer*** ... to maintain a complete record of all the complaints which ***it*** has received" since its last market conduct examination. W. Va. Code § 33-11-4(10) (emphasis added). It does not apply to "complaints which [an adjuster] has received" because an adjuster is a "person" and not an "insurer." *Cf.* W. Va. Code § 33-11-2 (defining "person" as including "any individual, company, insurer ...."). The Insurance Commissioner's legislative rules governing market conduct examinations further state that insurers shall maintain records in accordance with "the NAIC Market Regulation Handbook, including ... complaint/grievance handling, and claims practices." W. Va. C.S.R. 114-15-4.2. That handbook only requires an insurer to track "consumer ***direct complaints to the regulated entity*** and those complaints filed with the insurance department." *See* National Association of Insurance Commissioners, Market Regulation Handbook, Volume IV p. 311 (2019) (emphasis added). It is undisputed that Nationwide's complaint register includes this information.

Importantly, Nationwide has been doing business in West Virginia for decades, and its complaint register and business practices are reviewed by the Insurance Commissioner at least every five years for compliance with West Virginia law. *See* W. Va. Code § 33-2-9. If Nationwide failed to maintain its complaint register in compliance with W. Va. Code § 33-11-4(10), the Insurance Commissioner would have discovered this and either ordered Nationwide to correct the noncompliance or taken action against Nationwide's license. *See* W. Va. Code § 33-2-9(j)(3)(A) (if the examination reveals that an insurer is operating in violation of West Virginia law, the Insurance Commissioner may order the company to correct the violation). *See also* W. Va. Code § 33-3-11 (authorizing the Insurance Commissioner to refuse to renew, revoke, or suspend an insurer's license for failing to comply with West Virginia law). This has not occurred because the Insurance Commissioner has never found Nationwide's complaint register to be incomplete or out of compliance with the statute. This fact alone demonstrates that Nationwide did not spoliate evidence and therefore no adverse inference instruction should be given at trial.

**ii. The Circuit Court failed to conduct a mandatory analysis of the factors set forth in Syl. Pt. 2, *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999).**

The Circuit Court's order does not even conduct the basic analysis required before giving an adverse inference jury instruction. Before granting Plaintiff's motion, the Circuit Court was required to consider the following factors:

> (1) the party's degree of control, ownership, possession or authority over the destroyed evidence; (2) the amount of prejudice suffered by the opposing party as a result of the missing or destroyed evidence and whether such prejudice was substantial; (3) the reasonable of anticipating that the evidence would be needed for litigation; and (4) if the party controlled, owned, possessed, or had authority over the evidence, the party's degree of fault in causing the destruction of the evidence.

Syl. Pt. 2, *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999). "The party

requesting the adverse inference jury instruction based upon spoliation of evidence has the burden of proof on each element of the four-factor spoliation test." *Id.*

The Circuit Court's order does not mention the *Tracy* factors because Plaintiff cannot meet his burden of proof on any of them. As to Nationwide's control "over the destroyed evidence," Nationwide did not destroy evidence. Plaintiff has a complete copy of Nationwide's complaint register as to all of its lines of insurance. App. 577-591. The Circuit Court's analysis should have ended at this first factor, "and no adverse inference instruction may be given or other sanction imposed." *Tracy*, 206 W. Va. 363 at Syl. Pt. 2.

The second factor, the "prejudice suffered by [Plaintiff] as a result of the missing or destroyed evidence and whether such prejudice was substantial," does not apply because there is no "missing or destroyed evidence." Again, Nationwide produced its complete complaint register, so Plaintiff cannot demonstrate any prejudice, let alone the "substantial prejudice" required to justify an adverse inference. Furthermore, Nationwide's complaint register is not itself evidence and is not admissible at trial, and Plaintiff never intended to actually use the complaint register to discover admissible evidence about any individual complaint on that list.

As to "the reasonableness of anticipating that the evidence would be needed," Nationwide clearly did not anticipate that Plaintiff would need auto complaints, or really any other type of complaint from its complaint register other than first-party homeowners complaints (which Nationwide undeniably produced before its Rule 30(b)(7) deposition), for Plaintiff to pursue discovery of his UTPA claim. Auto claims, for example, are governed by a completely different set of claims handling regulations than Plaintiff's homeowners claim. *See* W. Va. C.S.R. § 114-14-7 ("Standards for Prompt, Fair and Equitable Settlements Applicable to Automobile Insurance"). Similarly, the claims handling experiences of a third-party are different from those

of a first-party insured because an insurance company does not owe a duty to an adversary of its insured. *See Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W. Va. 430, 504 S.E.2d 893 (1998). Even assuming that complaints under unrelated lines of insurance or third-party complaints could lead to the discovery of evidence about Nationwide's business practices in other types of claims, that evidence ***still*** would not be admissible ***in this case*** because it would not be "sufficiently similar to the insured's experiences to show a pattern of claims handling" as to homeowners claims. *McCormick v. Allstate Ins. Co.*, 202 W. Va. 535, 541, 505 S.E.2d 454, 460 (1998). *Cf. Murthy v. Woodbrook Cas. Ins., Inc.*, No. 5:07-CV-46, 2008 WL 644767 (N.D. W. Va. Mar. 6, 2008) (denying motion to compel discovery of third-party claims as irrelevant to a first-party UTPA claim).

Finally, although Nationwide does not dispute that it "controlled, owned, possessed or had authority" over its complaint register, there is no basis for finding that it "caus[ed] the destruction" of evidence. Nationwide is required by W. Va. Code § 33-11-4(10) to maintain a complaint register for the Insurance Commissioner and obviously complies with this record-keeping requirement. The Insurance Commissioner has never found otherwise. Nationwide produced its complete complaint register to Plaintiff as requested. The Circuit Court's contrary finding is clearly wrong.

### iii. Plaintiff never intended to take discovery on any of the complaints on Nationwide's complaint register.

The Circuit Court justified its decision on the basis that "Nationwide has deprived the Plaintiff of evidence related to claims that reasonably could have led Plaintiff to evidence demonstrating Nationwide's general business practice violating West Virginia's Unfair Trade Practices Act, W. Va. Code § 33-11-4(9)." There is no factual basis for this finding because Plaintiff's counsel explicitly informed Nationwide that he did not want to conduct discovery on

any of the individual complaints: "I do NOT want a witness who is designated to testify ... as to the specifics of the individual matters identified on the Complaint Register." App. 564. Similarly, Plaintiff's counsel informed Nationwide that it did not need to produce claims files for any of the complaints: "I have agreed that Nationwide can delay production of any additional claim file materials, while we review the privilege issues." Plaintiff's counsel never followed up to request claim files for any of the matters on Nationwide's complaint register, and did not raise nonproduction of claim files in his motion for adverse inference. This is because Plaintiff's counsel never intended to discover whether any particular complaint on Nationwide's complaint register (homeowners, auto, or otherwise) could actually be used at trial to support Plaintiff's UTPA claim. For example, Plaintiff never intended to determine if any individual complaint involved Nationwide's claims settlement practices, resulted in a lawsuit or administrative complaint against Nationwide, a finding of liability against or a settlement with Nationwide over its business practices, or even the basic facts of any particular complaint.

