

**BEFORE THE  
SUPREME COURT OF APPEALS OF WEST VIRGINIA**

**Appeal No.: 33667**

**JOSEPH & REBECCA FAUBLE**

**Appellants,**

**BERKELEY COUNTY**

**v.**

**CIVIL ACTION NO: 05-C-83**

**NATIONWIDE MUTUAL FIRE INSURANCE COMPANY,**

**Appellees.**

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**REPLY BRIEF OF APPELLANTS**

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Prepared By:

Mark Jenkinson, Esquire (WV 5215)

Lawrence M. Schultz, Esquire (WV 4293)

Burke, Schultz, Harman & Jenkinson

P.O. Box 1938

Martinsburg, WV 25402

Counsel for the Appellants

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## TABLE OF AUTHORITIES

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## INTRODUCTION

In it's brief, the Appellee, Nationwide Mutual Insurance Company, (hereinafter "Nationwide") repeatedly makes the following two basic assertions:

- I. That the Faubles were not forced to filed suit against Nationwide; and
- II. That the Faubles earlier demand that Nationwide be required to share in their attorneys' fees incurred in pursuing the third-party claim against Alex Paris did not arise from any contractual provision contained within the underlying policy of insurance.

Both of these assertions are false. The Faubles were, quite literally, "forced" to file suit against Nationwide. Further, Nationwide's original assertion of a subrogation claim is clearly based upon language in Nationwide's Homeowners policy issued to the Faubles.

## ARGUMENT

1. **Nationwide not only forced the Faubles to sue it to vindicate their rights, Nationwide also forced the Faubles to sue the tortfeasor by its intransigence over subrogation.**

In early February 2005 the company responsible for the blasting damage to the Faubles' home advised counsel for the Faubles that it would refuse to go forward with its settlement of \$80,000.00 (a settlement which had been reached two weeks earlier on January 28, 2005) unless it was permitted to deduct from that amount the **entire** amount of Nationwide's claim for subrogation which was a claim for 100% of the approximately \$48,000.00 paid by Nationwide to the Faubles. Counsel for the Faubles, knowing that such a claim for 100% subrogation reimbursement was not allowed under West Virginia law, refused to accept these terms.

Accordingly, on February 14, 2005 the Faubles filed suit against Alex Paris for the purpose of enforcing the settlement that had been entered into on January 28, 2005. It is important to note that even at this point in February 2005 the Faubles still elected **not** to sue their own insurance company, despite the fact that it was clearly Nationwide's refusal to accept the customary one-third set-off from their subrogation claim that was responsible for the Faubles inability to consummate the settlement of the third-party claim with Alex Paris. Nationwide forced the Faubles to sue Alex Paris!

Nationwide then chose to intervene as a party litigant to the lawsuit between the Faubles and Alex Paris. The Order Granting Leave for them to

do this was entered by the Court on May 11, 2005.<sup>1</sup> After Nationwide had been permitted to intervene, the Faubles filed a Motion for Summary Judgment and a Motion to Enforce Settlement.<sup>2</sup> The Court denied Plaintiff's Motion to Enforce the Settlement Agreement on June 30, 2005<sup>3</sup> and subsequently issued an Order Denying Faubles' Motion for Summary Judgment on July 11, 2005.<sup>4</sup> As a basis for these denials, the Court specifically held that the Faubles were not yet adverse to Nationwide and this served as a procedural bar to the court's ability to grant the relief sought by the Faubles. Specifically, the Court ordered that it would not be in a procedural position to declare the rights of the parties under the Faubles' insurance policy unless and until the Faubles filed a cross-claim against Nationwide, or, indeed, a separate complaint for declaratory relief, to wit:

The Court is **unable to rule on the merits** of the Faubles' Motion for Summary Judgment because the Motion does not comply with Rule 56(a). Although the Faubles are seeking to recover upon a claim, it is against Paris and not Nationwide. In addition, the parties are not procedurally adverse because Nationwide is a co-plaintiff with the Faubles. **Once the Faubles file a cross-claim against Nationwide under a declaratory action, or another action, the Court can declare the rights of the**

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<sup>1</sup> Supreme Court Index (S.C.I.) pp. 61-63

