

15-0968

08/28/15

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

DAVID CHEDESTER and JOYCE CHEDESTER,

Plaintiffs,

v.

//

CIVIL ACTION NO.: 15-C-325

ERIE INSURANCE PROPERTY and CASUALTY COMPANY, et al.

Defendants

ORDER

On August 20, 2015, came the Plaintiffs by counsel, Todd Wiseman and James Stealey, and the Defendant, Erie Insurance Property and Casualty Company ("Erie"), by counsel, Laurie Barbe and Chelsea Prince, for hearing upon Defendant's Motion to Dismiss pursuant to Rule 12(b) (6), on grounds that Plaintiffs' claims as to it are time barred by the applicable statute of limitations and therefore fail to state a claim upon which relief may be granted.

Statement of Facts as contained in the record and the subject insurance policy:

The Chedesters submitted their claims to Erie under their home insurance policy on or about April 24, 2013. They claimed that heavy snow during the preceding winter caused damage to their home. They retained a contractor to review the damages. Erie retained a structural engineer who inspected the property and reported that improper construction methods and poor workmanship as well as heavy snow loads caused the home's damage. Erie

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CAROLE JONES
CLERK CIRCUIT COURT

then informed the Chedesters by letter of May 10, 2013, that their property damage claim was denied:

Based on the limitations and exclusions cited and other limitations and exclusions which may also be applicable, the Erie Insurance Property and Casualty Company has taken the position that the damage to the roof and the front wall are specifically excluded under your policy and Erie Insurance Property and Casualty Company will be unable to assist you with repairs to your home.

Further discussions between the Chedesters and Erie took place and the homeowners provided additional information to the insurer to no avail as Erie again informed the Chedesters on June 12, 2013, that their claims were denied. On November 11, 2013, the Chedesters had their home inspected by an engineer whose findings were submitted to Erie. Erie again denied the claims.

The Chedesters filed a Complaint on June 3, 2015, alleging and seeking relief against Erie for Breach of Contract (Count 1), Reasonable Expectations (Count 2), Unfair Trade Practices Act Violations (Count 3), Bad Faith – Common Law Violations (Count 4) and Vicarious Liability of Erie for the Conduct of individual defendant Bruce Hunter (Count 7). Erie's motion to dismiss entails Counts 1 through 4.

Standard governing the court's disposition of a motion to dismiss pursuant to Rule 12(b)(6):

The law is clear that a motion to dismiss for failure to state a claim should only be granted where it appears beyond doubt that the plaintiffs can prove no set of facts in support of their claims which would entitle them to relief.

Disposition of the motion as to Counts 1 and 2 (coverage claims):

The subject insurance policy provides for a limitation on the time in which suit may be brought in connection with a first-party dispute:

We [Erie] may not be sued unless there is full compliance with all the terms of this policy. Suit must be brought within one year (Maryland – three years) after the loss or damage occurs.

Erie argues that this provision is controlling and as the plaintiffs' loss occurred no later than April 2013, coverage was denied on May 10, 2013, and plaintiffs' complaint was filed on June 3, 2015, their claims are time barred and properly dismissed.

The plaintiffs contend that W.Va. Code 33-6-14 voids the limiting provisions of the policy. In pertinent part the statute declares:

No policy delivered or issued for delivery in West Virginia and covering a subject of insurance resident, located, or to be performed in West Virginia, shall contain any condition, stipulation or agreement . . . preventing the bringing of an action against any such insurer for more than six months after the cause of action accrues, or limiting the time within which an action may be brought to a period of less than two years from the time the cause of action accrues in connection with all insurances other than marine insurances . . . Any such condition, stipulation or agreement shall be void, but such voidance shall not affect the validity of the other provisions of the policy. This section shall not apply to the standard fire insurance policy.

Erie cites *Sizemore v. State Farm*, 505 S.E.2d 654 (1998), in support of its argument that the subject policy is a "standard fire insurance policy" as defined by W.Va. Code 33-17-2 and is therefore exempt from the provisions of 33-6-14. The argument is specious. If inclusion of fire

insurance in a multiple line casualty policy transforms the entire policy into a “standard fire insurance policy” the statute is eviscerated.

The clear design and intent of 33-6-14 was to afford a degree of protection for insureds from what the legislature deemed overly restrictive time limitations while treating marine insurances somewhat differently and exempting the “standard fire insurance policy”. Attaching fire insurance to other kinds of insurance which the statute clearly affects cannot alter the protections afforded by the statute.

Exclusion of the “standard fire insurance policy” from 33-6-14 simply acknowledges that in the statutory framework shaping West Virginia insurance law, fire insurance is treated separately in article 17 which establishes a standard for such policies. Hence, “standard fire policy” is a term of art rooted in the historical New York standard fire policy as entailed in 33-17-2.

It is significant and helpful to understanding the statutory framework as a whole to note that 33-17-2 declares that its provisions do not apply to multiple line coverages with casualty insurance combined with fire insurance if “*the fire portion thereof*” contains “language at least as favorable to the insured as the applicable portions of the standard fire policy”. Thus, it is sensible in order to maintain the distinctive elements respecting fire coverage in the statutory insurance framework and to avoid confusion which may arise from different statutes addressing the same subject matter, that 33-6-14 simply excludes “the standard fire insurance policy” from its provisions.

The *Sizemore* decision also attempted to resolve any confusion arising from the two statutes being examined (evidently not with universal success) by finding and concluding:

Accordingly, we find that because the Legislature saw fit to allow insurance providers to write multiple line policies containing fire insurance coverage conforming to the standard fire policy, the Legislature also saw fit to allow *fire insurance portions* of multiple line policies to contain the same limitation of action provision as the standard fire policy to which they must conform.