**2. The Circuit Court clearly erred by treating Nationwide's complaint register as admissible evidence from which an adverse inference can be drawn.**

The Circuit Court's order is also clearly wrong because Nationwide's complaint register is merely a list of customer service complaints. It is not evidence that any of the complaints on that list are valid, or that Nationwide engages in a general business practice that violates W. Va. Code § 33-11-4(9). It is not a basis for bringing a private cause of action against Nationwide, and it is not even admissible at trial because it does not meet the baseline admissibility requirements of Rule 404(b) of the West Virginia Rules of Evidence. It is therefore not a basis for finding that Nationwide is liable to Plaintiff on any of his claims, let alone a basis for giving an adverse inference instruction to the jury. The Circuit Court, however, not only plans to inform the jury about the existence of Nationwide's complaint register, but to **also** instruct the jury that it may

presume that this inadmissible list of complaints establishes that Nationwide engages in a general business practice that violates the UTPA.

**i. There is no private cause of action for violations of W. Va. Code § 33-11-4(10).**

First, the "completeness" of Nationwide's complaint register cannot be the basis for an adverse inference because there is no private cause of action for violations of W. Va. Code § 33-11-4(10). The statute states:

> Failure to maintain complaint handling procedures. -- No insurer shall fail to maintain a complete record of all the complaints which it has received since the date of its last examination under section nine, article two of this chapter. This record shall indicate the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints, and the time it took to process each complaint. For purposes of this subsection, 'complaint' shall mean any written communication primarily expressing a grievance.

W. Va. Code § 33-11-4(10). There is no express private action for violations of W. Va. Code § 33-11-4(10), nor is there a basis for implying one.

"Whenever a violation of a statute is the centerpiece of a theory of liability, the question arises whether the statute creates an implied private cause of action." *Yourtree v. Hubbard*, 196 W. Va. 683, 688, 474 S.E.2d 613, 618 (1996). This Court utilizes the following test to determine when a statute gives rise by implication to a private cause of action:

> (1) the Plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) such private cause of action must not intrude into an area delegated exclusively to the federal government.

Syl. Pt. 1, *Hurley v. Allied Chemical Corp.*, 164 W. Va. 268, 262 S.E.2d 757 (1980). "Although all prongs of the [*Hurley*] test have weight and none, standing alone, is determinative, our cases

demonstrate that legislative intent is the polar star in determining the existence of a private cause of action." *Fucillo v. Kerner ex rel. J.B.*, 231 W. Va. 195, 200, 744 S.E.2d 305, 310 (2013).[5]

It is clear the Legislature did not intend to create a private cause of action for violations of W. Va. Code § 33-11-4(10) because it was not enacted for the benefit of insureds, but was instead enacted to assist the Insurance Commissioner in meeting its administrative obligation to perform market conduct examinations of insurance companies. The statute does not mention insureds at all, but instead refers to W. Va. Code § 33-2-9, which sets forth the Insurance Commissioner's obligation to "thoroughly examine [an insurance company's] financial condition and methods of doing business and ascertain whether it has complied with all the laws and regulations of this state." W. Va. Code § 33-2-9. The Legislature's intent on this subject is further expressed by W. Va. Code § 33-2-9: "[n]o cause of action shall arise, nor shall any liability be imposed, against any person for the act of communicating or delivering information or data to the commissioner or his or her examiners pursuant to an examination, analysis or review made under this section...." *Id.* The purpose of W. Va. Code § 33-11-4(10) was to benefit the Insurance Commissioner in satisfying its administrative obligations, and not to bestow a private cause of action upon insureds.

**ii. Whether Nationwide maintains its complaint register in compliance with W. Va. Code § 33-11-4(10) is irrelevant to Plaintiff's claims.**

Second, whether Nationwide maintains its complaint register in accordance with W. Va. Code § 33-11-4(10) is not a basis for giving an adverse inference because the complaint register

[5] The *Hurley* test was adopted by this Court from *Cort v. Ash*, 422 U.S. 66 (1975), which was "effectively overruled" by subsequent opinions of the U.S. Supreme Court. *See Thompson v. Thompson*, 484 U.S. 174, 189 (1988) (Scalia, J., concurring) ("It could not be plainer that we effectively overruled the *Cort v. Ash* analysis ... converting one of its four factors (congressional intent) into *the determinative factor*, with the other three merely indicative of its presence or absence."). *See also Touche Ross & Co. v. Redington*, 442 U.S. 560, 574-575 (1979) (refusing to imply a cause of action because "the statute by its terms grants no private rights" and the legislative history does not speak to the issue of private remedies). This Court, as noted in *Fucillo*, has similarly departed from the *Cort* analysis since *Hurley* and also focuses on whether there is ascertainable legislative intent to create a private cause of action under a statute.

is not relevant evidence as to any of Plaintiff's claims. Plaintiff did not plead violations of W. Va. Code § 33-11-4(10) in his complaint (because there is no private cause of action for violations of that statute). App. 31-55. Rather, Plaintiff alleged Nationwide failed to conduct an adequate or timely investigation of his insurance claim, and refused to pay and timely pay benefits under his policy. App. 50-53. Plaintiff therefore alleged violations of the unfair claims settlement practices provisions of W. Va. Code § 33-11-4(9), pursuant to the implied cause of action recognized in *Jenkins v. J.C. Penney Cas. Ins. Co.*, 167 W. Va. 597, 280 S.E.2d 252 (1981). Whether Nationwide properly maintained its complaint register for the Insurance Commissioner in accordance with W. Va. Code § 33-11-4(10) is simply irrelevant to whether Nationwide promptly investigated or properly adjusted Plaintiff's insurance claim in accordance with W. Va. Code § 33-11-4(9).

