



IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION

CIVIL ACTION NO. 16-C-7000

THIS DOCUMENT APPLIES TO:

**CENTRAL WEST VIRGINIA REGIONAL
AIRPORT AUTHORITY, INC., a
West Virginia corporation,**

Civil Action No. 15-C-1022 KAN

Plaintiff,

v.

**TRIAD ENGINEERING, INC.,
a West Virginia corporation; et al.**

MEMORANDUM OPINION AND ORDER DENYING PLAINTIFF CENTRAL WEST VIRGINIA REGIONAL AIRPORT AUTHORITY, INC.'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S CLAIM FOR DECLARATORY JUDGMENT AGAINST WESTFIELD INSURANCE COMPANY AND GRANTING THE CROSS-MOTION FOR SUMMARY JUDGMENT ON COVERAGE ISSUES FILED BY WESTFIELD

The Presiding Judges have reviewed and maturely considered the Plaintiff Central West Virginia Regional Airport Authority, Inc.'s *Motion For Summary Judgment On Plaintiff's Claim For Declaratory Judgment Against Defendant Westfield Insurance Company* (Transaction ID 62263384) filed in Civil Action No. 15-C-1022 KAN and the *Cross-Motion For Summary Judgment On Coverage Issues* (Transaction ID 62314280) filed in Civil Action No. 15-C-1022 KAN by Westfield Insurance Company ("Westfield"). Having heard oral argument with respect to said motions, and having conferred with one another to ensure the uniformity of their decision, as contemplated by *Rule 26.07(a)* of the *West Virginia Trial Court Rules*, the Presiding Judges are of the opinion to and do unanimously make the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The present action arises out of a slope failure at the Runway Extension Project at Yeager Airport in Charleston, West Virginia.

2. Defendant Triad Engineering, Inc. (“Triad”) has been sued by the Plaintiff Central West Virginia Regional Airport Authority, Inc. (“the Airport”), for damages arising from the failure of a 500-foot extension of the runway and the construction of an Engineered Material Arresting System (“EMAS”).

3. Triad performed design and engineering work for the project, and the Airport has alleged Triad’s liability for negligence, breach of contract, breach of warranty, and other causes of action arising from the failure or partial failure of the runway extension.

4. At the time relevant to the Airport’s claims, Triad was insured under various insurance policies which provided different kinds of insurance coverage. In particular, Triad had “errors and omissions” coverage for liability arising out of its professional services provided under Policy No. AEICPG-13, issued by Architects & Engineers Insurance Company (“AEIC”). Triad also had commercial automobile coverage, commercial property coverage, and commercial general liability coverage (“CGL coverage”) under a Commercial Insurance Coverage Policy issued by Westfield, identified as Westfield Policy No. CMM 4150717, which also provided umbrella coverage. The initial period of the Westfield Policy was 11/01/07 to 11/01/08, and it was thereafter renewed on an annual basis. Prior to that, Triad was insured under a CGL Policy issued by Cincinnati Insurance Company (“Cincinnati”), identified as Policy No. CPP0915202, for the period of 11/01/2004 to 11/01/2007.

5. The Airport has sought a declaratory judgment that its claims against Triad are

covered under both the CGL and umbrella coverages provided by the Westfield Policy. Conversely, Westfield has sought a declaratory judgment with respect to its duty to defend and indemnify Triad in connection with the claims being asserted against Triad, based on Westfield's assertion that its Policy expressly excludes coverage for the type of professional services and contractual claims being asserted in this case.

6. In its *Third Amended Complaint*, the Airport alleges this action arises from the failure of a Runway Safety Area ("RSA") for the Airport's Runway 5 and Runway 23. In particular, the Airport alleges, "[i]t was determined that the best manner in which to provide the RSA for Runway 5 was a 500 foot extension of the runway's southernmost end and the use of an engineered material arresting system ("EMAS")." *Third Amended Complaint* at ¶26. It further alleges, "[a]n EMAS system is a system of specialized air-entrained cement blocks at the end of a runway onto which an airplane can travel in an emergency. These blocks are meant to collapse under the weight of the airplane thereby stopping or arresting the airplane's progress and preventing a crash." *Id.*

7. The *Third Amended Complaint* goes on to allege that, on July 28, 2013, Airport Authority employees "noticed separation in and around the EMAS blocks which was not present the week before." *Third Amended Complaint* at ¶32. It then alleges that, on March 12, 2015, "the Runway 5-23 EMAS and MSE area catastrophically failed sending hundreds of thousands of cubic yards of fill and other material down and onto the Keystone Drive area of Charleston destroying homes, a church, public roads and damming a stream." *Third Amended Complaint* at ¶38.