We conclude, therefore, that the term, "standard fire insurance policy" in W.Va. Code 33-6-14 (1957) includes *the fire portion* of approved multiple line insurance policies which combine casualty and fire insurance coverage, as provided for in W.Va.Code 33-17-2 (1957), so that *the fire portion* of approved multiple line policies is exempt from the two year requirement for limitation of action provisions in insurance contracts set out in W.Va.Code 33-6-14 so long as the policy language is at least as favorable to the insured as the applicable portions of the standard fire policy...

There is a one year statute of limitations under the standard fire insurance policy which would apply to *the fire portion* of a multiple line policy but would not apply to other lines of such policy. Accordingly, the court finds and concludes that the statute of limitations for plaintiffs' breach of contract and reasonable expectations claims is ten years as each of the claims sounds in contract.

Disposition of the motion as to Counts 3 and 4 - the Unfair Trade Practices Act – W.V. Code 33-11-1 et seq. and common law bad faith (See, *Hayseeds, Inc. v. State Farm Fire & Cas.*, 177 W.Va. 323, 352 S.E.2d 73 (1986) and progeny):

The coverage claims in Counts 1 and 2 are properly bifurcated from the Unfair Trade Practices Act claim in Count 3 and the common law (*Hayseeds*) bad faith claim in Count 4. See, *Beasley v. Allstate*, 184 F. Supp. 2d 523 (2002). It is well settled that these claims for relief do not accrue until the underlying coverage issues are resolved. Should plaintiffs prevail on their coverage claims a one year statute of limitations applies to these derivative claims.

The Court notes that plaintiffs' claims in Count 5 and Count 6 are against defendants other than Erie and the vicarious liability claim arising from the alleged conduct of defendant Hunter is not part of Erie's motion.

It is therefore **ORDERED** that Erie's motion to dismiss Count 1 and Count 2 is **DENIED** and the motion to dismiss Count 3 and Count 4 is **DENIED** without prejudice. It is further **ORDERED** that the coverage claims in Counts 1 and 2 be and are hereby **BIFURCATED** from the Unfair Trade Practices claim in Count 3 and from the common law bad faith claim in Count 4.

The Clerk shall mail a copy of this Order to all counsel of record.

ENTER:

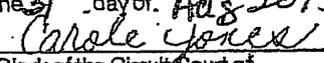


J.D. BEANE, Judge

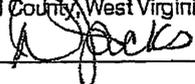
STATE OF WEST VIRGINIA
COUNTY OF WOOD, TO-WIT:

I, CAROLE JONES, Clerk of the Circuit Court of Wood County, West Virginia, hereby certify that the foregoing is a true and complete copy of an order entered in said Court, on the 27 day of AUG 2015, as fully as the same appears to me of record.

Given under my hand and seal of said Circuit Court, this the 31 day of AUG 2015



Clerk of the Circuit Court of
Wood County, West Virginia

By: , Deputy

IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

DAVID CHEDESTER and JOYCE CHEDESTER,
Individually and As Husband and Wife,

Plaintiffs,

v.

Civil Action No.: 15-C-325
Judge: Honorable _____

ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,
a Pennsylvania corporation, BRUCE HUNTER, an
employee of Erie Insurance Property and Casualty Company
and BARRY DICKSON, Professional Engineer, LLC,

Defendants.

COMPLAINT

Comes now the plaintiffs, David Chedester and Joyce Chedester (sometimes referred to as "Chedesters" and/or "plaintiffs") and for their Complaint against the Erie Insurance Company (sometimes referred to as "Erie"), Bruce Hunter (sometimes referred to as "Hunter") and Barry Dickson (sometimes referred to as "Dickson" and the plaintiffs allege as follows:

PREFACE

1. David Chedester and Joyce Chedester are, at all relevant times herein, residents of Preston County, West Virginia.
2. At all relevant times herein, Chedester has owned real property located at 5288 Gladesville Road in Independence, WV.
3. The subject property includes an insured two story wood framed house with an asphalt shingle roof.
4. At all relevant times herein, all referenced property is insured by Erie Insurance.
5. Erie Insurance Company is a foreign insurance company domiciled in the State of Pennsylvania and is licensed to sell insurance and adjust all insurance claims which arise in all counties within the State of West Virginia, under any policy issued by Erie.

FILED IN OFFICE

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CAROLE JONES
CLERK CIRCUIT COURT

6. Erie's claims operation center, where all claims arising in the State of West Virginia are adjusted, claims adjusters are supervised and claims management decisions are made, is located in Parkersburg, Wood County, West Virginia.

7. Bruce Hunter is an Erie claims employee, who was supervised from Erie's Wood County, West Virginia claims operation.

8. Barry Dickson, LLC, is a limited liability company, domiciled in the State of West Virginia, whose primary purpose is to provide engineering services to its clientele.

9. Upon information and belief, Barry Dickson, LLC, is located in Morgantown, West Virginia.

FACTS OF LOSS

10. During the 2012 winter, snow fall caused damage to plaintiffs' roof in Independence, WV.

11. The plaintiffs' structure was insured by an Erie policy.

12. In accordance with the terms of the policy, the plaintiffs' timely submitted their claims to Erie for damages to the insured property on or about April 24, 2013.

13. As an effort to mitigate their damages, the plaintiffs retained a contractor to review the damage to their home and engaged in efforts to make repairs.

14. It was the contractor's opinion that the damage extended to the roof, walls and siding and that it was caused by the weight of snow.

15. Despite the opinion from the contractor and the fact that heavy snow was a well-documented event, Erie questioned the causation of damage to the home structure and it advised the plaintiffs that it required more time to render any decisions related to the status of plaintiffs' claims for the roof, walls and siding of the insured property until causation and damages could be confirmed, given the extent of the damages.