This should be obvious from the content of the complaint register itself. Although *Jenkins* permits evidence of how an insurer handles other claims, that evidence is only relevant in this case if Plaintiff can show "that the same insurance company had committed the same violation of W. Va. Code § 33-11-4(9) in handling other claims." *Dodrill v. Nationwide Mut. Ins. Co.*, 201 W. Va. 1, 10, 491 S.E.2d 1, 10 (1996) (internal citations omitted). "[I]nformation regarding how an insurance company handles other claims is admissible if it is ***sufficiently similar to the insured's experiences*** to show a pattern of claims handling." *McCormick v. Allstate Ins. Co.*, 202 W. Va. 535, 541, 505 S.E.2d 454, 460 (1998) (emphasis added). Nationwide's complaint register does not contain information that would be relevant to this question; it merely lists statistical information about "the total number of complaints, their classification by line of insurance, the nature of each complaint, the disposition of these complaints, and the time it took to process each complaint." W. Va. Code § 33-11-4(10). *Cf.* App. 582-591. Additionally, the types of complaints

tracked on Nationwide's complaint register are not limited to claims handling and are not even limited to first-party complaints from insureds such as Plaintiff.

### iii. Nationwide's complaint register does not meet the admissibility requirements of Rule 404(b) and Syl. Pt. 2, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994), and cannot be used at trial.

Finally, even if Nationwide's complaint register is relevant, it is nonetheless inadmissible and cannot be used at trial, and therefore cannot give rise to an adverse inference. To be admissible, relevant "other acts" evidence of Nationwide's business practices must still satisfy the baseline evidentiary requirements of Rule 404(b) of the West Virginia Rules of Evidence. *See State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 628-629, 425 S.E.2d 577, 583-584 (1992) ("This type of related-acts evidence is admissible at trial under Rule 404(b) of the West Virginia Rules of Evidence."). Among other requirements, before evidence of other acts may be admitted under Rule 404(b), the trial court "must be satisfied by a preponderance of the evidence that the acts or conduct occurred and that the defendant committed the acts." Syl. Pt. 2, in part, *State v. McGinnis*, 193 W. Va. 147, 455 S.E.2d 516 (1994). In other words, absent proof by a preponderance that Nationwide actually committed an unfair trade practice in violation of W. Va. Code § 33-11-4(9) as to an individual complaint listed on its complaint register, evidence about that complaint is inadmissible as a matter of law under Rule 404(b). The complaint register itself cannot meet this standard; the fact that people may have lodged written grievances with Nationwide that must be tracked on its complaint register is not itself proof that those grievances are valid or that Nationwide actually committed an unfair trade practice as to any of them. It is only evidence of the volume of complaints Nationwide receives, which is inadmissible propensity evidence under Rule 404(b). Plaintiff, in fact, cannot prove by a preponderance that any matter listed on Nationwide's complaint register is admissible at trial because he did not take discovery

on the specifics of those matters: "I do NOT want a witness who is designated to testify ... as to the specifics of the individual matters identified on the Complaint Register." App. 564.

### 3. The Circuit Court clearly erred by failing to comply with the procedural requirements for granting an adverse inference jury instruction.

The Circuit Court's order is also clearly wrong because the court failed to respect the procedural protections afforded to a party before an adverse inference may be given. The Circuit Court ignored Plaintiff's failure to confer in good faith with Nationwide before seeking an adverse inference sanction, as required by *Cattrell Companies, Inc. v. Carlton, Inc.*, 217 W. Va. 1, 614 S.E.2d 1 (2005). The Circuit Court also failed to conduct an *in camera* evidentiary hearing as to the threshold issue of whether spoliation in fact occurred, and whether Plaintiff can meet his burden of proof under the *Tracy* factors, as required by Syl. Pt. 8, *General Pipeline Const., Inc. v. Hairston*, 234 W. Va. 274, 765 S.E.2d 163 (2014). Although the Circuit Court's order fails on the law and the facts, the Circuit Court's failure to also follow proper procedure is yet another reason this Court should prohibit the Circuit Court from enforcing its order.

First, although Plaintiff filed his motion seeking sanctions under Rule 37 for Nationwide's alleged failure to comply with a discovery order, the Circuit Court ignored Plaintiff's failure to act in good faith to resolve the issue before filing his motion:

> A party who has successfully obtained an order compelling discovery has a duty to act in good faith with the opposing party when the opposing party seeks clarification of what is sought under the order compelling discovery. Further, a party moving for sanctions under Rule 37(b) of the West Virginia Rules of Civil Procedure, for failure to comply with an order compelling discovery, must file with the motion an affidavit certifying that the attorney has conferred with opposing counsel and worked in good faith to resolve the issues raised in the motion but was unsuccessful.

Syl. Pt. 4, *Cattrell Companies, Inc. v. Carlton, Inc.*, 217 W. Va. 1, 614 S.E.2d 1 (2005). Plaintiff did not file the required affidavit with his motion, most likely because he did not attempt to confer

with Nationwide or work in good faith to resolve the issue. Following Nationwide's Rule 30(b)(7) deposition, Plaintiff's counsel did not request that Nationwide supplement its discovery production or attempt to communicate with Nationwide's counsel about obtaining the missing portions of Nationwide's complaint register. Instead, Plaintiff's counsel remained silent for nearly two months, and until after the discovery cutoff, then filed a motion for sanctions.

Second, the Circuit Court was required to hold an evidentiary hearing on the spoliation issues alleged in Plaintiff's motion before deciding whether to grant an adverse inference:

> "When a party seeks to present evidence of spoliation to a jury and intends to pursue an adverse inference jury instruction, on motion of a party the trial court must have an *in camera* hearing to assess whether the party asserting spoliation can make a *prima facie* case under Syllabus Point 2 of *Tracy v. Cottrell ex rel. Cottrell*, 206 W. Va. 363, 524 S.E.2d 879 (1999)."

Syl. Pt. 8, *General Pipeline Const., Inc. v. Hairston*, 234 W. Va. 274, 765 S.E.2d 163 (2014). Although the Circuit Court heard argument from counsel on the motion, "[s]tatements made by lawyers do not constitute evidence in a case." *West Virginia Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 112 n.5, 543 S.E.2d 664, 669 n.5 (2000) (unsupported factual assertions made by Plaintiffs' counsel in briefs did not create a question of fact precluding summary judgment). The Circuit Court took no evidence as to whether Nationwide spoliated evidence or whether Plaintiff can satisfy any of the *Tracy* factors, and thus had no basis for determining that spoliation in fact occurred or that an adverse inference was appropriate.