8. In Count I of its original *Complaint* and in each of its *Amended Complaints*, the

Airport alleged that Triad and other defendants were negligent, in that they:

- a. Improperly designed and engineered the runway safety area, MSE, EMAS and other related improvements;
- b. Improperly designed and engineered the fill material/compaction requirements for the runway safety area, MSE and other related improvements;
- c. Improperly tested and investigated subsurface and other conditions of the runway safety area, MSE and other related improvements;
- d. Failed to take steps to prevent collapse, subsidence and soil consolidation of the runway safety area, MSE and other related improvements;
- e. Failed to properly inspect the construction of the runway safety area, MSE, EMAS and other related improvements;
- f. Failed to properly test or otherwise verify that the fill comprising the runway safety area and MSE met necessary requirements prior to certification;
- g. Failed to properly monitor, warn or instruct as to the safety of the subject work even after concerns were raised with regard to the subject job;
- h. Improperly and negligently constructed and built the EMAS and MSE system;
- i. Improperly and negligently supervised the construction and installation of the EMAS and MSE systems;
- j. Improperly and negligently failed to design, contract (sic), inspect or ensure the proper placement and operation of the drainage system on the subject project;
- k. Improperly and negligently failed to design, construct, inspect or ensure the proper placement and operation of the Miramesh GR and Miragrid 1 OXT & 20XT on the subject project;
- l. Improperly and negligently failed to warn or otherwise instruct of the risk, dangers and hazards associated with the 1:1 slope on the subject project; and
- m. other such duties which will be determined during the course of discovery in this action.

Third Amended Complaint at ¶45.

9. The Airport alleged in its original *Complaint* and in each of its *Amended Complaints* that Triad and other defendants, “negligently supervised the construction and installation of the EMAS and MSE systems;” “negligently failed to design, construct, inspect or ensure the proper placement and operation of the drainage system on the subject project;” and “negligently failed to design, construct, inspect or ensure the proper placement and operation of the Miramesh GR and Miragrid 1 OXT & 20XT on the subject project”. (See *e.g.*, *Third Amended Complaint* at ¶45 i., j., and k.)

10. In Count II, the Airport alleged breach of implied warranty against Triad and other defendants by asserting that “[t]he work and services provided by defendants was not performed with ordinary skill, care or diligence and was not performed in a skillful, careful, and workmanlike manner.” *Third Amended Complaint* at ¶51.

11. Count III of the *Third Amended Complaint* alleged breach of contract against Triad and other defendants, asserting, “The defendants, by and through their conduct and/or the conduct of their agents as described herein, have breached material terms of these contracts by failing to perform work or other services in a skillful, careful, and workmanlike manner.” *Third Amended Complaint*, at ¶56.

12. Count IV of the *Third Amended Complaint* alleged, against Triad and other defendants, breach of quasi-contract, in that the Airport “relied upon the promises of defendants, including the affirmations, representations and conduct of the defendants, to perform work or other services with ordinary skill, care and diligence in a skillful, careful, and workmanlike manner” and, as a result, allegedly suffered harms and losses. *Third Amended Complaint* at ¶¶59, 61.

13. In Count XIV of its *Third Amended Complaint*, the Airport asserted a separate negligence claim solely against Triad which is couched in terms of Triad's "general business operations" and specifically alleged that "Triad breached its statutory and regulatory duties to plaintiff by negligently managing its general business operations resulting in the assignment (sic) the duties of designing the MSE and overseeing its construction to Mr. Fogarty who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE." *Third Amended Complaint* at ¶123.

