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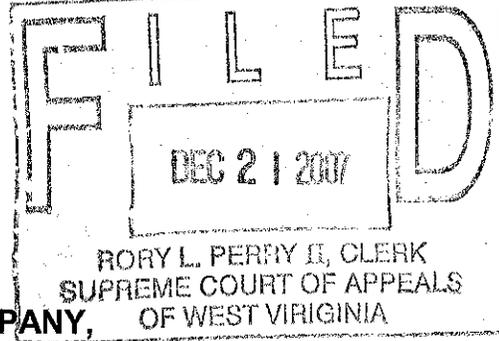
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

JOSEPH & REBECCA FAUBLE,
Appellants and Plaintiffs below,

v.

NATIONWIDE MUTUAL INSURANCE COMPANY,

Appellee and Defendant below.



*Appeal from the Circuit Court of
Berkeley County, West Virginia
Civil Action No. 05-C-83*

BRIEF OF APPELLEE

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I. NATURE OF PROCEEDINGS

The present matter constitutes an appeal of an Order entered by the Circuit Court of Berkeley County, West Virginia on December 5, 2006 dismissing the Appellants' claim of entitlement to "substantially prevailed" damages.

II. SUMMARY OF ARGUMENT

The Appellants seek to persuade this Court to set aside the Respondent Judge's Order denying their quest to obtain an additional recovery of attorney's fees under the doctrine of "substantially prevailed" damages. *Hayseeds, Inc. v. State Farm Fire & Cas. Ins. Co.*, 177 W.Va. 323, 352 S.E.2d 73 (1986). In support thereof, the Appellants contend that they were "forced" to file suit against the Appellee in order to obtain a proportionate offset of Nationwide's subrogation recovery for amounts remitted under a policy of insurance issued by Nationwide. They further contend that, having been successful in obtaining such a recovery, they are now entitled to either one-third of policy limits or, in the alternative, a determination of attorney's fees based on the factors set forth by this Court in *Aetna Cas. and Surety Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E. 2d 156 (1986).

The Appellants' argument is fundamentally flawed. The methodology for calculating an award of attorney's fees in conjunction with a *Hayseeds* claim only becomes relevant if "substantially prevailed" damages are applicable. Conversely, it is of no significance in cases where such a recovery is precluded as a matter of law.

This is precisely the case in the present matter. Upon review of prior proceedings and the briefs of counsel, the Circuit Court of Berkeley County concluded that the Appellants' success in obtaining an offset of Nationwide's subrogation recovery did not

implicate the vindication of a contractual right. Accordingly, the Respondent Judge determined that the "substantially prevailed" doctrine was not applicable and properly denied the Appellants' Petition for commensurate damages. In addition, the Respondent Judge ruled that the amount of damages sought was clearly excessive under the circumstances.

The Appellants fail to adequately address the former finding. Rather, they focus solely on their alleged entitlement to either one-third of policy limits or, in the alternative, a computation of attorney fees under *Pitrolo*, and challenge the Respondent Judge's alternative determination that the amount of damages sought was *per se* unreasonable in light of the fact of the claim. Such a contention begs the question of whether "substantially prevailed" damages are even an allowable element of recovery under the facts of the case - which, according to the Circuit Court's Order - they are not.

The offset from Nationwide's subrogation recovery awarded to the Appellants did not rise to the level of a contractual benefit. As a result, their claim for "substantially prevailed" damages is insufficient as a matter of law and must be denied.

III. STATEMENT OF FACTS

At all times relevant hereto, Nationwide had in effect a policy of homeowners insurance with Appellants Rebecca and Joseph Fauble and, on or about June 9, 2003, the Appellants submitted a claim under the policy for damages allegedly caused by blasting activities of Alex Paris Contracting Inc. (Paris). Nationwide investigated the claim and, on February 13, 2004, wrote to Appellants' counsel Mark Jenkinson and advised him that Zurich Insurance Company, the commercial liability carrier for Paris, had accepted full responsibility for the damages to the Appellants' residence. Nationwide subsequently

offered a total of \$47, 737.00 to resolve the claim for damages and, on September 13, 2004, remitted this amount.¹ Shortly thereafter, Nationwide advised Appellants' counsel that it would assign the file to its subrogation section for recovery against Paris.