**4. The Circuit Court's errors irremediably prejudice Nationwide's right to a fair trial by effectively preventing it from contesting Plaintiff's UTPA and punitive damages claims.**

The Circuit Court's ruling would obviously prejudice Nationwide's ability to meaningfully defend itself at trial. "In practice, an adverse instruction often ends litigation – it is too difficult of a hurdle for the spoliator to overcome." *In re Ethicon, Inc. Pelvic Repair Systems Product Liability*

*Litigation*, 299 F.R.D. 502, 525 (S.D. W. Va. 2014). In this case, Plaintiff undeniably received not only a copy of Nationwide's complete complaint register, but also a list of lawsuits filed against Nationwide, but did nothing with that information to develop admissible evidence of Nationwide's business practices. Plaintiff did not ask a single question in a deposition about any complaint or lawsuit brought against Nationwide, did not require Nationwide to produce a single claim file other than his own, and has not disclosed any expert opinions about Nationwide's claims handling practices in other matters. The Circuit Court's ruling, if not overturned by this Court prior to trial, would nonetheless allow the jury to infer that Nationwide is liable on Plaintiff's UTPA claim despite Plaintiff's own failure to develop evidence to support that claim.

## D. THE CIRCUIT COURT COMMITTED CLEAR ERROR AND IRREMEDIABLY PREJUDICED NATIONWIDE'S RIGHT TO A FAIR TRIAL BY GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT THAT HE "SUBSTANTIALLY PREVAILED" ON HIS INSURANCE CLAIM.

### 1. Plaintiff cannot "substantially prevail" as a matter of law because "in order to substantially prevail, a policyholder must first make a reasonable demand within the policy limits." *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). Plaintiff has thus-far refused to make a demand at or within policy limits and therefore cannot show that he sued Nationwide as a result of a breakdown in the parties' negotiations.

The Circuit Court's *Order Granting Plaintiff's Motion for Partial Summary Judgment (Plaintiff Has Substantially Prevailed)* is also clearly wrong, and should also be prohibited by this Court, because Plaintiff cannot demonstrate the required factual predicate to "substantially prevail" against Nationwide for purposes of recovering *Hayseeds* damages. Plaintiff cannot prove he sued Nationwide because "the negotiations broke down," and therefore cannot prove that he substantially prevailed on his insurance claim, because "in order to substantially prevail, a policyholder must first make a reasonable demand within the policy limits." Plaintiff ***never attempted to negotiate with Nationwide***, either before or after filing suit, and therefore cannot substantially prevail as a matter of law and his motion should have been denied.

In order to recover *Hayseeds* damages, a policyholder must first "substantially prevail" against his or her insurer. *See* Syl. Pt. 1, *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73 (1986). "The phrase 'substantially prevails' relates to the status of the property damage claim at the time the negotiations broke down." *Thomas v. State Farm Mut. Auto. Ins. Co.*, 181 W. Va. 604, 608, 383 S.E.2d 786, 790 (1989). A policyholder substantially prevails against his or her insurer on a property damage claim:

> when the action is settled for an amount equal to or approximating the amount claimed by the insured ... as well as when the action is concluded by a jury verdict for such an amount ... as long as the attorney's services were necessary to obtain payment of the insurance proceeds.

Syl. Pt. 1, in part, *Jordan v. National Grange Mut. Ins. Co.*, 183 W. Va. 9, 393 S.E.2d 647 (1990).

This case has not "concluded by a jury verdict," so the only possible basis under *Jordan* for finding that Plaintiff substantially prevailed is if Nationwide "settled for an amount equal to or approximating the amount claimed by the insured." In *Miller v. Fluharty*, this Court set forth the criteria for determining when a policyholder substantially prevails as a result of settlement negotiations with his or her insurer:

> When examining whether a policyholder has substantially prevailed against an insurance carrier, a court should look at the negotiations as a whole from the time of the insured event to the final payment of the insurance proceeds. If the policyholder makes a reasonable demand during the course of the negotiations, within policy limits, the insurance carrier must either meet that demand, or promptly respond to the policyholder with a statement why such a demand is not supported by the available information.

Syl. Pt. 4, in part, *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). Although Plaintiff is not required to make a settlement demand prior to filing suit, the *Miller* Court made clear that:

> ***in order to substantially prevail, a policyholder must first make a reasonable demand within the policy limits.*** If a first-party insurance carrier refuses to meet a policyholder's reasonable

> demands and goes to trial, ***then*** the insurance carrier faces the possibility of paying ... *Hayseeds*-type consequential damages.

*Miller*, 201 W. Va. at 698 (emphasis added). This is because "[s]ettlement negotiations regarding a first-party policy are, of course, built on a two-way street. As we stated in *Hadorn v. Shea*, ***it takes two to negotiate.***" *Id.* at 699 (emphasis added) (internal citation, quotation, and brackets omitted). This is clear from all of the cases Plaintiff relied on before the Circuit Court: in every single case (except Plaintiff's case), the policyholder substantially prevailed because he or she first made a reasonable demand within policy limits and the insurer refused to meet that demand.[6]

Plaintiff cannot make this threshold showing as a matter of law. Before Plaintiff can substantially prevail, he must first attempt to negotiate in good faith with Nationwide. This is because *Thomas* requires Plaintiff to establish "the status of the property damage claim at the time the negotiations broke down" so that the Court can "look at the negotiations as a whole from the time of the insured event to the final payment of the insurance proceeds" under *Miller*. Plaintiff, however, ***never*** made a demand within policy limits (or even a demand ***for*** policy limits), either before or after suing Nationwide, and didn't even bother to respond to Nationwide's March 9, 2018 offer to pay his claim until July 6, 2018. Plaintiff's counsel conceded this in open court:

> THE COURT: Did you make a demand?
>
> MR. KESNER: Judge, at that point there wasn't something to demand.

---

[6] *See Paxton v. Municipal Mut. Ins. Co.*, 202 W. Va. 224, 503 S.E.2d 537 (1998) (after insurer rejected their estimates, plaintiffs hired an attorney and demanded policy limits on their fire loss claim); *Miller v. Fluharty*, 201 W. Va. 685, 691-692, 500 S.E.2d 310, 316-317 (1997) (plaintiff demanded policy limits on his UIM claim); *Smithson v. U.S. Fidelity & Guar. Co.*, 186 W. Va. 195, 198, 411 S.E.2d 850, 853 (1991) (plaintiff demanded policy limits after the loss of his truck and tools, and then proved in a subsequent arbitration proceeding that the actual cash value of his property exceeded policy limits); *Jordan v. National Grange Mut. Ins. Co.*, 183 W. Va. 9, 10, 393 S.E.2d 647, 648 (1990) (plaintiffs sued after insurer rejected their demand for policy limits on their fire loss claim); *Thomas v. State Farm Mut. Auto. Ins. Co.*, 181 W. Va. 604, 605-606, 383 S.E.2d 786, 787-788 (1989) (plaintiff sued after insurer rejected his estimate of $8,200.05 to repair his truck and instead offered $4,960.72); *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 325, 352 S.E.2d 73, 75 (1986) (plaintiff sued after insurer rejected his demand for coverage).