14. Triad is also alleged to have breached its statutory and regulatory duties to plaintiff by:

- A. failing to supervise and oversee Mr. Fogarty's work on the MSE; *Third Amended Complaint* at ¶124
- B. failing to ensure that Mr. Fogarty's MSE design conformed to accepted engineering standards and safeguarded the life, health, property and welfare of the public; *Third Amended Complaint* at ¶125
- C. negligently managing its general business operations resulting in the assignment of Mr. Fogarty's duties of designing the MSE and overseeing its construction to Mr. Ryan who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE; *Third Amended Complaint* at ¶126
- D. assigning Mr. Fogarty's duties to Mr. Ryan, who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE; *Third Amended Complaint* at ¶127
- E. failing to supervise and oversee Mr. Ryan's work on the MSE; *Third Amended Complaint* at ¶128
- F. failing to ensure that Mr. Ryan's MSE design modifications conformed to accepted engineering standards and safeguarded the life, health, property and welfare of the public; *Third Amended Complaint* at ¶129
- G. negligently managing its general business operations resulting in Triad's failure to

inform the plaintiff that Triad assigned the duties of designing the MSE and overseeing its construction to Mr. Fogarty who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE; *Third Amended Complaint* at ¶130

H. negligently managing its general business operations resulting in Triad's failure to inform the plaintiff that Triad assigned Mr. Fogarty's duties of designing the MSE and overseeing its construction to Mr. Ryan who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE; *Third Amended Complaint* at ¶131

15. Additionally, Triad is alleged to have breached its common law duties to plaintiff

by:

A. negligently managing its general business operations resulting in Triad's assignment of the duties of designing the MSE and overseeing its construction to Mr. Fogarty who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE; *Third Amended Complaint* at ¶132

B. assigning the duties of designing the MSE and overseeing its construction to Mr. Fogarty who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE; *Third Amended Complaint* at ¶133

C. failing to supervise and oversee Mr. Fogarty's work on the MSE; *Third Amended Complaint* at ¶134

D. failing to ensure that Mr. Fogarty's MSE design conformed to accepted engineering standards and safeguarded the life, health, property and welfare of the public; *Third Amended Complaint* at ¶135

E. negligently managing its general business operations resulting in the assignment of Mr. Fogarty's duties of designing the MSE and overseeing its construction to Mr. Ryan who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE; *Third Amended Complaint* at ¶136

F. assigning Mr. Fogarty's duties of designing the MSE and overseeing its construction to Mr. Ryan who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of

the MSE; *Third Amended Complaint* at ¶137

- G. failing to supervise and oversee Mr. Ryan’s work on the MSE; *Third Amended Complaint* at ¶138
- H. failing to ensure that Mr. Ryan’s MSE design modifications conformed to accepted engineering standards and safeguarded the life, health, property and welfare of the public; *Third Amended Complaint* at ¶139
- I. negligently managing its general business operations resulting in Triad’s failure to inform the plaintiff that Triad assigned the duties of designing the MSE and overseeing its construction to Mr. Fogarty who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE; *Third Amended Complaint* at ¶140
- J. negligently managing its general business operations resulting in Triad’s failure to inform plaintiff that Triad assigned Mr. Fogarty’s duties of designing the MSE and overseeing its construction to Mr. Ryan, who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE. *Third Amended Complaint* at ¶141.

16. The Westfield Policy provides general liability coverage for those sums which Triad becomes legally obligated to pay as damages because of “bodily injury” or “property damage” caused by an “occurrence” to which the Policy applies. In addition, the Westfield Policy contains the following exclusions, which expressly exclude coverage for professional services:

* * *

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - DESIGNATED PROFESSIONAL SERVICES

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Description of Professional Services:
1. ENGINEERING SERVICES

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

With respect to any professional services shown in the Schedule, the following exclusion is added to Paragraph 2., **Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability** and Paragraph 2., **Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability**:

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” due to the rendering of or failure to render any professional service.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage”, or the offense which caused the “personal and advertising injury”, involved the rendering or failure to render any professional service.

* * *

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**EXCLUSION - ENGINEERS, ARCHITECTS OR SURVEYORS
PROFESSIONAL LIABILITY**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., **Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability** and Paragraph 2., **Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability**:

This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

Professional services include:

1. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and
2. Supervisory, inspection, architectural or engineering activities.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by

that insured, if the “occurrence” which caused the “bodily injury” or “property damage”, or the offense which caused the “personal and advertising injury”, involved the rendering of or failure to render any professional services by you or any engineer, architect or surveyor who is either employed by you or performing work on your behalf in such capacity.