On October 29, 2004, Nationwide wrote Zurich and provided supporting documentation of its subrogation claim. In response, by facsimile transmission dated December 7, 2004, Zurich confirmed that it would honor Nationwide's subrogation claim. On February 14, 2005, unknown to Nationwide at the time, the Appellants filed suit against Paris in the Circuit Court of Berkeley County.

Upon being notified of the suit, Nationwide moved for and was granted leave to intervene in order to preserve its right to recover from Paris the amounts previously paid to the Appellants. The Appellants 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 Appellants' counsel without its knowledge or consent and further noted that since Zurich had previously accepted liability on behalf of Paris, there had been no need to have an attorney represent Nationwide's interests - whether by virtue of actual retention or by implication.

In its Order of October 5, 2005, in addition to requiring the consummation of the settlement between the Appellants and Paris, the Respondent Judge held that

¹ Additional payments would be subsequently made bringing the total to \$49, 843.43.

Nationwide's subrogation recovery was to be reduced by \$16,614.17 - with said reduction representing a pro-rata share of the Appellants' attorney fees. The Order also provided that the case was concluded and was to be dismissed from the docket.

Nationwide sought appellate review of the Respondent Judge's Order but this Court declined to accept the appeal. The settlement with Paris was then consummated and Nationwide's subrogation recovery was reduced by the amount specified in the aforesaid Order.

The Appellants then sought to re-open this matter in pursuit of additional attorney's fees, in excess of \$64,000.00, under the guise of their purported entitlement to "substantially prevailed" damages. The Appellee filed a response in opposition and the matter was ultimately dismissed by the Circuit Court of Berkeley County by Order dated December 5, 2006. It is this from this Order that the Appellants appeal.

IV. ASSIGNMENT OF ERROR

The Appellee does not assign error to the Circuit Court of Berkeley County.

V. STANDARD OF REVIEW

This Court has recognized that: "A circuit court's entry of summary judgment is reviewed *de novo*." Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Further, this Court has held that: "If there is no genuine issue as to any material fact summary judgment should be granted but such judgment must be denied if there is a genuine issue as to a material fact." Syl. Pt. 4, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963).

Since the predicate issue encompasses the ability of the Petitioners to assert a claim for "substantially prevailed" damages, and is therefore a question of law, a *de novo* standard of review is applied. Syl. Pt. 1, *Chrystal R. M. v. Charlie A. L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

VI. ARGUMENT

A. The Appellants have not satisfied the elements necessary to pursue a claim for "substantially prevailed" damages.

The Respondent Judge correctly held that the Appellants had not been required to initiate suit against Nationwide and that the relief awarded did not equate to a contractual recovery. These are fundamental predicates for asserting a "substantially prevailed" claim and have been a cornerstone of this judicially created doctrine since its inception.

1. The subrogation offset awarded by the Circuit Court of Berkeley County was not contractual in nature.

Certainly Nationwide had a contractual relationship with the Appellants. That is not disputed. However, the existence of a contractual relationship does not unilaterally convert any subsequent litigation, no matter how attenuated, to a "substantially prevailed" claim. The record establishes that Nationwide moved to intervene in the action brought by the Appellants against the purported tortfeasor to enforce a settlement agreement for the sole purpose of preserving its subrogation interest. Only then did the Appellants seek to assert the cross-claim against Nationwide for a portion of its ultimate recovery. This was merely an attempt, albeit successful, to shift a portion of the cost of litigation and did not implicate a benefit provided under the insurance contract. As such, does not meet this fundamental test for a "substantially prevailed" claim.

So-called "substantially prevailed" damages were first recognized in the seminal case of *Hayseeds, supra*, wherein this Court held that when a policyholder is required to sue his or her own insurance company for property damage and the policyholder "substantially prevailed," the insurer is liable for payment of the policyholder's reasonable attorneys fees, which presumptively are one-third of the face value of the amount of the policy, unless the policy is either "extremely small or enormously large" plus certain additional damages, if proven.