App. 745. In fact, despite multiple requests by Nationwide, Plaintiff ***refused*** to make a demand of any kind at any point prior to court-ordered mediation on August 12, 2019, App. 713, and to this day has not made "a reasonable demand with the policy limits" as required by *Miller*.

Despite making no effort to actually resolve his insurance claim, Plaintiff argued below that, in a first-party property damage claim, "[i]t's not subject to negotiat[ion]." For purposes of whether Plaintiff can substantially prevail, this is untrue and the Circuit Court clearly erred by accepting it. *See Thomas*, 181 W. Va. at 604 ("The phrase 'substantially prevails' relates to the status of the property damage claim at the time the ***negotiations*** broke down."); *Miller*, 201 W. Va. at 699 ("[s]ettlement ***negotiations*** regarding a first-party policy are, of course, built on a two-way street ... ***it takes two to negotiate***."). Plaintiff cannot sue Nationwide, make no effort to negotiate a settlement of his claim, and then argue he substantially prevailed. If this were the rule, a policyholder could immediately sue after making an insurance claim, argue that his or her insurer only paid the claim because of the lawsuit, and automatically recover *Hayseeds* damages on every claim. This is obviously not the law in West Virginia, yet it is exactly what the Circuit Court condoned when it granted Plaintiff's motion.

**2. Plaintiff also cannot "substantially prevail" as a matter of law because he cannot demonstrate that his "attorneys' services were necessary to obtain payment of the insurance proceeds." Syl. Pt. 1, *Jordan v. National Grange Mut. Ins. Co.*, 183 W. Va. 9, 393 S.E.2d 647 (1990). Plaintiff sued Nationwide two weeks after submitting his proof of loss, and just days after being advised that Nationwide was nearing completion of its investigation and would likely be making a coverage decision the following week.**

The Circuit Court's order is also clearly wrong because Plaintiff cannot demonstrate that his attorneys' services were necessary to obtain payment. Plaintiff failed to set forth any evidence showing that Nationwide improperly delayed its investigation of Plaintiff's insurance claim, its offer to pay Plaintiff's claim, or its actual payment of the claim. Instead, Plaintiff prematurely sued Nationwide before it could complete its investigation, a mere two weeks after submitting his

proof of loss and only days after being advised that Nationwide was nearing completion of its investigation and planned to make a coverage decision. Nationwide subsequently made a prompt offer to settle Plaintiff's claim after completing its investigation, and promptly paid the undisputed portion of the claim after his counsel finally responded to Nationwide's offer. Plaintiff therefore cannot show that "but-for" his attorneys' services, Nationwide would not have paid his claim.

To substantially prevail, a policyholder must not only show a breakdown in negotiations but must also prove that his "attorney's services were necessary to obtain payment of the insurance proceeds." *See* Syl. Pt. 1, in part, *Jordan v. National Grange Mut. Ins. Co.*, 183 W. Va. 9, 393 S.E.2d 647 (1990). This is a "but-for" test that cannot be based upon *post-hoc* rationalization:

> With respect to the necessity for the attorney's services, we mean that the insured must show more than *post hoc, ergo propter hoc*, that is, the insured must show more than the fact that a settlement for all or substantially all of the claim was reached after the action was brought against the insurer. Instead, the insured must show that but for his or her attorney's services such settlement would not have been reached, in light of the undue delay in investigating the claim.

*Jordan*, 183 W. Va. at 14.

As part of examining whether an attorney's services were the "but for" cause of an insurer's offer to settle under *Jordan*, the Court in *Miller v. Fluharty* outlined an insurer's duties in investigating and responding to a first-party insurance claim:

> An insurance carrier has a duty, once a first-party policyholder has submitted proof of a loss, to promptly conduct a reasonable investigation of the policyholder's loss based upon all available information. On the basis of that investigation, if liability to the policyholder has become reasonably clear, the insurance carrier must make a prompt, fair and equitable settlement offer. If the circuit court finds evidence that the insurance carrier has failed to properly or promptly investigate the policyholder's claim, then the circuit court may consider that evidence in determining whether the policyholder has substantially prevailed in an action to enforce the insurance contract.

Syl. Pt. 3, *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997). An insurer's duty to investigate under *Miller* is triggered by receipt of a policyholder's proof of loss, and the Court presupposed that an insurer must be allowed sufficient time to complete its investigation before determining if liability is reasonably clear:

> [t]o be clear, however, we do not mean by our statements today that an insurance carrier is required to pay the limits of any insurance policy the moment a policyholder makes a claim ... There is no doubt that an insurance carrier is allowed a certain amount of time to investigate and process a claim, at its own expense ....

*Miller*, 201 W. Va. at 699. This is because an insurer's offer to pay a claim must be based upon its "reasonable investigation of the policyholder's loss." *Id.* at Syl. Pt. 3 (an insurer must make a settlement offer if liability has become reasonably clear "[o]n the basis of that investigation").

The *Miller* Court's holding is based upon an insurer's duties under the UTPA to "promptly conduct a reasonable investigation" of a claim and "make a prompt, fair and equitable settlement offer" if liability has become reasonably clear. *See* 201 W. Va. at 694-695. *See also* W. Va. Code § 33-11-4(9). Although the UTPA does not define what it means to make a "prompt" settlement offer, the Insurance Commissioner's Unfair Trade Practices legislative rules set forth the minimum standards for when an insurer must offer to pay, and when it must actually pay, all or part of a policyholder's claim.[7] "Within ten (10) working days of completing its investigation, the insurer shall deny the claim in writing or make a written offer, subject to policy limits." W. Va. C.S.R. § 114-14-6.3 (duty after investigation). An insurer "shall pay any amount finally agreed upon in

[7] In a footnote, the *Miller* Court stated that "[a] 'prompt' investigation is one 'performed readily or immediately,' or involves 'responding instantly.'" 201 W. Va. at 694 n.12. It is obviously not possible for an insurer (or anyone else) to investigate "instantly," nor is it necessarily possible (or even practical) in certain circumstances to "immediately" do so. For example, Nationwide could not "instantly" or "immediately" investigate the interior of Plaintiff's residence after the fire because the Fire Marshal had not yet completed its investigation. App. 688. Instead, the Insurance Commissioner's legislative rules define the timeframes within which an insurer "promptly" takes action with respect to an insurance claim.

settlement of all or part of any claim not later than fifteen (15) working days from the receipt of such agreement ...." W. Va. C.S.R. § 114-14-6.11 (time for payment of claims).