* * *

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION - CONTRACTORS - PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

The following exclusion is added to Paragraph 2., **Exclusions of Section I - Coverage A - Bodily Injury And Property Damage Liability** and Paragraph 2., **Exclusions of Section I - Coverage B - Personal And Advertising Injury Liability**:

1. This insurance does not apply to “bodily injury”, “property damage” or “personal and advertising injury” arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:
 - a. Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; or
 - b. Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with construction work you perform.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the “occurrence” which caused the “bodily injury” or “property damage”, or the offense which caused the “personal and advertising injury”, involved the rendering of or failure to render any professional services by you or on your behalf with respect to the operations described above.

2. Subject to Paragraph 3. below, professional services include:
 - a. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and
 - b. Supervisory or inspection activities performed as part of any related architectural or engineering activities.

3. Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor.

* * *

17. The Westfield Policy also includes Umbrella Coverage, which likewise excludes coverage for injury or damage related to or arising from Triad's rendering or failure to render any professional service including, but not limited to, preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications by any architect, engineer or surveyor; inspection, supervision, quality control, architectural or engineering activities done by Triad or on behalf of a project on which Triad serves as a construction manager; and engineering services, including related supervisory or inspection services.

18. The exclusions for professional services in the Umbrella Coverage Form of the Westfield Policy, like the exclusions in the Policy's CGL coverage, also include the following provision:

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage", involved the rendering of or failure to render any professional service.

19. Prior to beginning the project, Triad entered into a written "Agreement for Professional Services" with the Airport which provided for the Airport's retention of Triad to provide professional engineering and design services on the runway extension project.

20. The engineering and design services to be provided were set forth in Section I-Design Services, Section II-Inspection Services, Section III-Record Drawing Services, and in

Section IV-Additional Services which may be requested by Owner (Airport Authority) including studies, reports, design documents, renderings, exhibits, serving as an expert witness and providing construction staking beyond survey baselines and bench marks.

21. As alleged in the *Third Amended Complaint*, Patrick Fogarty was Triad's engineer who signed off on the plans for the project. It is undisputed that Mr. Fogarty is an engineer and that he is a 1985 graduate of West Virginia Institute of Technology, with a B.S. in civil engineering.

22. Mr. Fogarty was employed at Triad at the time Triad entered into the subject contract was entered into with the Airport and he confirmed in his deposition that the Agreement set forth all the duties and obligations of Triad with respect to the project, and there were no other writings that changed the duties or obligations of Triad to the Airport.

23. While Mr. Fogarty signed off on the plans for the RSS/MSE, he testified that he relied on other individuals at Triad for assistance. In particular, Parviz Jalali, a professional engineer and manager of the geotechnical department at Triad, provided assistance with the geotechnical aspects of the project. Likewise, Larry Nottingham, P.E., M.S., Ph.D., developed the exploration plan and laid out borings on the hillside on which the slope was eventually constructed. Mr. Fogarty also testified that Lenny Corns and Dane Ryan were involved in design drafting and that others from Triad's drilling department and laboratory also had a role in the project.

24. Dane Ryan was, at the time of the development of the project, a senior designer for Triad. He testified that he worked with Patrick Fogarty on completing the plans and construction drawings and recalled working with the geotechnical team on the project. *Id.* at 75.

Mr. Ryan also testified that he ran ReSSA software to calculate the factor of safety for the project-internal stability, external stability and pull-out and assisted in monitoring the movement of the hillside.

25. Dr. Nottingham testified that Triad assigned projects to personnel in one of two ways: either based on pre-existing client relationships or the needs of the particular project. Dr. Nottingham further testified that Pat Fogarty was assigned to the Runway A Extension Project because of his pre-existing relationship with the Airport and that he did not know if anyone at Triad ever checked to see if Pat Fogarty had the requisite skill and expertise to undertake the Project.

26. In its *Motion for Summary Judgment on Plaintiff's Claim For Declaratory Judgment Against Defendant Westfield Insurance Company* (Transaction ID 62263384), the Airport asked the Court to find that its claims arise from Triad's ordinary administration of its business and the negligent selection of the individuals assigned to the project.