In reaching this conclusion, the *Hayseeds* Court stated that the ability to assert a claim for "substantially prevailed" damages arose from the underlying insurance contract and the concomitant duties of the insurer to the insured. This Court has reiterated on multiple occasions that the efficacy of a "substantially prevailed" claim is inextricably linked to the enforcement of a contractual provision contained within the underlying policy of insurance and the necessity of filing suit to obtain the same. See, e.g. *Marshall v. Saseen*, 192 W. Va. 94, 450 S.E.2d 791 (1994) (The rationale underlying *Hayseeds* was that the insurer had contractually promised the insured such coverage.); *Hadorn v. Shea*, 193 W. Va. 350, 456 S.E.2d 194 (1995) (Our rule is intended to address the situation that occurs when an insured must sue his insurer to compel it to honor its contractual obligations.); *Miller v. Fluharty*, 201 W. Va. 685, 500 S.E.2d 310 (1997) (The policy underlying *Hayseeds, Jordan* and *Marshall* is that a policyholder buys an insurance contract for peace of mind and security, not financial gain, and certainly not to be embroiled in litigation.) (Citations omitted.) The goal is for all policyholders to get the benefit of their contractual bargain.) (Emphasis added.)

The award of an offset from Nationwide's subrogation recovery does not reflect the vindication of a contractual right and cannot therefore, in accordance with *Hayseeds* and its progeny, serve as the predicate for the Appellants' "substantially prevailed" claim. Although the Circuit Court ultimately held that Nationwide was obligated to reduce the amount of its recovery by a pro-rata share to compensate the Appellants for attorney's fees incurred in bringing their suit against Paris, this obligation was equitable in nature and did not arise from the duties imposed under the contract, itself. As such, it cannot, as a matter of law, serve as the predicate for the assertion of a "substantially prevailed" claim.

2. The Appellants were not forced to initiate litigation against Nationwide and an attorney's services were not necessary to obtain recovery of a contractual benefit

The Appellants' contention that they were forced to file suit against Nationwide is equally meritless. The Appellants initially brought suit against Paris, seeking a recovery over and above the first-party coverage paid by Nationwide. This was certainly their right. The fact remains, however, that they were not forced to file suit against Nationwide to obtain their homeowner's coverage benefits. Rather, they sought additional amounts from Paris over and above that which was implicated under the settlement with Nationwide.

Secondly, Nationwide had previously agreed with the Paris' insurance carrier that its subrogation interest would be honored. Indeed, at the time suit was filed, Nationwide had not only tendered its policy payment but arranged for reimbursement. Upon learning of the suit, Nationwide intervened as allowed under the West Virginia Rules of Civil Procedure to protect its subrogation interest - prompting a cross-claim by the Appellants for a proportional recovery from the same.

The Appellants advance the argument that *Federal Kemper Insurance Co. v. Arnold*, 183 W. Va. 31, 393 S.E. 2d 669 (1990), which applied equitable principles to require an insurer to contribute to the costs incurred by an insured in advancing a bodily injury claim against a third-party tortfeasor, converts this offset to a contractual right of proportionate recovery. This is simply not the case. *Federal Kemper* was limited to its specific facts and, as such, is distinguishable from the present matter.

- a.) Although the Circuit Court specifically relied on *Federal Kemper* in awarding an offset from Nationwide's subrogation recovery, it made no finding extending this case to support a subsequent award of "substantially prevailed" damages.
- b.) Additionally, the *Federal Kemper* Court stated that it was to be "assumed" that the plaintiffs expended money in obtaining this recovery. In the present case, however, Appellants' counsel previously acknowledged that he was not charging attorney fees on "undisputed first party coverages," i.e. the \$49,843.43 previously advanced by Nationwide. As a result, the only fees incurred by the Appellants were associated with their attempt to recover an amount over and above the policy payment made by Nationwide - a situation that was markedly different that reflected in *Federal Kemper*.
- c.) *Federal Kemper* was predicated on an equitable imperative. As noted by this Court, "to establish an artificial rule which would provide an insurer with the right to sit back and permit its insured to proceed with an action, expecting to share in the avails of that proceeding without the burden of any of the expense, occurs to us to be anomalous." This is at odds with the present

facts - in that Nationwide had previously negotiated the recovery of its subrogation interest and was not "relying" on the Appellant to obtain the same on its behalf.

