

BAS

BERKELEY COUNTY
CIRCUIT CLERK

2006 DEC -5 PM 4:43

VIRGINIA M. SINE, CLERK

IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

JOSEPH & REBECCA FAUBLE, and
NATIONWIDE MUTUAL FIRE INSURANCE CO.
AS SUBROGEE OF JOSEPH AND REBECCA FAUBLE,
Plaintiffs

v.

CIVIL ACTION NO: 05-C-83

ALEX E. PARIS CONTRACTING, INC.,
Defendant

**ORDER DENYING PETITION FOR
ATTORNEY'S FEES**

This matter came on before the Court this 5 day of December, 2006 upon the
Petition of Joseph and Rebecca Fauble for an award of attorney's fees predicated on the allegation
that they "substantially prevailed" against Nationwide in the present civil action.

Upon review of the submissions filed by counsel for the parties, this Court finds as follows:

1. Petitioners Joseph and Rebecca Fauble asserted a claim for damage to their residence
allegedly caused by blasting activities undertaken by Alex E. Paris Contracting, Inc.
(Paris). The Petitioners reported the claim to Nationwide, their homeowner's insurer,
which then began an investigation of the loss and initiated negotiations with Zurich
Insurance Company (Zurich), the liability carrier for Paris. The Petitioners also
retained attorney Mark Jenkinson to represent their interests in this matter at some
point shortly after the date of loss.



2. Although Zurich ultimately accepted liability on behalf of its insured, a settlement was not immediately forthcoming. Nationwide therefore tendered payment of \$49,843.43 to the Petitioners under their homeowner's policy and reserved the right to seek subrogation of this amount from Paris and/or Zurich, its insurer.
3. The Petitioners subsequently entered into a settlement agreement with Paris for \$80,000.00. Of this amount, almost \$50,000.00 had already been paid by Nationwide.
4. Subsequent to the payment by Nationwide, and unknown to Nationwide at that time, the Petitioners filed suit against Paris, to enforce the aforesaid settlement agreement.
5. Upon being notified of the suit, Nationwide moved for and was granted leave to intervene in order to preserve its right to recover the amounts previously paid to the Petitioners from Paris. The Petitioners then filed a cross-claim against Nationwide alleging that any such recovery by Nationwide should be reduced by one-third in order to compensate them for attorney's fees ostensibly incurred for the benefit of Nationwide in securing said recovery. Nationwide objected to this offset on the grounds that it could not be made a "de facto" client of Petitioners' counsel without its knowledge or consent and further noted that since Zurich had accepted liability on behalf of Paris, there had been no need to have an attorney represent Nationwide's interests - whether through actual retention or by implication.
6. In its Order of October 5, 2005, in addition to requiring the consummation of the settlement between the Petitioners and Paris, this Court held that Nationwide's subrogation recovery was to be reduced by \$16,614.17 - representing a pro-rata share

of the Petitioners' attorney fees. The Order also provided that the case was concluded and was to be dismissed from the docket.

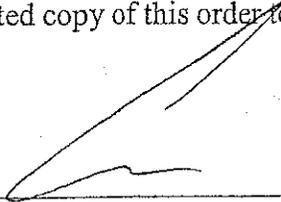
This Court finds that the pro-rata share of attorney's fees previously awarded to the Petitioners, in the amount of \$16,614.17, did not constitute a contractual benefit arising from the policy of homeowner's insurance issued by Nationwide and that said offset was therefore legally insufficient to invoke the "substantially prevailed" doctrine as more fully set forth in *Hayseeds, Inc. v. State Farm Fire & Cas. Ins. Co.*, 177 W.Va. 323, 352 S.E.2d 73 (1986) and its progeny. Moreover, this Court finds that an award of over \$60,000.00 in additional attorney's fees, as sought by the Petitioners, would be *per se* unreasonable and once again inconsistent with West Virginia law regarding the recovery of "substantially prevailed" damages.

This Court further finds that, to the extent the Petitioners assert the entitlement to "substantially prevailed" damages based on the adjustment by Nationwide of their homeowner's claim, any such attempt is barred by the doctrine of *res judicata*. Finally, this Court finds that such a theory of recovery is inconsistent with West Virginia law regarding the sufficiency of a "substantially prevailed" claim in that suit was not filed against Nationwide in this regard.

WHEREFORE, this Court denies, with prejudice, the Petition for Attorney's Fees at issue and Orders that this civil action be dismissed in its entirety and retired from the docket.

The Petitioner's objections are preserved for the record.

The Clerk of the Court will forward an attested copy of this order to all parties and counsel
of record.



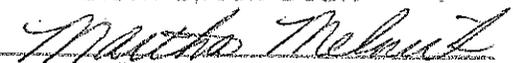
Hon. Christopher C. Wilkes
Judge
Circuit Court of Berkeley County, West Virginia

Prepared by:

Michael M. Stevens
Martin & Seibert, L.C.
Counsel for Nationwide Mutual Fire Insurance Company

TRUE COPY
ATTEST

Virginia M. Sine
Clerk Circuit Court

By: 
Deputy Clerk