27. In its *Response and Cross-Motion* (Transaction ID 62314280), Westfield asserts that all of the Airport's claims against Triad arise from Triad's professional services, which are expressly excluded under Westfield's Policy. In particular, Westfield asserts that selecting the employees involved in the project was part of the professional services Triad provided and asks the Court to deny the Airport's *Motion* and instead grant Westfield summary judgment based upon the exclusions for claims arising from Triad's professional services.

28. Pursuant to the Court's Scheduling Order, the parties have now completed discovery related to the declaratory coverage issues and this issue is ripe for consideration by the Court.

CONCLUSIONS OF LAW

1. Summary judgment is mandated where “there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law.” *W. Va. R. Civ. P. 56(c)*; *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 58, 59, 459 S.E.2d 329, 335, 336 (1995) (citation omitted); *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

2. To defeat summary judgment, an opposing party “may not rest upon [its] mere allegations[,]” *W. Va. R. Civ. P. 56(e)*, but must “by affirmative evidence demonstrate that a genuine issue of fact exists.” *Painter*, 192 W.Va. at 195 n. 5, 451 S.E.2d at 761 n. 5 (1994).

3. Under West Virginia law, liability insurance creates two (2) duties for the insurer: the duty to defend and the duty to provide coverage. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 194, 342 S.E.2d 156 (1986). The insurer must defend its insured if the allegations and the facts behind them “are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy.” *Id.*; *Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 378, 376 S.E.2d 581 (1988) (citing *Pitrolo*); *See also* Syl. Pt. 6, *Farmers & Mechs. Mut. Ins. Co. v. Cook*, 210 W. Va. 394, 557 S.E.2d 801 (2001). The insurer must defend all the claims if its policy could apply to any of them, but it “need not defend ... if the alleged conduct is entirely foreign to the risk insured against.” *Leeber*, 180 W. Va. at 378.

4. Clear insurance policy provisions are to be applied. *Cook*, 210 W. Va. at Syl. Pt. 5 (citing Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33 (1986)); *Green v. Farm Bureau Mut. Auto Ins. Co.*, 139 W. Va. 475, 80 S.E.2d 424, 426 (1954). An insurer may validly limit coverage, and policy provisions that limit coverage are placed in a policy for that very reason. *Green*, 80 S.E.2d at 426. Insurance coverage is a matter of law if

material facts are undisputed. Syl. Pt. 1, *Tennant v. Smallwood*, 211 W. Va. 703, 568 S.E.2d 10 (2002).

5. The facts material to insurance coverage in this case are the Westfield Policy's terms and the Airport's allegations in its *Complaint* and *Amended Complaints*. See *Leeber*, 376 S.E.2d at 584-85.

6. The Westfield Policy expressly excludes claims arising out of Triad's professional services.

7. The Supreme Court of Appeals of West Virginia recognized exclusions for professional services are valid in the case of *Webster CTY. Solid Waste Auth. v. Brackenrich & Assocs., Inc.*, 217 W. Va. 304, 617 S.E.2d 851 (W.Va. 2005), overruled on other grounds by *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W.Va. 470, 745 S.E.2d 508 (2013):

The inclusion in a standard commercial general liability policy of language that excludes coverage for "professional liability" is specifically designed to shift the risk of liability for claims arising in connection with the performance of professional services away from the insurance carrier and onto the professional. Professionals wishing to insure themselves against the risk of liability in connection with the rendering of their professional services may opt to purchase separate insurance coverage, known as an errors and omissions policy.

Webster CTY. Solid Waste Auth., at 311,858.

8. In *Webster CTY. Solid Waste Auth.*, the Court dealt with arguments similar to those raised by the Airport and expressly rejected them because the claims were clearly based on the provision of professional services, regardless of how they were described:

Notwithstanding the fact that the Agreement pursuant to which Brackenrich was employed specifically delineates inspection of the construction-related work as one of the "engineering services" to be provided, the Authority suggests that such inspection services are outside the ambit of engineering services. Arguing that the inspections involved did not require the professional acumen of an engineer but

only the non-professional acumen of an unskilled employee, the Authority posits that such inspections cannot be tied to the engineering duties specified in the Agreement. Given that the Agreement clearly envisioned and required that the necessary inspections related to the landfill construction would be performed by Brackenrich-an engineering firm-we find this argument to be without merit. To suggest that no professional training was required to perform these construction-related inspections simply defies logic as the inspections of the materials being used and the work being performed clearly were related to the engineering duties specified under the Agreement.

