IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

RESOURCE CONSULTANTS AND DEVELOPERS, INC.,

Plaintiff/Appellee,

v.

Appeal No.: 35524
(Circuit Court of Greenbrier County, West Virginia
Civil Action No. 05-C-342
Judge James J. Rowe)

BITUMINOUS CASUALTY CORPORATION,

Defendant/Appellant

(Consolidated with McCormick, et al. v. WalMart Stores, Inc.. et al., Civil Action No. 01-C-251, Circuit Court of Greenbrier County, West Virginia)

REPLY BRIEF ON BEHALF OF APPELLANT BITUMINOUS CASUALTY CORPORATION

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Pursuant to Rule 15(c) of the West Virginia Rules of Appellate Procedure, appellant Bituminous Casualty Corporation ("Bituminous") files this brief in reply to the brief of appellee Resource Consultants and Developers, Inc. ("RCDI").

I. The Choice of Law Issue

Tacitly acknowledging that the application of Kentucky law would lead to a different result than West Virginia law (mainly because RCDI loses under Kentucky law), RCDI suggests that "public policy requires the application of West Virginia law" to this insurance dispute. *RCDI Brief at 15.* Significantly, however, in Syllabus Point 3, Nadler v. Liberty Mutual Fire Ins. Co., 188 W. Va. 329, 424 S.E.2d 256 (1992), this Court held that:

> The mere fact that the substantive law of another jurisdiction differs from or is less favorable than the law of the forum state does not, by itself, demonstrate that application of the foreign law under recognized conflict of laws principles is contrary to the public policy of the forum state.

See also Nelson v. Allstate Indem. Co., 202 W.Va. 289, 503 S.E.2d 857 (1998). As noted in Howe v. Howe, 218 W.Va. 638, 625 S.E.2d 716 (2005):

> This Court does not take a request to invoke our public policy to avoid application of otherwise valid foreign law lightly. As we stated in Nadler:
>
> We adhere to the general principle that a court should not refuse to apply foreign law, in otherwise proper circumstances, on public policy grounds unless the foreign law is contrary to pure morals or abstract justice, or unless enforcement would be of evil example and harmful to its own people.
>
> Id. at 338, 424 S.E.2d at 265 (internal citations and quotations omitted).

218 W.Va. at 646-47, 625 S.E.2d at 724-25. The mere fact that that the law of Kentucky may be different than the law of West Virginia, and certainly the mere fact that the outcome may be different, is not a sufficient reason to disregard this state's normal choice of law rules.

The only argument that RCDI advances about contacts with West Virginia involve the subcontract containing the indemnification clause. If this case involved a dispute about indemnification under the subcontract, the West Virginia connection would be consequential. Contrary to RCDI's assertions, however, ***this*** case is not a dispute between the parties to the indemnity agreement. That dispute has already been adjudicated in conjunction with RCDI's third-party complaint against Davis & Burton in Civil Action No. 01-C-251. This case involves issues of the interpretation of an insurance contract. Specifically, whether RCDI is entitled to the benefits and protections of the Bituminous policy. The only involvement of the indemnity agreement is whether it represents an "insured contract" under the definition contained in the policy. That issue of insurance coverage is clearly governed by Kentucky law. The issue of whether RCDI (or, more accurately, RCDI's insurer) is entitled to recoup costs of defense from Davis & Burton's insurer is not the kind of issue that implicates any public policy, much less a fundamental, well articulated public policy of the State of West Virginia.

II. RCDI Has Failed To Address the Principle Points of the Appellant's Assignments of Error

A. The Indemnity Provision of the Subcontract is not an Insured Contract

In deciding this appeal, this Court must keep in mind certain fundamental (and uncontested) facts. RCDI's declaratory judgment suit against Bituminous asserted that RCDI was entitled to a full and complete defense of the McCormick claims from Bituminous. This claim was made by RCDI notwithstanding the fact that RCDI was not the named insured on the Bituminous insurance policy. Nor was RCDI listed as an additional insured on the Bituminous policy. Indeed, RCDI's name appears nowhere in the Bituminous insurance policy at issue.