Plaintiff cannot show that Nationwide delayed investigating his claim. Although Nationwide's duty to investigate under *Miller* did not begin until Plaintiff submitted his proof of loss on December 11, 2017,[8] Nationwide nonetheless began its investigation almost immediately after the fire occurred. The day after Plaintiff reported the fire, Nationwide sent an adjuster to meet with him at his residence and paid him $3,000.00 to assist with his immediate financial needs. App. 642-643. The following day, Nationwide offered Plaintiff ALE benefits to pay his living expenses during its investigation. Nationwide also provided Plaintiff with a proof of loss statement form so that he could comply with the conditions of his policy.[9] Within a week, Nationwide had retained a fire inspector and physically inspected Plaintiff's residence. App. 611. This inspection, like that of the local fire department and the Fire Marshal, indicated that the fire had been intentionally set. App. 612, 620. The multiple points of origin for the fire, Plaintiff's whereabouts immediately prior to the fire, and Plaintiff's statements that conflicted with observations of the scene of the fire, justified Nationwide referring Plaintiff's claim to SIU for further investigation and taking Plaintiff's EUO. App. 620, 658. Critically, a referral to SIU and a request that Plaintiff submit to an EUO do not equate to a denial of Plaintiff's insurance claim. In fact, Nationwide never denied Plaintiff's claim, or even indicated that it intended to deny Plaintiff's claim. Instead,

[8] Plaintiff claims he submitted his proof of loss on November 18, 2017, based upon Mr. Conaway's deposition testimony about an email exchange he had with Plaintiff on that date. Plaintiff did not submit either his proof of loss or the November 18, 2017 email as exhibits to his motion for partial summary judgment because both documents disprove his assertions. Plaintiff's proof of loss is clearly dated December 8, 2017. App. 695-696. Furthermore, on November 18, 2017, it was actually Mr. Conaway who emailed Plaintiff, attaching "a new proof of loss that you requested," and that Plaintiff returned to Mr. Conaway via fax on December 11, 2017. App. 715-716.

[9] This also satisfied Nationwide's duties under the Insurance Commissioner's legislative rules to timely acknowledge Plaintiff's claim and provide him with reasonable assistance to submit his claim. *See* W. Va. C.S.R. § 114-14-5.4 (stating that an insurer must provide necessary claim forms, instructions, and assistance, and that doing so within 15 working days also constitutes timely acknowledgment of the claim)

a few days before Plaintiff sued, Nationwide informed Plaintiff that it was nearing completion of its field investigation and intended to make a coverage decision as soon as it received the results of its cause and origin investigation:

> Nationwide is nearing completion of the field portion of the claim investigation. They are still waiting on return of a necessary portion of the cause and origin investigation. I am aware that in anticipation of the receipt of that a conference has been set up for January 3, at which point a coverage determination is likely to be made.

App. 698. No reasonable juror could conclude that Nationwide acted unreasonably by waiting until after the fire investigation completed before offering to pay Plaintiff's insurance claim.

Plaintiff also cannot show that Nationwide delayed making an offer to pay his claim. Pursuant to *Miller* and the Insurance Commissioner's legislative rules, Nationwide was required to either deny Plaintiff's claim or offer to pay it within ten (10) working days of completing its investigation. The cause and origin report regarding the fire was completed on February 22, 2018 and submitted to Nationwide's coverage counsel, who completed his legal analysis of Plaintiff's claim and submitted it to Nationwide on March 2, 2018. App. 611, 703. Nationwide offered to pay Plaintiff's claim a week later, on March 9, 2018 – well within the 10-working-day time period. App. 704-706. Plaintiff also failed to produce any evidence showing that Nationwide's investigation or coverage decision would have been different "but for" his attorneys' services.

Plaintiff argued below that his attorneys' services were necessary because he "was offered nothing until after he retained counsel and was forced to file suit to obtain policy benefits." App. 374. This is untrue; Nationwide paid Plaintiff a $3,000 advance on his claim two days after the fire and paid his requested ALE benefits throughout its investigation. App. 505-507, 642-643, 708. It is also disingenuous, and a clear example of the type of *post-hoc, ergo propter hoc* argument the *Jordan* Court rejected. Plaintiff sued Nationwide two weeks after submitting his proof of loss and before Nationwide could finish its investigation, despite having been advised a

few days earlier that Nationwide would likely be making a coverage decision the following week. App. 31-38, 695-698. It is obvious that Plaintiffs' attorneys, having been tipped off that Nationwide would soon be making a coverage decision, rushed to the courthouse and filed suit so they could argue later that their services were necessary to obtain payment of Plaintiff's claim.

Furthermore, rather than being the "but for" cause of Nationwide's offer to pay Plaintiff's claim, the evidence shows instead that Plaintiffs' attorneys obstructed payment of his claim. Under the Insurance Commissioner's legislative rules, Nationwide was required to pay Plaintiff within fifteen (15) working days of reaching an agreement to settle all or part of his claim. *See* W. Va. C.S.R. § 114-14-6.11 (time for payment of claims). Despite multiple follow-up communications, Plaintiff's counsel did not even acknowledge Nationwide's March 9, 2018 offer to pay, let alone communicate that Plaintiff would accept Nationwide's payment, until July 6, 2018, when his counsel finally instructed Nationwide's counsel to make payment of the undisputed portions of Plaintiff's fire loss claim and how to make out the checks. App. 707. Nationwide then paid the undisputed portions of Plaintiff's fire loss claim on July 16, 2018 – well within the 15-working-day time period. App. 708-709. Any delay in payment was actually caused by Plaintiff's own attorney's refusal to acknowledge or respond to Nationwide's offer to negotiate in good faith. Again, as the Court stated in *Miller*, "[s]ettlement negotiations regarding a first-party policy are, of course, built on a two-way street ... it takes two to negotiate." *Miller*, 201 W. Va. at 699. Plaintiff's attorneys cannot obstruct Nationwide's efforts to negotiate with Plaintiff and then argue that their services were necessary to obtain payment.[10]

[10] Plaintiff did not argue below that his attorneys' services were needed to obtain payment on his water loss claim because his attorneys obstructed Nationwide's efforts to both investigate and pay that claim. Plaintiff's counsel reported the water loss to Nationwide's counsel on March 15, 2018. App. 710. However, despite multiple requests from Nationwide's counsel, Plaintiff's counsel did not agree to allow Nationwide to inspect his residence and the claimed water damage until August 8, 2018. App. 711. Nationwide completed its estimate of Plaintiff's water loss claim three weeks later and paid the claim on September 4, 2018. App. 712.