16. Specifically, on May 10, 2013, Erie adopted its first coverage position, despite documentation of the existence of severe weather, it was not certain that damage to the insured property's roof, walls and siding was caused by the severe storms and/or the weight of snow.

17. Despite its knowledge of severe weather and knowledge of the fact that the costs to repair the plaintiffs' home were substantial, Erie looked elsewhere for excuses and reasons not to pay the claim.

18. Erie's adjuster, Bruce Hunter inspected the plaintiffs' home.

19. Erie then retained Dickson to inspect the plaintiffs' home.

20. Allegedly, the purpose of Erie's inspection of the roof was to determine the cause of the damage.

21. Dickson's inspection of the home occurred on April 26, 2013.

22. The findings of the inspection of the roof, despite knowledge of prior severe weather, was that the damage was alleged to have been caused by "improper construction methods, poor workmanship, and heavy snow loads" due to what was classified by the defendants as "causing the bulging, expansion, and settling of the roof and walls" and losses of these types are excluded.

23. Based on the report issued by Dickson, Erie and Hunter adopted the claims decision to deny the plaintiffs' claim for coverage to his roof, walls and siding on or about May 10, 2013, for the first time.

24. The precise nature of the relationship between defendant Erie, defendant Hunter and defendant Barry Dickson are unknown to the plaintiffs.

25. Plaintiffs provided any and all cooperation which Erie could have conceivably required of them.

26. The plaintiffs obtained estimates which properly documented the cost to repair the damage caused to their home by the weight of snow and severe weather and they timely presented those estimates to Erie.

27. Throughout the life of the claim, Erie completely rebuffed any measures to assist the plaintiffs and because of their wrongful claims position which was based upon the conduct of Erie, Hunter and Dickson.

28. Despite receiving information which conflicts with Erie's wrongful claims position, Erie has denied the plaintiffs' claims on multiple occasions again denied the plaintiffs' claims on June 12, 2013.

29. Plaintiffs retained the services of David B. Friend, ICC Certified, to determine the cause of the damage to the roof.

30. On November 11, 2013, the plaintiffs' insured property was inspected by David B. Friend, ICC Certified.

31. Mr. Friend's findings confirmed that the damage to the plaintiffs' roof was due to ridge line failure due to excessive snow load.

32. As required by the policy, the plaintiffs promptly furnished Erie with a copy of Mr. Friend's report.

33. Erie again denied the plaintiffs' claims and summarily dismissed the conclusions from Mr. Friend's report and clearly stated that it relied upon the opinions obtained from Dickson in doing so.

34. The plaintiffs retained the services of Eagle Construction, LLC to commence repairs on their home before more damage occurred.

35. To date, the cost of repairs has been completely borne by the Plaintiffs and there remains additional work to be performed in order to complete all repairs caused by the weight of snow and severe weather which Erie has wrongfully denied.

36. Damage caused to a home by severe weather, including but not limited to the weight of snow, is specifically covered under the terms of the subject Erie policy.

37. Erie, as the date of this filing, has not offered to pay the plaintiffs any amount of money for damage to the roof, walls and siding of the plaintiffs' insured home.

COUNT I
BREACH OF CONTRACT - ERIE

38. Plaintiffs hereby restate and re-allege each and every allegation contained in the preceding paragraphs of this Complaint as though the same were fully incorporated in parts of all Counts of this Complaint.

39. Because of defendant Erie's conduct, plaintiffs were forced to obtain the assistance of counsel.

40. Despite paying value for the subject policy and complying with all conditions and terms set forth in the subject policy, the plaintiffs have received absolute assurance from Erie that it has no intention of paying any element of the loss which comprises the claim.

41. Erie has acted in complete and utter breach of its contractual obligations owed to the plaintiffs.

COUNT II
CLAIMS AGAINST ERIE
FOR CHEDESTER'S REASONABLE EXPECTATIONS

32. Plaintiffs hereby restate and re-allege each and every allegation contained in the preceding paragraphs of this Complaint as though the same were fully incorporated in parts of all Counts of this Complaint.

34. Plaintiffs allege that to the extent Erie relied upon any policy provision or exclusion to deny payment, that the same policy provision or exclusion is ambiguous, either patently or latently.

35. Plaintiffs reasonably expected that the subject policy of insurance would provide coverage to repair their home when they needed Erie's help.

COUNT III
UNFAIR TRADE PRACTICE ACT VIOLATIONS AGAINST ERIE

36. Plaintiffs hereby restate and re-allege each and every allegation contained in the preceding paragraphs of this Complaint as though the same were fully incorporated in parts of all Counts of this Complaint.

37. Upon information and belief, Erie knowingly, wrongfully, intentionally and maliciously refused to act in conformity with the rulings of the West Virginia Supreme Court of Appeals in the manner in which it treated the plaintiffs and handled their first-party claim.

38. Upon information and belief, Erie has wrongfully, intentionally and maliciously breached its duties to the plaintiffs, including refusals or failures to conduct a reasonable investigation of the plaintiffs' claim.

39. Upon information and belief, Erie knew or should have known that plaintiffs' damages arising from the weight of snow and severe weather were substantial losses and were covered within the policy limits of available coverages to the plaintiffs from their Erie insurance policy.

40. Upon information and belief, Erie has wrongfully, intentionally and maliciously failed and/or refused to conduct a reasonable investigation of all aspects of plaintiffs' claim, and further

refused to conduct themselves in conformity with the directives of the West Virginia Insurance Commissioner's Office.

41. Upon information and belief, Erie, its officers, agents and employees have knowingly, wrongfully, intentionally and maliciously handled plaintiffs' claim by only collecting the minimum facts necessary to support its wrongful, intentional and malicious coverage position, and further, refused to timely review the relevant body of law applicable to plaintiffs' claims.