In finding that Bituminous had a duty to provide a full and complete defense to an entity that it did not insure, the Circuit Court relied solely on this Court's statement in Marlin v. Wetzel County Board of Education, 212 W.Va. 215, 569 S.E.2d 462 (2002), that "when a party has an 'insured contract,' that party stands in the same shoes as the insured for coverage purposes." Setting aside the choice of law issue and assuming *arguendo* that Marlin can be applied in this case,[1] it is self-evident that the "stand in the shoes" principle can only be applied when the underlying contract at issue (in this case, the subcontract between RCDI and Davis & Burton) is, in fact, an "insured contract." For the subcontract to be an "insured contract" under the insurance policy's definition of that term, Davis & Burton (as Bituminous' insured) must have "assume[d] the tort liability of another to pay damages because of 'bodily injury' or 'property damage' to a third person or organization." If the subcontract does not qualify as an "insured contract," then the "stand in the shoes" principle of Marlin cannot be applied and RCDI's claims against Bituminous for a defense in the McCormick case must fail.

Significantly, in its thirteen pages of argument on this assignment of error, RCDI does not cite to a single case which supports the proposition that the standard indemnity language contained in the 1987 edition of AIA Document A-401, Standard Form of Agreement Between Contractor and Subcontractor, the indemnity provision in the subcontract between RCDI and Davis & Burton that is at issue in this case (or indemnity language contained in any similarly worded contract), requires the subcontractor to "assume the tort liability" of the contractor under the agreement's indemnity provision. Nor does RCDI cite to a single case holding that a contract containing such an indemnity provision constitutes an "insured contract" under a commercial general liability or similar insurance policy.

[1] Both parties acknowledge that no Kentucky case has ever recognized the "stand in the shoes" concept.

Bituminous also challenged RCDI to answer the question: what "tort liability" of RCDI did Davis & Burton assume under this indemnity provision? *See Bituminous Brief at 19.* Tellingly, RCDI has no response to this challenge. Instead, RCDI's response brief begs the question. RCDI simply asserts that the subcontract required Davis & Burton to assume RCDI's tort liability without ever offering an explanation of ***how*** the subcontract required Davis & Burton to do so.

Moreover, while RCDI accuses Bituminous of "mischaracterizing the issue on appeal," it is RCDI that "mischaracterizes" the issue. As noted above, RCDI was ***not*** an insured under the Bituminous policy. The Circuit Court's conclusion that Bituminous owed a duty to defend an entity that was not the Company's insured was not based on provisions of the Bituminous insurance policy. Cases interpreting an insurer's duty to defend its own insured under the insured's own policy do not even address, much less resolve, the issue of whether the subcontract in this case constitutes an "insured contract" as defined in the Bituminous policy. Quite simply, if the indemnity provision was not an "insured contract," then the Circuit Court was wrong in finding for RCDI. RCDI's response simply ignores this critical fact.

Curiously, RCDI's brief alleges that Bituminous has "failed to distinguish the Davis & Burton indemnification provision from that in Marlin." *RCDI Brief at 23.* In fact, Bituminous clearly distinguished the two provisions and even provided an example of how the respective applications of the two indemnity provisions would be substantially different under the same set of facts. *See Bituminous Brief at 18-19.* RCDI's brief does not take issue with this example and significantly, RCDI provides no example of its own to demonstrate how the indemnity provision in this case could require Davis & Burton to assume any of RCDI's tort liability.

Furthermore, Bituminous quoted Rush v. Norfolk Electric Co., Inc., 70 Mass.App.Ct. 373, 379, 874 N.E.2d 447, 452 (2007), which discussed "[t]he important difference between ... the scope of the respective indemnities" of the type of indemnity clause in this case and the type of indemnity clause in Marlin. *See Bituminous Brief at 19.* Contrary to RCDI's assertions, Bituminous has in fact demonstrated that, while the indemnity agreement in Marlin would constitute an "insured contract" because it would potentially require the indemnitor to assume all of the indemnitee's tort liability, the indemnity provision in this case would not constitute an "insured contract" because it would never require the indemnitor to assume any liability but its own.

RCDI further argues that "adopting the construction of the indemnity provision suggested by Bituminous would render meaningless the indemnification agreement between RCDI and Davis & Burton" because "the indemnity provision would simply provide for comparative contribution [a right already recognized by West Virginia law] between RCDI and Davis & Burton once the respective negligence of each party to the indemnification agreement is determined." *RCDI Brief at 24.* This is simply not so. There are substantial and significant differences between the right to comparative contribution and the indemnity agreement at issue.

In Syllabus Point 4, Sitzes v. Anchor Motor Freight, Inc., 169 W.Va. 698, 289 S.E.2d 679 (1982), this Court addressed the right of comparative contribution, holding that: "Once comparative fault in regard to contribution is recognized, recovery can be had by one joint tortfeasor against another joint tortfeasor *inter se* regardless of their respective degree of fault so long as the one has paid more than his *pro tanto* share to the plaintiff." This recovery, however, is limited to only include the percentage of the plaintiff's actual damages for which the joint tortfeasor is actually responsible.