All of the allegations of negligence related to the provision of professional services provided by Brackenrich are framed in terms of duties owed by an ordinary, reasonable, prudent engineer. Clearly, the Authority has based its claim against Brackenrich on the negligent provision of professional services and not the negligent provision of services unrelated to the Agreement under which Brackenrich was hired for its professional engineering services. While the Authority suggests that the negligence averments contained in the complaint are both professional and non-professional in nature, the only averments that it suggests qualify as non-professional are the inspection-related allegations. Given the clear obligation to provide such inspection services as part of the duties delineated in the “Agreement for Engineering Services,” we do not find the Authority's position on this issue to be persuasive.

Webster CTY. Solid Waste Auth., at 312, 859.

9. The Court in *Webster CTY. Solid Waste Auth.* further stated:

Even if a professional utilizes the services of a non-professional in connection with the performance of its contractual services, the professional nonetheless remains the liable party for the work performed. To suggest that the use of any non-professional to perform some part of the professional undertakings contemplated in a professional services contract somehow alters the nature of the services being performed is simply untenable.

Webster CTY. Solid Waste Auth., at 313, 860 n.11. Therefore, any assertion that coverage exists because Triad used employees who were not engineers to perform certain work is without merit.

10. The Supreme Court of Appeals of West Virginia has also found that professional services exclusions are unambiguous and should be applied even when the alleged negligent act was hiring someone to perform the work. For example, in *State Auto. Mut. Ins. Co. v. Alpha*

Eng'g Servs., Inc., 208 W. Va. 713, 542 S.E.2d 876 (W.Va. 2000), the Court noted:

The parties in this action dispute the application of the “professional services” exclusion contained in State Auto's liability policy. Mossy Eagle argues that while it was contractually obligated to provide the surveys, maps, and engineering services under dispute in Brock Mining's complaint, it did not in fact render these professional services. **Instead, Mossy Eagle insists that Alpha provided the services, that Mossy Eagle's only potentially negligent act was its hiring of Alpha as its agent, and that the professional services exclusion therefore operates only against Alpha. We disagree.**

The exclusion at issue in this case plainly excludes any coverage for “[p]reparing, approving, or failing to prepare or approve maps, drawings, opinions, reports, surveys, change orders, designs or specifications” and “[s]upervisory, inspection or engineering services.” The complaint filed by Brock Mining alleges that Mossy Eagle was obligated to provide these professional services, and that its agent, Alpha, was negligent in providing these professional services. In sum, Mossy Eagle provided the contracted-for professional services to Brock Mining through the use of an agent. **The language of the exclusion appears to be unambiguous, and in accordance with our prior holdings, must be applied and not construed.**

We therefore find that the circuit court did not err in declaring that the professional services exclusion applied to the actions alleged in Brock Mining's complaint. The circuit court correctly applied the exclusion to the actions alleged in Brock Mining's complaint, and properly concluded that State Auto had no duty to defend or provide coverage under its liability policy for Mossy Eagle's and Alpha Engineering's negligent provision of surveys, maps and engineering services to Brock Mining.

State Auto. Mut. Ins. Co. v. Alpha Eng'g Servs., Inc., at 716-17, 879-80 (Emphasis supplied)

11. While the Airport alleged in its *Amended Complaints* that Triad and others were negligent in constructing and supervising the construction of the drainage system, the Miramesh GR and the Miragrid on the project, the Airport may not rest on its allegations alone, and has presented no evidence to the Court that Triad participated in or supervised the construction of the drainage system, Miramesh or Miragrid at Yeager Airport. In contrast, Westfield has directed the Court to the sworn testimony of Pat Fogarty that Triad's services in connection with the

project at Yeager Airport were set forth solely in Triad's Agreement for Professional Services with the Airport.