Moreover, in order to sustain a claim for "substantially prevailed" damages, the proponent must also demonstrate that "the attorney's services were necessary to obtain payment of the insurance proceeds." *Richardson v. Kentucky National Ins. Co.*, 216 W. Va. 464, 607 S. E. 2d 793 (2004), quoting Syl. Pt. 1, in part, *Jordan v. National Grange Mut. Ins. Co.*, 183 W.Va. 9, 393 S.E.2d 647 (1990). Although the Appellants secured counsel shortly after the date of loss, and notwithstanding the Circuit Court's finding that counsel was retained, in part, to pursue their claim for benefits under the policy issued by Nationwide, the record confirms that the same was never "necessary." Specifically, Nationwide neither denied the existence of coverage nor refused to pay property damage proceeds or derivative policy benefits. Indeed, Nationwide remitted payment to the Appellants well before suit was filed against Paris. As a result, there can be no legitimate contention that litigation was initiated in order to secure this, or any other, contractual benefit.

B. The Appellants do not effectively challenge all relevant findings in the Circuit Court's Order that would preclude their ability to obtain "substantially prevailed" damages. As a result, the present Appeal cannot be sustained.

The Circuit Court Order underlying this appeal specifically held that the Appellants had not been forced to file suit against Nationwide and that their receipt of the subrogation offset in question did not constitute a contractual recovery. The Respondent Judge then

found that, in the alternative, the amount of attorney's fees sought by the Appellants was patently excessive under the facts of this case.

As noted above, the Appellants have devoted a significant portion of their brief to the *Pitrolo* factors and their commensurate argument that the Circuit Court erred by not applying the same in calculating an award of damages. The Appellants also contend that Nationwide's act of intervening in their suit against Paris, which then resulted in a cross-claim by the Appellants against Nationwide, was somehow equivalent with "forcing them into litigation."

Nowhere, however, do the Appellants directly challenge that portion of the Respondent Judge's Order which concluded that the offset of Nationwide's subrogation recovery, ultimately granted by the Circuit Court, was not contractual in nature. At best, they refer to generalized language in the Court's October 5, 2005 Order which stated, in pertinent part, that all rights and responsibilities under the insurance contract had been addressed. This cursory reference is insufficient to constitute a meaningful argument in opposition to the Circuit Court's clear and unambiguous finding in its subsequent Order of December 6, 2006 that such an award did not arise from the insurance contract, itself.

That provision of the Respondent Judge's Order, alone, is sufficient to deny the recovery sought. As a result, even if the Appellants were to prevail on all other aspects of this appeal, it would be nonetheless be moot.

The doctrine of mootness has long been recognized by this Court. See, e.g. Syl. Pt. 1, *State ex rel. Lilly v. Carter*, 63 W.Va. 684, 60 S.E. 873 (1908), wherein this Court stated that "moot questions or abstract propositions, the decision of which would avail nothing in

the determination of controverted rights of persons or of property, are not properly cognizable by a court.”

These principles are equally applicable in the present case. Consideration of the issues raised on appeal “avails nothing” in the final determination of a “controverted right” in that the Circuit Court's Order finding that the subrogation offset was not contractual in nature mandates the denial of any subsequent “substantially prevailed” claim.

The Appellee acknowledges that this Court has adopted several exceptions to the mootness doctrine - most notably that “a case is not rendered moot even though a party to the litigation has had a change in status such that he no longer has a legally cognizable interest in the litigation or the issues have lost their adversarial vitality, if such issues are capable of repetition and yet will evade review. (Emphasis added.) Syl. Pt. 1, *State ex rel. M.C.H. v. Kinder*, 173 W. Va. 387, 317 S.E. 2d 150 (1984). Similarly, in *Israel by Israel v. W.Va. Secondary Schools Activities Comm'n*, 182 W.Va. 454, 388 S.E.2d 480 (1989), this Court provided further guidance by holding that three factors to be considered in deciding whether to address technically moot issues are as follows: “first, the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; second, while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and third, issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided.” *Id.*