### 3. The Circuit Court engaged in improper fact-finding by refusing to acknowledge evidence that contradicted Plaintiff's assertions and by failing to draw permissible inferences from those facts in the light most favorable to Nationwide as the nonmovant.

The Circuit Court also disregarded the standard of review applicable to Plaintiff's motion for partial summary judgment. The Circuit Court accepted Plaintiff's unsupported factual assertions as true, adopted Plaintiff's version of disputed material facts, ignored admissible evidence that contradicted Plaintiff's assertions, and failed to draw permissible inferences from the facts in Nationwide's favor. In making its ruling, the Circuit Court improperly assumed the role of factfinder on critical factual questions governing Plaintiff's motion, and further compounded its error by making incorrect findings as to those facts.

Summary judgment is only appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." W. Va. R. Civ. P. 56(c). In making this determination, trial courts are prohibited from weighing the evidence and must draw all permissible inferences in favor of the nonmovant:

> The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.

*Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) (internal citations and quotation marks omitted). "On a motion for summary judgment the court cannot summarily try factual issues and may consider only facts which are not disputed or the dispute of which raises

no substantial factual issue. A motion for summary judgment must be denied if varying inferences may be drawn from evidence accepted as true." *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 171, 133 S.E.2d 770, 777 (1963) (internal citations omitted). This is particularly true in insurance bad faith cases because the reasonableness of an insurer's conduct is a classic question of disputed fact for a jury. *See* Syl. Pt. 3, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 600 S.E.2d 346 (2004) ("Whether an insurer refused to pay a claim without conducting a reasonable investigation based on all available information under W. Va. Code, 33-11-4(9)(d) [2002], and whether liability is reasonably clear under W. Va. Code, 33-11-4(9)(f) [2002] ordinarily are questions of fact for the jury.").

The Circuit Court failed to follow this standard, choosing instead to make its own determinations on disputed factual issues governing Plaintiff's motion. Indeed, the entire basis of the Circuit Court's ruling rests upon its finding that Plaintiff was forced to file suit on December 29, 2017 "[a]fter Nationwide's failure to pay the Plaintiff's additional living expenses for the Plaintiff's temporary living arrangements, which were due by December 23, 2017." App. 16. Absent this finding, Plaintiff cannot substantially prevail because he cannot show that he needed to sue Nationwide to obtain payment of his insurance claim. However, there is absolutely no support in the record for the Circuit Court's finding, and Nationwide submitted evidence (that the Circuit Court ignored) demonstrating that this finding is incorrect.

Plaintiff argued in his motion, without submitting an affidavit or any other supporting evidence, that he sued Nationwide because its third-party ALE vendor, Klein & Company, "had communicated that the Plaintiff's additional living expenses benefits were being terminated effective December 22, 2017." App. 365. The Circuit Court clearly erred by accepting this unsupported assertion by Plaintiff's counsel because "[s]tatements made by lawyers do not

constitute evidence in a case." *West Virginia Fire & Cas. Co. v. Mathews*, 209 W. Va. 107, 112 n.5, 543 S.E.2d 664, 669 n.5 (2000) (unsupported factual assertions made by Plaintiffs' counsel in briefs did not create a question of fact precluding summary judgment). Furthermore, the actual evidence in this case shows that Nationwide extended Plaintiff's ALE benefits on December 20, 2017 and continued to pay Plaintiff's ALE benefits after that date.[11] App. 501-503. Plaintiff was specifically told this on December 21, 2017, when Nationwide informed him it was nearing completion of its investigation and would likely be making a coverage decision the following week: "[i]n the meantime, Nationwide is continuing to cover Mr. Banks' ALE expenses while he continues to rent from his brother near to his current employment." App. 698. This email directly contradicts Plaintiff's assertion, demonstrating that the real reason he filed suit was to make an improper *post-hoc, ergo proper hoc* argument for *Hayseeds* damages. Even if the Circuit Court properly credited Plaintiff's unsupported assertion, it still clearly erred by deciding the disputed question of material fact as to why Plaintiff filed suit.

This is not the only example of the Circuit Court's improper fact-finding. The Circuit Court also found that Plaintiff substantially prevailed because "Nationwide refused to deliver payment for the undisputed amounts owed to the Plaintiff until July 16, 2018, after months of

---

[11] In fact, Nationwide never stopped paying Plaintiff's ALE benefits. The plain language of Plaintiff's policy required Nationwide to pay ALE benefits "[i]f a covered loss require[d] **you** to leave the **residence premises**" and to pay those benefits up to "the limit of liability shown on the Declarations or 12 months, whichever occurs first." App. 392. Plaintiff was "required to leave the residence premises" due to the October 22, 2017 fire, so Nationwide was obligated to pay, and did pay, ALE benefits through October 22, 2018 – the twelve-month anniversary of the fire. App. 501-503, 505-507, 509-510, 705, 708.

As requested by Plaintiff, Nationwide paid $400.00 a month in ALE expenses from October 22, 2017 until Plaintiff moved to Florida on or about February 28, 2018. After moving, Plaintiff contacted Nationwide's ALE vendor and requested that Nationwide assist with his living expenses in Florida. App. 705. Plaintiff's counsel previously directed Nationwide and its ALE vendor not to communicate directly with Plaintiff, so Nationwide's counsel reached out to Plaintiff's counsel on multiple occasions to obtain information on the amount of ALE benefits requested. Plaintiff's counsel did not respond to Nationwide's requests until July 12, 2018, at which time he directed Nationwide to pay $700.00 per month in ALE benefits. On July 16, 2018, Nationwide paid Plaintiff's ALE benefits for March through August 2018. App. 505-507. On August 31, 2018, Nationwide paid Plaintiff's ALE benefits for September 2018 through October 22, 2018, in accordance with the requirements of his policy. App. 509-510.

litigation and discovery." App. 24. Nationwide, however, never "refused to deliver payment." App. 707. Instead, the evidence shows that Plaintiff's counsel failed to acknowledge or respond to Nationwide's March 9, 2018 offer to pay Plaintiff's claim until July 6, 2018, when he finally instructed Nationwide to make payment and how to make out the checks. *Id.* The Circuit Court even acknowledged this disputed question of material fact in its order: "Nationwide asserts that the delay in its payment was caused by the actions of Plaintiff's counsel ...." App. 20. The Circuit Court nonetheless failed to acknowledge the evidence supporting Nationwide's assertion, or draw appropriate inferences from that evidence in Nationwide's favor as the nonmovant. Instead, the Circuit Court simply accepted Plaintiff's argument that Nationwide made payment in July because of his counsel's efforts, rather than because of his counsel's failure or refusal to acknowledge and respond to Nationwide's offer before that date.