<sup>2</sup> S.C.I. pp. 65

<sup>3</sup> S.C.I. pp. 144-145

<sup>4</sup> S.C.I. pp. 146-147

**parties under the Faubles' insurance policy.**<sup>5</sup>  
(emphasis added)

Thus, the Faubles were, quite literally, required by the Court to file a cross-claim against Nationwide for declaratory relief before the Court would declare the rights of the parties "under the Faubles' insurance policy". It seems somewhat strange that Nationwide would now argue that the Faubles were not "forced" to file a claim against Nationwide. Indeed, the Faubles attempted to leave Nationwide out of the litigation and merely sought to enforce the third-party settlement they had reached with Alex Paris at the end of January 2005. When the Faubles did this, Nationwide moved to intervene in this matter to protect their claim for 100% reimbursement of the money paid to the Faubles under the subrogation provisions of the insurance policy. Subsequently, the Circuit Court refused to even rule upon the Faubles' motion until such time as they had filed a cross-claim against Nationwide. The Faubles complied with the order of the Circuit Court and filed a cross-claim against Nationwide. Now Nationwide has the audacity to argue before this Court that the Faubles were never "forced" to sue Nationwide.

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<sup>5</sup> Order Denying Plaintiff's Motion for Summary Judgment entered on July 11, 2005, S.C.I. pp. 146-147

**2. The underlying relief sought (and obtained) by the Faubles arose from the contract of insurance between the Faubles and Nationwide.**

Nationwide's second audacious argument in its reply brief is that the Faubles are not entitled to attorneys' fees under *Hayseeds*<sup>6</sup> because the relief they won did not arise out of the insurance policy. As discussed hereinabove, the Circuit Court of Berkeley County, on July 11, 2005, ruled that "once the Faubles file a cross-claim against Nationwide under a declaratory action, or another action, the Court can declare the rights of the parties **under the Faubles' insurance policy**."<sup>7</sup> (emphasis added) Less than three months later, on October 6, 2005, the lower court found in favor of the Faubles and ordered Nationwide to take two-thirds of the amount paid to the Faubles by Alex Paris in full and final settlement of Nationwide's subrogation claim under their insurance contract with the Faubles.

We know that the Circuit Court found that the subrogation dispute arose out of the insurance contract between the Faubles and Nationwide not by some process of osmosis, not by being able to magically divine that that was the finding of the Court, but rather because the Court stated that was the basis for its ruling right on the face of the Order. Specifically, at the end of

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<sup>6</sup> *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 329, 352 S.E.2d 79 (1986)

<sup>7</sup> Order Denying Plaintiff's Motion for Summary Judgment entered on July 11, 2005, S.C.I. pp. 146-147

the Court's Order Granting Summary Judgment to the Faubles against

Nationwide, the Court held as follows:

The Court having decided the rights and duties of the parties **under the insurance contract** and settlement agreement in question, orders that the Circuit Clerk shall retire this matter from the docket.<sup>8</sup> (emphasis added)

Nationwide appealed that ruling to this Court, which denied their Petition for Appeal on May 25, 2006.<sup>9</sup>

While it is one thing for Nationwide to misconstrue an Order of the Circuit Court of Berkeley County which it tried, in vain, to appeal, it is quite another for Nationwide to deliberately ignore the language of its own insurance policy with the Faubles.<sup>10</sup> At page 15 of the policy, subparagraph nine, Nationwide chose to include a subrogation clause. We know it is a subrogation clause because at the very beginning of the three-line clause at paragraph nine on page 15 of the policy is one word printed in bold, to wit:

#### **9. Subrogation.**

It was this subrogation clause that Nationwide fought so stubbornly to enforce earlier in this case. They fought and lost, because the policy language they wrote does not comply with *Federal Kemper Ins. Co. v. Arnold*, 183 W.Va. 31, 393 S.E.2d 669 (1990). They are now attempting to

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<sup>8</sup> Order Granting Plaintiff's Motion for Summary Judgment, 10/5/05, S.C.I. pp. 260-263

<sup>9</sup> West Virginia Supreme Court of Appeals Order, 5/25/06, S.C.I. pp. 371

<sup>10</sup> That policy is part of the record as Exhibit A to the Brief of Appellants.

deny even that they had a subrogation provision within their contract of insurance with the Faubles.