42. Upon information and belief, Erie, its officers, agents and employees have knowingly, wrongfully, intentionally and maliciously engaged in conduct that is unconscionable, deceptive, wrong and outrageous with regard to its coverage positions that are contrary to the laws of this State, the rulings of the West Virginia Supreme Court of Appeals and defendant Erie's own internal claims handling guidelines or directives.

43. Upon information and belief, Erie its officers, agents and employees committed acts and/or omissions or failures described herein, knowingly, wrongfully, intentionally and maliciously, and as part of a general business practice of violating the provisions of West Virginia Code § 33-11-4(9).

44. Upon information and belief, Erie has committed these acts and other acts not denominated above, which constitute numerous violations of the Insurance Unfair Trade Practices Act, West Virginia Code § 33-11-4(9), titled Unfair Claims Settlement Practices.

45. Upon information and belief, the wrongful intentional and malicious acts, omissions and/or conduct of Erie has compelled plaintiffs to institute litigation and suffer hardship in many ways, including, but not limited to, delay, financial hardship, embarrassment, annoyance and inconvenience.

46. Upon information and belief, Erie has violated West Virginia's Unfair Claims Settlement Practices Act in handling plaintiffs' claim and has done so with respect to the claims of others with such frequency so as to constitute a general business practice.

47. Upon information and belief, Erie has acted willfully, wantonly, maliciously and with reckless disregard for the civil rights of plaintiffs. Said acts, conduct and/or omissions were done with criminal indifference so as to permit an award of punitive damages.

COUNT IV
BAD FAITH - COMMON LAW VIOLATIONS AGAINST ERIE

48. Plaintiffs hereby restate and re-allege each and every allegation contained in the preceding paragraphs of this Complaint as though the same were fully incorporated in parts of all Counts of this Complaint.

49. Upon information and belief, Erie has knowingly, wrongfully, intentionally and maliciously refused to act in conformity with the rulings of the West Virginia Supreme Court of Appeals in the manner in which it treated plaintiffs and handled their first-party claim.

50. Upon information and belief, Erie has acted willfully, wantonly, maliciously and in reckless disregard for the civil rights of the plaintiffs. Said acts, conduct and/or omissions were done with criminal indifference so to permit an award of punitive damages.

COUNT V
CLAIMS AGAINST DICKSON FOR HIS INTENTIONAL AND TORTIOUS INTERFERENCE WITH PLAINTIFFS' CONTRACTUAL RELATIONSHIP WITH ERIE

51. Plaintiffs hereby restate and re-allege each and every allegation contained in the preceding paragraphs of this Complaint as though the same were fully incorporated in parts of all Counts of this Complaint.

52. Upon information and belief, defendant Dickson is an engineer licensed to perform duties of an engineer in the State of West Virginia.

53. Upon information and belief, Dickson was retained by Erie to investigate causation issues related to damage to plaintiffs' insured property, insured by Erie.

54. Upon information and belief, Erie has retained the services of Dickson in other claims arising in the State of West Virginia.

55. Upon information and belief, Erie compensated Dickson to conduct an investigation of the plaintiffs' insured property and the causation of the loss which is the subject of this litigation.

56. At the time of acceptance of the assignment from Erie, Dickson knew or should have known that the property that was the subject of his assignment from Erie was actually insured by an insurance policy issued to the plaintiffs by Erie.

57. With knowledge of the existence of an insured contract between Erie and the plaintiffs, and knowledge that the extent of damage to the insured property was substantial, Dickson intentionally proceeded to conduct his inspection of the insured property in such a way as to assist Erie in avoiding its obligation to fulfill its contractual promises to the plaintiffs, thereby preventing the plaintiffs from enjoying the benefit of their bargain with Erie and thus assisting Erie with avoiding the payment of a claim.

58. All the while, during the process of conducting his inspection of the insured property, Dickson knew or should have reasonably known that the damage to the roof was caused by the weight of snow and severe weather.

59. Dickson knew that his conduct would purposefully place the plaintiffs at odds with their own insurer, Erie.

60. Dickson knew that issuing a report that was contrary to the plaintiffs' interests would assist Erie with its objective of avoiding the payment of a claim and that it was in direct conflict with Erie's written promises to the plaintiffs.

61. Dickson's conclusions were not based upon conducting a reasonable investigation that was consistent with accepted engineering principles.

62. Rather, Dickson's investigative conclusions were based upon an objective of creating or maintaining a relationship with Erie because of the potential financial rewards of such a relationship, all to the detriment of the plaintiffs.

63. The conduct of Dickson, and other breaches which are currently unknown to the plaintiffs, proximately caused the plaintiffs to suffer damages and it has also compounded the plaintiffs' damages.

COUNT VI
CLAIMS AGAINST BRUCE HUNTER

64. Plaintiffs hereby restate and re-allege each and every allegation contained in the preceding paragraphs of this Complaint as though the same were fully incorporated in parts of all Counts of this Complaint.

65. Upon information and belief, Hunter is an insurance adjuster licensed to adjust claims in all counties in the State of West Virginia.

66. Upon information and belief, Hunter is an employee of Erie.

67. Upon information and belief, Hunter is authorized by his employer to adjust claims and investigate claims which occur relative to policies issued by Erie.

68. Upon information and belief, Hunter has routinely adjusted claims relating to policies issued by Erie in all West Virginia counties.

69. At all times relevant herein, Hunter is a person who is engaged in the business of insurance.

70. As an adjuster, Hunter owed a duty to plaintiffs to promptly, fairly and honestly handle and investigate plaintiffs' claims.

71. Hunter owed the plaintiffs the duty of using reasonable care in performing his duties as the plaintiffs' insurance adjuster.