Application of these legal tenets to the case at bar does not support an exception to the mootness doctrine. First and foremost, this is clearly not a situation where the question

at issue was of "fleeting and determinate nature." The Appellants had ample opportunity to challenge this specific component of the Circuit Court's Order. They did not do so. This is certainly distinguishable from fact patterns which, by their inherent nature, suggest a perpetual inability to resolve if rendered moot. Moreover, there are no collateral consequences that would implicate the need for an exception to the preclusive effect of a determination of mootness. Rather, invocation of this bar to unfounded litigation would merely preserve the interpretation of the "substantially prevailed" doctrine as it presently exists. Finally, given that the crux of the present appeal seeks to precipitate a dramatic expansion to a specific remedy, based on a unique set of facts which inure to the benefit of the Appellant, it is unlikely that any overarching public interest would be served by consideration of the issues raised.

The Respondent Judge was clear in his holding and the Appellants have presented no argument in their appeal to effectively challenge that determination. Accordingly, the present appeal should be denied as moot and the Order of the Circuit Court of Berkeley County upheld.

VII. CONCLUSION

The Appellants argue that, due to Nationwide's alleged "intransigence," the Respondent Judge's Order should be set aside and that they should be allowed to receive an additional award of attorneys fees under the guise of "substantially prevailed" damages. Such a contention is erroneous on multiple grounds. As an initial matter, there is simply no basis for alleging that Nationwide was intransigent or otherwise unwilling to recognize the effect of settled law. Although the Circuit Court ultimately determined that *Federal Kemper, supra.*, supported the award of an offset from Nationwide's subrogation recovery,

over Nationwide's objection and unsuccessful appeal to this Court, the applicability of *Federal Kemper* in the present context was not, as the Appellants contend, a matter of established law. Indeed, the present facts are clearly distinguishable from those in *Federal Kemper*, most notably in that Nationwide was, at no time, "relying" on the Appellants to obtain a recovery of its subrogation interest while refusing to share in the cost of the same. To the contrary, Nationwide had already reached an agreement with the insurance carrier providing indemnification to Paris in order to secure its subrogation reimbursement - well before the Appellants filed suit. This is a significant departure from the rationale underlying the *Federal Kemper* decision, wherein this Court concluded that a carrier could not sit idly by and then expect to reap the reward of its inaction.

Moreover, regardless of whether *Federal Kemper* was properly applied in this case, the Appellants seek to expand the "substantially prevailed" doctrine far beyond any reasonable application. It is undisputed that, in addition to the first-party coverage provided under the policy at issue, the Appellants have already received over \$16,000.00 from Nationwide as a result of the subrogation offset awarded by the Circuit Court - which represented a proportional payment of their attorney fees. Notwithstanding the foregoing, the Appellants now seek to convince this Court to overturn the Order entered by the Respondent Judge on December 6, 2006 and, in so doing, find that they are entitled to additional damages over and above the attorney's fees already received.

The offset in question, however, fails to rise to the level of a contractual obligation. No such holding was announced in *Federal Kemper* and, indeed, the Respondent Judge found just the opposite in his Order. The Appellants have failed to challenge this cornerstone of the Order other than to continue with a bare assertion that they are

somehow "entitled" to an award of "substantially prevailed" damages. Such a contention gains no credence with repetition.

Given that the subrogation offset awarded by the Circuit Court was equitable, rather than contractual in nature, "substantially prevailed" damages are not an allowable element of recovery. Wherefore, and for the foregoing reasons, Nationwide Mutual Insurance Company respectfully submits that the December 5, 2006 Order of the Circuit Court of Berkeley County should be affirmed.

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CERTIFICATE OF SERVICE

I, Michael M. Stevens, Counsel for the Appellant, Nationwide Mutual Insurance Company, hereby certify that I served a true copy of the foregoing **Brief of Appellee** upon the following individuals, by placing the same in the U.S. Mail, First Class, postage prepaid, on this the 20th day of December, 2007.

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