In contrast, the indemnity provision at issue allows for recovery of a percentage of the attorney fees and expenses incurred by the indemnitee equal to the percentage of fault assessed to the indemnitor. *See e.g.* East-Harding, Inc. v. Horace A. Piazza & Associates 80 Ark.App. 143, 149, 91 S.W.3d 547, 551 (2002) (Indemnitor with similar indemnity agreement to the instant case would be required to reimburse indemnitee for the percentage of expenses and fees equal to the percentage of the indemnitor's fault, if any); Dillard v. Shaughnessy, Fickel and Scott Architects, Inc., 884 S.W.2d 722, 725 (Mo.App. 1994) (in applying indemnity agreement with "to the extent of" language, court stated, "[i[f a percentage of fault is ascribed to [the indemnitor], [the indemnitor] will reimburse that same percentage of the expenses and legal fees to [the indemnitees]."); Greer v. City of Philadelphia, 568 Pa. 244, 253, 795 A.2d 376, 381 - 382 (2002) (rejecting claim that similar indemnity provision was indistinguishable from right of contribution because provision "unambiguously entitles [indemnitees] to recover attorney's fees and other expenses arising out of [indemnitor's] negligence, which they might not otherwise be able to recover.").

These cases demonstrate a further fallacy of RCDI's position in this case. Suppose, for example that the Circuit Court had denied summary judgment and submitted the RCDI's third-party complaint against Davis & Burton to a jury. Suppose further that the jury concluded that RCDI was 90 percent at fault for the McCormick plaintiff's damages and that Davis & Burton was 10 percent at fault. Under the clear provisions of the indemnity agreement, RCDI would only be entitled to recover 10 percent of its attorney fees and expenses. Yet, under RCDI's position, RCDI (or, more accurately, its insurer) would be able to recover 100 percent of its attorney fees and expenses. Of course in this case, Davis & Burton has already been determined

to have no fault at all. Recovery of RCDI's attorney fees and expenses by RCDI's insurer results in a pure windfall that is directly contrary to the intent of the contracting parties.

Moreover, there are also substantial and significant procedural differences between the right to comparative contribution and the indemnity agreement at issue. A contribution claim must be pursued in the underlying claim and cannot be pursued as a separate cause of action. Howell v. Luckey, 205 W.Va. 445, 518 S.E.2d 873 (1999); Charleston Area Medical Center, Inc. v. Parke-Davis, 217 W.Va. 15, 614 S.E.2d 15 (2005). The indemnity provision at issue provides a contract claim which can be separately pursued. Similarly, while contribution rights may be extinguished by a good faith settlement with the plaintiff, any rights that the indemnitee may have under the indemnity agreement cannot.

B. The McCormicks Did Not Allege Any Negligence Against Davis & Burton

While RCDI strains to read the McCormick complaint to allege negligence in the construction of the WalMart storm water drainage system, it fails to address this critical point: there was never even an allegation by the McCormick plaintiffs that Davis & Burton negligently performed any of ***its duties*** on the Lewisburg WalMart project. RCDI notes that the McCormick complaint alleged that "the plans that had been developed" for the storm water drainage system were not implemented by RCDI. *RCDI Brief at 28 n.4.* Nowhere in the McCormick complaint is any allegation that those plans were not implicated because of anything that Davis & Burton did or did not do. Davis & Burton's job was to do what it was instructed to do by RCDI.

C. The Language of The Davis & Burton Policy Expressly Precludes The Application of the "Stand in the Shoes" Principle Set Forth In Marlin

As Bituminous has previously pointed out, in Tackett v. American Motorists Ins. Co., 213 W. Va. 524, 528, 584 S.E.2d 158, 162 (2003), this Court stated that "[u]nquestionably, the terms of the pertinent insurance contract govern the parties' relationship and define the scope of

coverage as well as the existence of the insurer's duty to defend its insured." RCDI simply ignores this fundamental proposition. The terms of the relevant endorsement in this insurance policy make clear that the insurer's duty to defend applies only to suits against the insured. RCDI was not an insured.

The fact that RCDI and Davis & Burton may have contemplated that RCDI would be added as an "additional insured" does not change this analysis. Moreover, as discussed further below, "additional insured" coverage for RCDI, even if it had been added to the Davis & Burton policy, would not have been implicated by the McCormick complaint.