72. Hunter breached the above duties in the following ways:

- (a) failing to properly investigate coverage for plaintiffs' subject claims;
- (b) failing to confirm and/or ratify coverage for plaintiffs' subject claims;
- (c) failing to protect plaintiffs' assets and allow for plaintiffs to take advantage of the insurance protection they had purchased when there was an opportunity to do so; and,
- (d) in other ways that will be shown according to proof.

73. The breaches of the aforementioned duties by Hunter, and other breaches that are currently unknown to the plaintiffs, proximately caused damage to plaintiffs demanded herein.

74. It is unknown to the plaintiffs whether Erie has ratified, sanctioned or adopted the conduct of Hunter.

COUNT VII
 VICARIOUS LIABILITY OF ERIE
 FOR THE CONDUCT OF HUNTER

75. Plaintiffs hereby restate and re-allege each and every allegation contained in the preceding paragraphs of this Complaint as though the same were fully incorporated in parts of all Counts of this Complaint.

76. As a direct and proximate result of Hunter's breach of his duties as more fully described above, Erie has denied coverage and/or failed or refused to affirm coverage for losses sustained by the plaintiffs.

77. Erie is vicariously liable for the negligent acts of Hunter, as his acts were performed as the statutory, actual and/or apparent employee/agent of Erie and pursuant to the agency instructions that controlled the actions of Hunter concerning the adjustment of claims.

WHEREFORE, plaintiffs pray for a trial by jury and for the following relief against the defendants:

1. An Order compelling Erie to provide a detailed accounting of all payments made to all persons, businesses, firms or organizations, of any kind by Erie;

2. An Order finding that all defendants are in error in any opinion concerning the causation of damages to the plaintiffs' property;

3. An Order finding that all damages to the plaintiffs' insured property was caused by the weight of snow and/or ice and that such damages were clearly covered under the terms of the Erie insurance policy.

4. An Order finding that the conduct of the defendants gave rise to plaintiffs' damages;

5. An Order finding that defendants are liable to plaintiffs for their conduct;

6. An Order finding that defendant Dickson intentionally and tortiously interfered with the plaintiffs and contractual rights owed to them by defendant Erie;

7. An Order finding that the plaintiffs have substantially prevailed;

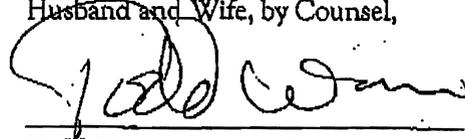
8. An Order finding that the actions and omissions, of defendants, were negligent, intentional, outrageous, extreme, severe and caused plaintiffs to suffer severe emotional distress and severe economic loss;

9. An Order finding that defendants engaged in a pattern of grossly malicious and reckless conduct toward plaintiffs to an extent that gives rise to punitive damages;

10. An Order finding that Erie violated West Virginia's UTPA with such frequency to constitute a general business practice regarding the manner in which it handled plaintiffs' claims;

11. An Order granting plaintiffs' judgment against defendants for all compensatory damages, Hayseeds damages, punitive damages, pre-judgment interest, post-judgment interest and attorney fees;
12. Cause pre - judgment interest to be awarded together with any such further relief as a Judge or jury shall find. The jurisdictional limits for this filing have been satisfied; and,
13. Plaintiffs request this Court provide any further relief that plaintiffs may be entitled to receive.

DAVID CHEDESTER AND JOYCE
CHEDESTER, Individually and As
Husband and Wife, by Counsel,



Todd Wiseman, State Bar #6811
Wiseman Law Firm, PLLC
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Vienna, WV 26105
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and

James Stealey, State Bar #3583
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IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

David Chedester and Joyce Chedester,
Individually and as Husband and Wife,

Plaintiffs,

v.

CIVIL ACTION NO. 15-C-325
(Hon. John D. Bean, Chief Judge)

Erie Insurance Property and Casualty Company,
a Pennsylvania corporation, Bruce Hunter, an
employee of Erie Insurance Property and Casualty
Company, and Barry Dickson, Professional Engineer, LLC,

Defendants.

**MOTION TO DISMISS OF DEFENDANT
ERIE INSURANCE PROPERTY AND CASUALTY COMPANY**

Comes now, Defendant Erie Insurance Property and Casualty Company ("Erie"), by the undersigned counsel, pursuant to Rule 12(b) (6) of the West Virginia Rules of Civil Procedure, and requests dismissal of Plaintiffs' Complaint as to Erie because Plaintiffs' causes of action are time-barred by the applicable statute of limitations and, therefore, fail to state a claim upon which relief may be granted.¹

Statement of Facts

Plaintiffs' Complaint was filed against Defendants Erie and Bruce Hunter on or around June 3, 2015, setting forth various causes of action allegedly arising out of their handling of Plaintiffs' first-party property damage claim: (1) breach of contract; (2) reasonable expectations;² (3) violations of the Unfair Trade Practices Act ("UTPA"); and

¹ As of the date of filing this motion, Defendants Bruce Hunter and Barry Dickson have not been served with the Plaintiffs' Complaint. As an employee of Erie and the claim adjuster assigned to investigate and evaluate the Plaintiffs' property damage insurance claim, however, the arguments for dismissal of the Plaintiffs' Complaint as to Erie apply equally to Mr. Hunter.