12. The Airport's assertion that the duty to select competent personnel and keep the Airport informed about the nature of the employees it has selected was not a "professional service," and its reliance on the case of *Boggs v. Camden-Clark Mem'l Hosp. Corp.*, 225 W. Va. 300, 693 S.E.2d 53 (W.Va. 2010) also fails under West Virginia law. In that regard, the Court in *Boggs* expressly rejected the argument that the professional services exclusion was ambiguous because the term professional services was not defined, and found that any claims arising from services which required specialized knowledge or skill are excluded. In doing so, it discussed the long line of cases finding such exclusions to be enforceable and noted:

In view of the foregoing authorities, we now hold that the term "professional services" contained in a commercial general liability policy, when not otherwise specifically defined, denotes those services rendered by someone with particularized knowledge or skill in his or her chosen field. *See Atlantic Lloyd's Ins. Co. of Texas v. Susman Godfrey, L.L.P.*, 982 S.W.2d 472, 476-77 (Tex. App.1998) ("To qualify as a professional service, the task must arise out of acts particular to the individual's specialized vocation. We do not deem an act a professional service merely because it is performed by a professional. Rather, it must be necessary for the professional to use his specialized knowledge or training."). In the instant proceeding, contrary to the position taken by Mr. Hayhurst and Mr. Boggs, the term "professional services" used in the policy is not ambiguous.

Boggs v. Camden-Clark Mem'l Hosp. Corp., at 309, 62.

13. In support of its position, the Airport has cited a number of decisions from other jurisdictions where particular claims were found not to involve "professional services." However, a review of those decisions reveals that the claims are distinguishable from the Airport's claims in this case.

14. The Airport's assertion that coverage exists under the doctrine of "reasonable expectations" also fails as a matter of law. In that regard, the West Virginia State Supreme Court of Appeals noted, in *National Mut. Ins. Co. v. McMahon & Sons Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987), that "the doctrine of reasonable expectations is limited to those instances . . . in which the policy language is ambiguous." *McMahon* at 742, 356 S.E.2d at 496, *overruled on other grounds by Parsons v. Halliburton Energy Serv., Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2016). As discussed above, the professional liability exclusion at issue has been found to be unambiguous many times. The exclusion clearly indicates that coverage does not apply to claims arising from the insured's professional services, "even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured."

15. In this case, discovery has shown that all of Triad's work and decisions were directed toward its completion of the engineering and design work associated with the Airport's runway project, and that the only relationship the Airport had with Triad was the relationship between a professional engineering firm and a paying customer. Because discovery has shown that all of the Airport's claims arise from that professional relationship and the professional services Triad was rendering, none of the claims asserted by the Airport are covered under the Westfield Policy.

16. *Rule 56(c)* of the *West Virginia Rules of Civil Procedure* governs requests for summary judgment and provides: "The judgment sought shall be rendered forthwith 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.”

17. Discovery is now completed in this case, and establishes there is no genuine question of fact with respect to coverage under the subject Westfield Policy, and Westfield is entitled to summary judgment that coverage for the Airport’s claims is excluded under the plain and unambiguous language of the subject Westfield Policy.

18. Accordingly, the Court concludes that Plaintiff’s *Motion for Summary Judgment on Plaintiff’s Claim for Declaratory Judgment Against Defendant Westfield Insurance Company* (Transaction ID 62263384) should be **DENIED** and that Westfield’s *Cross-Motion for Summary Judgment on Coverage Issues* (Transaction ID 62314280) should be **GRANTED**.

Having made the foregoing Findings of Fact and Conclusions of Law, the Court hereby **ORDERS** Plaintiff’s *Motion for Summary Judgment on Plaintiff’s Claim for Declaratory Judgment Against Defendant Westfield Insurance Company* (Transaction ID 62263384) is **DENIED**, and Westfield’s *Cross-Motion for Summary Judgment on Coverage Issues* (Transaction ID 62314280) is **GRANTED**.

The Court **ORDERS** that, with respect to the issue of coverage under the Westfield Policy issued to Triad, this is a final Order pursuant to *Rule 54(b)* of the *West Virginia Rules Of Civil Procedure*, as it ends the litigation on the merits concerning the issue of coverage under said Westfield Policy. See *Durm v. Heck’s Inc.*, 184 W.Va. 562, 401 S.E.2d 908 (1991). The parties may appeal this Order, within thirty (30) days after entry, to the Supreme Court of Appeals of West Virginia, as there is no just reason for delay.

To all of which the Court does note the objections and exceptions of the Plaintiff.

It is so **ORDERED**.

ENTER: February 4, 2019.

/s/ Derek C. Swope
Lead Presiding Judge
Yeager Airport Litigation