There are other, similar examples of incorrect and improper fact-finding in the Circuit Court's order that are fatal to its decision:

- The Circuit Court found that "[b]ecause Nationwide indicated in March of 2018 that its investigation was complete, it had ten (10) days to make a written offer for the undisputed amounts owed for the Plaintiff's claims, but it did not do so." App. 26. Nationwide, however, did make a written offer to pay Plaintiff's claim on March 9, 2018, but Plaintiff failed or refused to acknowledge or respond to that offer until July 6, 2018. App. 704-707.

- The Circuit Court found that "Nationwide's claims adjuster Kenneth Conaway acknowledged that the Plaintiff sent him a completed proof of loss on November 18, 2017." App. 26. However, Plaintiff's proof of loss is clearly dated December 8, 2017. App. 695-696. Furthermore, on November 18, 2017, it was actually Mr. Conaway who emailed Plaintiff, attaching "a new proof of loss that you requested," and that Plaintiff returned to Mr. Conaway via fax on December 11, 2017. App. 715-716. Plaintiff's proof of loss is also deficient, answering "awaiting estimates" as to every question about the value of his loss and "unknown at this time" as to the amount claimed. App. 695-696. Plaintiff never supplemented with estimates or a claimed amount.

- The Circuit Court found an "undisputed telephone communication by Plaintiff's counsel to Nationwide's counsel on March 1, 2018 addressing the additional [water] damage to the Plaintiff's property." App. 24. Although Nationwide's March 9, 2018 letter indicated that a phone call occurred on March 1, 2018, App. 705, there is no

evidence in the record that Plaintiff's counsel informed Nationwide of the water leak until March 15, 2018. Plaintiff's counsel's unsupported statements in his motion are not evidence. To the contrary, Nationwide's March 9, 2018 letter states that Plaintiff's counsel "indicated that the Residence had not been winterized" and requested "materials in your or Plaintiff's possession to dispute this winterization." *Id.*

- The Circuit Court found that Nationwide's March 9, 2018 offer was "conditioned" on Plaintiff "accepting the estimate to conclude his claim" and that "its issuance of a check for the Plaintiff's claim would resolve the Plaintiff's breach of contract action and his *Hayseeds* claim." App. 24. Nationwide's letter, however, merely states its position that paying Plaintiff's claim "moots any breach of contract action" and that "we do not believe any *Hayseeds* award is appropriate." App. 705-706. This was not a "condition" of payment.

All of these findings, which purportedly supported the Circuit Court's decision, were improper. It is up to a jury – not the Circuit Court – to weigh conflicting evidence and decide whether Plaintiff was required to sue Nationwide to obtain payment of his claim.

**4. The Circuit Court's errors irremediably prejudice Nationwide's right to a fair trial by taking away from the jury disputed questions of material fact as to the reasonableness of Nationwide's conduct and Plaintiff's comparative bad faith in failing or refusing to negotiate or cooperate with his insurer.**

The Circuit Court's ruling would obviously prejudice Nationwide's ability to meaningfully defend itself at trial. The Circuit Court's ruling takes away from the jury its duty to consider the evidence and decide whether Nationwide acted reasonably in handling Plaintiff's insurance claim. *See* Syl. Pt. 3, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 215 W. Va. 634, 600 S.E.2d 346 (2004) ("Whether an insurer refused to pay a claim without conducting a reasonable investigation based on all available information under W. Va. Code, 33-11-4(9)(d) [2002], and whether liability is reasonably clear under W. Va. Code, 33-11-4(9)(f) [2002] ordinarily are questions of fact for the jury."). Furthermore, it effectively prohibits Nationwide from presenting evidence of Plaintiff's comparative fault in failing or refusing to negotiate with Nationwide to resolve his insurance claim. As set forth in *Miller*, an insurer is only potentially liable for *Hayseeds* damages if it "refuses to meet a policyholder's **reasonable** demands." *Miller*, 201 W. Va. at 698 (emphasis added). A

policyholder's **unreasonable** conduct is obviously relevant to this question; the *Miller* Court made clear that *Hayseeds* damages are unavailable to a Plaintiff who "obstruct[s] settlement negotiations with his or her own insurer, [] intentionally delay[s] settlement, and [] then later demand[s] the payment of the limits of the first-party policy plus attorney's fees and costs." *Id.* The Circuit Court's ruling, if not overturned by this Court prior to trial, would prevent the jury from considering this relevant and probative information in reaching its decision.

## VI. CONCLUSION

Nationwide respectfully requests that this Court prohibit the Circuit Court from enforcing its *Order Granting Plaintiff's Motion for Adverse Inference Instruction* and its *Order Granting Plaintiff's Motion for Partial Summary Judgment (Plaintiff Has Substantially Prevailed)*.

**Respectfully submitted,**

**BOWLES RICE LLP**

**J. Tyler Mayhew (WVSB #11469)**
**101 South Queen Street**
**Post Office Drawer 1419**
**Martinsburg, West Virginia 25402-1419**
**Tel: (304) 264-4209**
**Fax: (304) 267-3822**
**tmayhew@bowlesrice.com**

***Counsel for Petitioners Nationwide Property & Casualty Insurance Company, Kenneth R. Conaway, Betsy Ross, and Lisa McGahan***

## VERIFICATION

STATE OF WEST VIRGINIA
COUNTY OF WOOD:

Pursuant to W.Va. Code § 53-1-3, I verify that I have reviewed this **Petition for Writ of Prohibition**; that the facts set forth in the petition are true and correct, unless stated to be upon information and belief; and that, as to any facts set forth in the petition upon information and belief, I believe those representations to be true.

J. Tyler Mayhew

Taken, subscribed, and sworn to before me this 18th day of October, 2019.

My commission expires: March 29, 2021.

NOTARY PUBLIC OFFICIAL SEAL
MARY L CLEMONS
State of West Virginia
My Comm. Exp. Mar 29, 2021
Bowles Rice
101 South Queen St Martinsburg, WV 25401

Notary Public