² A "reasonable expectations" claim is not a stand-alone claim in West Virginia, but rather can be a policyholder's defense to a coverage denial but only after a Court finds that the policy language at issue is ambiguous. Ordinarily, "[i]n West Virginia, the doctrine of reasonable expectations is limited to those instances . . . in which the policy language is ambiguous." *National Mut. Ins. Co. v. McMahon & Sons, Inc.*,

(4) common law bad faith.³

Plaintiffs allege during the winter of 2012 that large amounts of snowfall caused damage to their residence located in Independence, West Virginia. [Compl. at ¶ 10.] Plaintiffs' residence was insured by an Extracover HomeProtector Policy issued through Erie. [See Policy, attached hereto as Exhibit A.]⁴ With respect to property protection

177 W.Va. 734, 742, 356 S.E.2d 488, 496 (1987), *overruled on other grounds by Potesta v. United States Fid. & Guar. Co.*, 202 W.Va. 308, 504 S.E.2d 135 (1998) (internal citations omitted). “[T]he doctrine of reasonable expectations is essentially a rule of construction, and unambiguous contracts do not require construction by the courts.” *McMahon*, 177 W.Va. at 742 n.7, 356 S.E.2d at 496 n. 7 (internal citations omitted). Plaintiffs have only generically alleged in Count II that any policy language relied upon by Erie to deny their claim must be ambiguous. However, no actual policy language is cited by Plaintiffs to make that allegation.

³ Although Plaintiffs have delineated separate counts for their allegations of common law bad faith and breach of contract, these claims are actually duplicative of each other. In the first-party context, a breach of contract claim arising from coverage denial is a creature of common law. The standard for such a claim was announced in *Hayseeds Inc. v. State Farm Fire & Cas.*, 177 W. Va. 323, 352 S.E.2d 73, 80 (1989) (“Accordingly, we hold today that whenever a policyholder must sue his own insurance company over any property damage claim, and the policyholder substantially prevails in the action, the company is liable for the payment of the policyholder’s reasonable attorneys’ fees.”). Notably, “[t]o recover attorney fees and net economic loss damages and damages for aggravation and inconvenience under syllabus point 1 of *Hayseeds, Inc. v. State Farm Fire & Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986), it is not necessary that a plaintiff show bad faith.” Syl. Pt. 3; *McCormick v. Allstate Ins. Co.*, 197 W.Va. 415, 475 S.E.2d 507 (1996). In other words, a plaintiff may recover in a *Hayseeds* action regardless of whether bad faith was present or absent in the coverage decision. *Id.* However, due to the confusion regarding these concepts, parties and courts understandably conflate the terms. Conversely, causes of action based upon unfair claims settlement practices are a creature of statutory construction and arise under the UTPA. See, W. Va. Code § 33-11-1, *et seq.* Regardless of the title assigned to the cause of action, all are barred by the one-year statute of limitations as explained below.

⁴ Because Plaintiffs’ claims against Erie center on the language of the policy pertaining to their residential property, it is appropriate for this Honorable Court to refer to and rely upon the attached policy in deciding this Motion to Dismiss, without the necessity of converting this Motion to a Motion for Summary Judgment. “The mere fact that documents are attached to a Rule 12(b) (6) motion to dismiss does not require converting the motion to a Rule 56 motion for summary judgment. Under the doctrine of ‘incorporation by reference’ a document attached to a motion to dismiss may be considered by the trial court, without converting the motion into one for summary judgment, only if the attached document is (1) central to the plaintiff’s claim, and (2) undisputed.” *Cleckley, Davis, and Palmer, LITIGATION HANDBOOK ON WEST VIRGINIA RULES OF CIVIL PROCEDURE*, 4th ed., §12(b) (6) [3], p. 394. Moreover, “[t]he court may consider, in addition to the pleadings, materials embraced by the pleadings . . . See, *Gulas v. Infocision Management Corp.*, 215 W.Va. 225, 599 S.E.2d 648 (2004) (per curiam); *In re Colonial Mortgage Bankers Corp.*, 324 F.3d 12 (1st Cir. 2003); *Palay v. United States*, 349 F.3d 418 (7th Cir. 2003); *In re K-Tel Intern, Inc.*, 300 F.3d 881 (8th Cir. 2002). It has been held that ‘a document outside the four corners of the complaint may . . . be considered if it is central to the plaintiff’s claims and is undisputed in terms of authenticity.’ *Maxcess, Inc. v. Lucent Technologies, Inc.*, 433 F.3d 1337 (11th Cir. 2005). . . . *Continental Cas. Co. v. American Nat. Ins. Co.*, 417 F.3d 727 (7th Cir. 2005) (‘Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff’s complaint and are central to the claim.’)” *Id.*, p. 355. It is beyond argument that the Plaintiffs’ insurance policy pertaining to their residential property, in question in the instant action, is central to Plaintiffs’ first-party claims. There would be no such claims but for the issuance of this policy. Therefore, this Honorable Court is entitled to refer to and rely upon the attached policy in deciding this Motion to Dismiss without converting it to a Motion for Summary Judgment.

provided under the policy, the policy provides, *inter alia*, as follows:

PERILS WE INSURE AGAINST

DWELLING AND OTHER STRUCTURE COVERAGES

We pay for risks of direct physical loss to property insured under the *Dwelling and Other Structures Coverages* except as excluded or limited herein.

We do not pay for loss:

5. Caused by:
 - b. mechanical breakdown, deterioration, wear and tear, marring, inherent vice, latent defect, tree roots, rust, smog, wet or dry rot, mold, fungus, or spores;
 - e. bulging, cracking, expansion, settling or shrinking in ceilings, foundations, floors, patios, decks, pavements, roofs or walls.
6. Caused by weather conditions if any peril excluded by this policy contributes to the loss in any way.
8. Caused by, resulting from, contributed to or aggravated by faulty or inadequate:
 - a. planning, zoning, development;
 - b. design, development of specifications, workmanship, construction;
 - c. materials used in construction; or
 - d. maintenance;of property whether on or off the **residence premises** by any person, group, organization, or governmental body.