If Nationwide intends to stick to this bizarre argument that the victory won by the Faubles on the subrogation issue did not arise out of the contract of insurance, the Faubles would only hope that Nationwide will issue a statewide bulletin to all homeowner policyholders in the State alerting them that the subrogation language in their homeowners policy (designed to protect Nationwide) is of no moment and that they should treat the subrogation clause as if it simply does not exist. The Faubles suspect that no such statewide bulletin will be issued. The Faubles suspect that Nationwide will continue to attempt to enforce its contractual claims to subrogation whenever the opportunity presents itself. All the Faubles ask in this case is that Nationwide not be allowed to have it both ways. There is a subrogation clause in the policy and Nationwide's rights under this clause are limited by clear and long-standing West Virginia precedent.<sup>11</sup>

### **Conclusion**

Nationwide's continuing attempt to confuse the issues notwithstanding, the questions this Court must answer remain clear:

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<sup>11</sup> *Federal Kemper Ins. Co. v. Arnold*, 183 W.Va. 31, 393 S.E.2d 669 (1990); *Richardson v. Kentucky National Insurance Company*, 216 W.Va. 464 (2004)

1. Were the Faubles embroiled in litigation and forced to incur attorneys' fees as a result of Nationwide's inflated claim to a 100% subrogation interest in this matter?
2. Did the Faubles substantially prevail on the subrogation issue they were forced to litigate with Nationwide?

The answer to both questions is a resounding "yes." Indeed, not only did the Faubles "substantially prevail" they completely prevailed. The argument with Nationwide was over the final one-third of their claim for subrogation. In other words, Nationwide paid approximately \$48,000.00 to the Faubles on their first-party claim. The Faubles always conceded that Nationwide would be entitled to two-thirds of that amount (approximately \$32,000.00) back upon payment by Alex Paris of the third-party claim. It was only the final third of that amount (approximately \$16,000.00) over which the Faubles and Nationwide parted company. Ultimately the Circuit Court of Berkeley County found that the Faubles were entitled to every penny of that disputed one-third in the approximate amount of \$16,000.00 and they were, in fact, paid every penny of that amount. So the Faubles didn't just get most of the relief that they sought in the litigation with Nationwide, they got **all** of the relief that they sought.

That relief was finally obtained when this Court denied Nationwide's Petition for Appeal on December 5, 2006.<sup>12</sup> It was only after that ruling that the Faubles (for the first time) petitioned the Circuit Court of Berkeley County for an award of the attorneys' fees they were forced to incur as a result of the litigation with Nationwide. Unfortunately, the Circuit Court confused the issue of the one-third set-off of subrogation (which is Nationwide's share of attorneys' fees incurred as a result of the third-party claim against Alex Paris) and the claim for attorneys' fees incurred as a result of the litigation with Nationwide. The Circuit Court's confusion resulted in the Order Denying Petition for Attorneys' Fees entered on the 5th day of December 2006.<sup>13</sup> It is from that Order that the Faubles now appeal and ask that that Order be reversed and that this matter be remanded to the Circuit Court with direction that the lower court is to award the Faubles their reasonable attorneys' fees incurred in successfully litigating the subrogation dispute with Nationwide.

Respectfully Submitted,

JOSEPH AND REBECCA  
FAUBLE, Appellants  
By Counsel

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<sup>12</sup> Supreme Court Order Rejecting Petition for Appeal, 5/25/06, S.C.I. pp. 370-371

<sup>13</sup> S.C.I. pp. 478-481



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Mark Jenkinson, Esquire (WV 5215)  
Lawrence M. Schultz, Esquire (WV 4293)  
Burke, Schultz, Harman & Jenkinson  
P.O. Box 1938  
Martinsburg, WV 25402  
(304) 263-0900  
*Counsel for Appellants*

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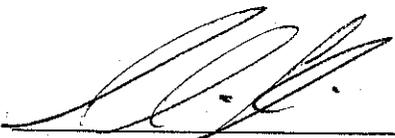
CERTIFICATE OF SERVICE

Type of Service: United States Mail, First Class Postage Prepaid

Date of Service: January 4, 2008

Person (s) Served: Michael Stevens, Esquire  
Walter Jones, Esquire  
Martin & Seibert  
PO Box 1286  
Martinsburg, WV 25402

Item Served: Reply Brief of Appellants



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Mark Jenkinson, Esquire (WV 5215)  
Lawrence M. Schultz, Esquire (WV 4293)  
Burke, Schultz, Harman & Jenkinson  
P.O. Box 1938  
Martinsburg, WV 25402  
(304) 263-0900