[Ex. A at 8.] The policy also defines certain rights and duties of the Insured and Insurer, including, *inter alia*:

RIGHTS AND DUTIES – CONDITIONS – SECTION I

(16) WHAT TO DO WHEN A LOSS HAPPENS

In case of a loss, anyone we protect must:

1. give us or our Agent immediate notice of the loss. If the loss is due to criminal activity or theft, you must also notify the police;

[Ex. A at 16.] Finally, the policy provides for a limitation on the time period in which suit can be brought in the event of a first-party dispute:

RIGHTS AND DUTIES – CONDITIONS – SECTION I

(15) SUIT AGAINST US

We may not be sued unless there is full compliance with all the terms of this policy. Suit must be brought within one year (Maryland – three years) after the loss or damage occurs.

[*Id.*]

Notwithstanding the clear language of the policy concerning coverage, exclusions, and the parties' rights and obligations, Plaintiffs did not alert Erie to their potential property damage claim until on or around April 24, 2013. [Compl. at ¶ 12.] At that point in time, the damage alleged to Plaintiffs' residence extended to the roof, walls, and siding of the house. [*Id.* at ¶ 14.] On April 26, 2013, Barry Dickson, structural engineer, inspected the Plaintiffs' residence at Erie's request to determine the cause of the reported damage. [*Id.* at ¶¶ 19-21.] Mr. Dickson concluded that the damage was caused by "improper construction methods, poor workmanship, and heavy snow loads." [*Id.* at ¶ 22.] After receiving Mr. Dickson's report, Erie corresponded with Plaintiffs by letter dated May 10, 2013, notifying them of its coverage denial with respect to their property damage claim. [*Id.* at ¶¶ 16, 23; *see also*, Correspondence from B. Hunter to Plaintiffs, dated May 10, 2013, attached as **Exhibit B.**]⁵ With this correspondence, Erie clearly and unequivocally stated:

Based on the limitations and exclusions cited and other

⁵ Again, the coverage denial letter dated May 10, 2013, can properly be considered by the Court without converting this Motion to a Rule 56 Motion for Summary Judgment. The letter is both central to Plaintiffs' claims and is undisputed. While not attached as an exhibit to Plaintiffs' Complaint, the denial letter forms the basis for Plaintiffs' breach of contract and common law bad faith claims as this was the very denial of coverage of which Plaintiffs complain. In fact, the denial is explicitly mentioned by date in paragraph 16 of the Complaint.

limitations and exclusions which may also be applicable, the **Erie Insurance Property and Casualty Company has taken the position that the damage to the roof and the front wall are specifically excluded under your policy** and Erie Insurance Property and Casualty Company will be unable to assist you with repairs to your home.

[Ex. B (emphasis added).]

The denial of coverage letter is dated May 10, 2013; however, Plaintiffs did not file the instant lawsuit until on or around June 5, 2015. Based upon the undisputed facts – construed in the light most favorable to the Plaintiffs – it is clear that Plaintiffs’ Complaint fails to state a claim upon which relief may be granted due to the application of the one-year statute of limitations pertaining to this action and the Plaintiffs’ failure to file suit within the applicable statute of limitations.

Standard of Law

A trial court should grant a motion to dismiss pursuant to West Virginia Rule of Civil Procedure 12(b) (6) if the plaintiff has failed to state a claim upon which relief can be granted. W. VA. R. CIV. P. 12(b) (6). The sole purpose of a motion to dismiss filed pursuant to Rule 12(b) (6) of the West Virginia Rules of Civil Procedure is to test the legal sufficiency of the complaint. *John W. Lodge Dist. Co. v. Texaco, Inc.*, 161 W. Va. 603, 604, 245 S.E.2d 157, 158 (1978). When considering a motion to dismiss, the Court is to construe the complaint in the light most favorable to the plaintiff and to consider all allegations contained therein as true. *Id.* However, the Supreme Court of Appeals of West Virginia (“the W.Va. Supreme Court” or “the Court”) has emphasized that “this liberal standard does not relieve a plaintiff . . . of the obligation of presenting a valid claim, that is a claim upon which relief can be granted.” *Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 96-7, 479 S.E.2d 602, 606-07 (1996). *See also State ex rel. McGraw v. Scott Runyan Pontiac Buick, Inc.*, 194 W. Va. 770, 776, 461 S.E.2d 516, 522 (1995) (“[D]espite the allowance in

Rule 8(a) that the plaintiff's statement of the claim be 'short and plain,' a plaintiff may not 'fumble around searching for a meritorious claim within the elastic boundaries of a barebones complaint[,]' . . . or where the claim is not authorized by the laws of West Virginia. A motion to dismiss under Rule 12(b) (6) enables a circuit court to weed out unfounded suits.") (citing, *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1430 (7th Cir. 1993); *accord, Harrison v. Davis*, 197 W. Va. 651, 657-58 n. 17, 478 S.E.2d 104, 110-11 n. 17 (1996). Accordingly, a motion to dismiss should be granted where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Texaco*, 245 S.E.2d at 159. Based upon the foregoing standards, Plaintiffs' allegations are procedurally deficient because they have been brought far outside the applicable statute of limitations.

Argument

In this matter, Plaintiffs' Complaint directed to Erie – even viewed in the light most favorable to Plaintiffs – does not survive scrutiny under Rule 12(b) (6) and must be dismissed with prejudice. Plaintiffs expressly admit that Erie "adopted the claims decision to deny the plaintiffs' claims for coverage to his [sic] roof, walls and siding on or about May 10, 2013...." [Compl. at ¶ 23; *see also*, Ex. B.] This coverage denial was clearly and unequivocally communicated to Plaintiffs on May 10, 2013, when Erie informed them that "Erie Insurance Property and Casualty Company has taken the position that the damage to the roof and the front wall are specifically excluded under your policy." [Ex. B.] Thus, it is undisputed that Erie denied the property damage claim on May 10, 2013, and Plaintiffs' Complaint filed on or around June 3, 2015 is untimely based upon the application of the one year statute of limitations for common law bad faith / breach of contract and statutory UTPA claims in West Virginia.

It is well established law in the state of West Virginia that a one-year statute of limitations applies to claims filed under the West Virginia UTPA. See *Wilt v. State Auto. Mut. Ins. Co.*, 203 W.Va. 165, 171, 506 S.E.2d 608, 614 (1998) (“[W]e determine that claims involving unfair settlement practices that arise under the Unfair Trade Practices Act are governed by the one-year statute of limitations set forth in West Virginia Code § 55-2-12(c)”). Likewise, the statute of limitations for bringing claims based upon common law bad faith is also one year. See Syl. Pt. 4, *Noland v. Virginia Insurance Reciprocal*, 224 W. Va. 372, 686 S.E.2d 23 (2009) (The Court expressly held that “[t]he one year statute of limitations contained in W. Va. Code § 55-2-12(c) . . . applies to a common law bad faith claim.”). The State of West Virginia generally adheres to the “discovery rule” for determining when the statute of limitations begins to run. In other words, the statute of limitations begins running when a plaintiff knew or should have known of the existence of a claim. See *Knapp v. American General Finance Inc.*, 111 F.Supp.2d 758 (S.D. W. Va. 2000) (involving a first-party claim for UTPA and common law bad faith violations):

The statute of limitations for claims arising under the West Virginia Unfair Trade Practices Act (UTPA), West Virginia Code §§ 33-11-1 *et seq.*, is one year. See *Wilt v. State Auto. Mut. Ins. Co.*, 203 W.Va. 165, 506 S.E.2d 608 (1998). Because the Knapps' loan agreement was entered into on November 26, 1997 and this action was not brought until May 21, 1999, Defendants argue their UTPA claim should be barred by the statute of limitations.

In a variety of cases, however, the Supreme Court of Appeals of West Virginia has applied the Discovery Rule, holding that “a right of action does not ‘accrue’ until the plaintiffs knew or should have known by the exercise of reasonable diligence of the nature of their claims.” *Stemple v. Dobson*, 184 W.Va. 317, 320, 400 S.E.2d 561, 564 (1990)...“Where a cause of action is based on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury.” *Stemple*, 184 W.Va. at 321, 400 S.E.2d at 565.

Id. at 765. In the instant case, it is undisputed that the Plaintiffs knew or should have known of the existence of their “bad faith” claims when Erie denied their claim for insurance benefits on May 10, 2013.

The West Virginia Supreme Court in *Noland* exhaustively examined the date the statute of limitations begins to run – absent the application of the discovery rule. Adopting the rationale of *Daugherty v. Allstate Insurance Co.*, 55 P.3d 224 (Colo. Ct. App. 2002) (superseded by statute as stated in *Broduer v. American Home Assur. Co.*, 169 P.3d 139 (2007)) and *Adamski v. Allstate Ins. Co.*, 738 A.2d 1033 (Pa. Super. Ct. 1999), the West Virginia Supreme Court affirmed the decision of the Raleigh County Circuit Court which held that the statute of limitations began to run on the plaintiff’s claims of common law bad faith and UTPA violations for wrongful failure to defend as of the date when the insured knew or reasonably should have known “that the insurer refused to defend him or her in an action.” *Noland*, Syl. Pt. 4, 5, 224 W. Va. 372. See also, *Watson v. National Union Fire Insurance Co.*, 2013 WL 2000267 (S.D. W. Va. May 13, 2013) (applying the one-year statute of limitations applicable to common law bad faith and UTPA claims to preclude the plaintiff’s claim, as the statute began to run on the date the plaintiff became aware of the denial of insurance benefits.); *Sizemore v. State Farm Gen. Ins. Co.*, 202 W. Va. 591, 505 S.E.2d 654 (1998) (finding the plaintiffs’ claim for property coverage for their fire loss was barred by the one-year limitation of action provision in their insurance policy thereby effectively barring any *Hayseeds* cause of action otherwise available for attorneys’ fees and costs as a result of the denial of the fire loss claim.).

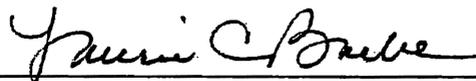
In this matter, the Plaintiffs’ Complaint expressly acknowledges that the Plaintiffs knew of the right to sue for violations of the UTPA and common law bad faith / breach of contract at the time of the coverage denial on May 10, 2013. [Compl. at 23; see also, Ex. B.] Moreover, the policy expressly states that any first-party claim “must be

brought within one year...after the loss or damage occurs.” [Ex. A at 16.] Consequently, the one-year statute of limitations began to run on May 10, 2013, and any claim filed after May 10, 2014 is time-barred by operation of the clearly established law of West Virginia and the language of the Erie policy. Because the instant Complaint was not filed until June 3, 2015, well over the one-year limitation period for these actions and the date that Plaintiffs’ Complaint expressly acknowledges they were put on notice of Erie’s alleged violations of the UTPA and common law bad faith / breach of contract, Plaintiffs’ Complaint is time-barred and should be dismissed in its entirety, with prejudice as to Defendant Erie.

Conclusion

Wherefore, Defendant, Erie Insurance Property and Casualty Company, by undersigned counsel, moves this Court for a complete dismissal of the Plaintiffs’ Complaint on the grounds that Plaintiffs’ suit is time-barred by the applicable one year statute of limitations arising from both case law in West Virginia and the Erie policy at issue in this case.

Dated this 9th day of July, 2015.



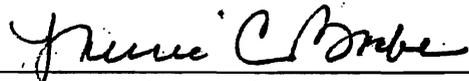
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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2015, I served the foregoing "Motion to Dismiss of Defendant Erie Insurance Property and Casualty Company" upon counsel of record by depositing true copies thereof in the United States mail, postage prepaid, in envelopes addressed as follows:

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