Moreover, while quoting a portion of the policy endorsement's relevant language, RCDI omits the most significant part of the endorsement. *See RCDI Brief at 30.* The relevant policy language states: "Solely for the purposes of liability assumed in an 'insured contract', reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of 'bodily injury' or 'property damage.'" As previously discussed, this express policy language makes clear that any such claim against Davis & Burton, the insured, must be treated as a third-party claim.

Once again, however, in its response to this assignment of error, RCDI begs the question. RCDI asserts that the express policy language should simply be ignored because of Marlin. However, RCDI does not even attempt to explain ***why*** Marlin should be applied to reach a result that is completely contrary to the express language of the insurance policy.

Bituminous believes that, to the extent that Marlin applied the "stand in the shoes of the insured" principle to the duty to defend an indemnitee, it was wrongly decided. A rule which

allows an indemnitee who is not insured under the insurance policy to assert a claim directly against the indemnitor's insurer, is contrary to the weight of authority in the United States.[2] *See e.g.* Alliance Syndicate, Inc. v. Parsec, Inc. 318 Ill.App.3d 590, 599, 741 N.E.2d 1039, 1045, 251 Ill.Dec. 861, 867 (Ill.App. 2000) ("The fact that the Parsec/CSX agreement was an "insured contract" did not expand the policy to automatically provide coverage for CSX or its liability, or impose any duty on Alliance to defend CSX in the underlying suit. Instead, Parsec, as the insured, was covered for the liability it assumed under the insured contract."); Alex Robertson Co. v. Imperial Casualty & Indemnity Co., 8 Cal.App.4th 338, 10 Cal.Rptr.2d 165 (Cal.App. 1992) (unless insurance policy provides otherwise, no direct action lies against insurer until judgment has been obtained against insured). However, whether this Court chooses to apply Marlin, to limit Marlin, or to overrule Marlin, the result in this case would be the same. RCDI cannot recover its defense costs incurred in the McCormick case from Bituminous.

D. If the Indemnity Clause Controls, It Should Control in its Entirety

RCDI argues that "[t]he Fourth Circuit and other jurisdictions have held that a contract with an indemnification clause controls the allocation of insurance..." *RCDI Brief at 11.* Yet RCDI advocates a position which requires the Court to ignore the controlling indemnification clause. RCDI cites to Travelers Property Cas. Co. of America v. Liberty Mut. Ins. Co., 444 F.3d 217 (4th Cir. 2006) as controlling authority. However, in Travelers, the Fourth Circuit stated that liability, "including contractual liability created by an indemnification clause," must be determined first. Then, "responsibility for insurance coverage follow[s] the liability of the

[2] RCDI asserts that "West Virginia is not alone in imposing a duty upon an indemnitor's insurer to defend an indemnitee." *citing* Krieger v. Wilson Corp., 139 N.M. 274, 131 P.3d 661 (New Mex. App. 2005) and York v. Vulcan Materials Co., 63 S.W.3d 384 (Tenn.App. 2001). *RCDI Brief at 22.* While the New Mexico interim level appeals court in Krieger did, in fact, adopt that aspect of Marlin,, it is the only court which has done so, and even that decision has not been endorsed by the New Mexico Supreme Court. RCDI also misstates the holding of Vulcan, In Vulcan, it appears that the insurer of the subcontractor "conceded its duty to defend Vulcan's vicarious liability due to [the subcontractor's] negligence...." The court in Vulcan simply held the insurer to its concession.

insureds." 444 F.3d at 222. In this case, Circuit Court first determined contractual liability under the indemnity clause, and then completely ignored its own finding in determining who was responsible for insurance coverage. If the Court is inclined to adopt this line of cases, then responsibility for insurance coverage should follow the liability of the insureds. In this case Davis & Burton was expressly determined to have ***no*** liability under the indemnity clause. Thus, Davis & Burton's insurer should likewise have no liability.

III. RCDI's Cross Assignment of Error Is Without Merit

In its Order of October 5, 2007, the Circuit Court found that RCDI was not entitled to coverage from Bituminous under a certificate of insurance because RCDI could not show that it relied on the certificate to its detriment to satisfy a claim of estoppels. There was no error in this ruling and, even if RCDI could have established reliance, it would not have coverage under the Bituminous policy for the McCormick claims.

In its brief, RCDI asserts that both Kentucky and West Virginia law "recognize that representations made in a certificate of insurance are enforceable." *RCDI Brief at 35.* In support of this proposition, RCDI cites Western Leasing, Inc. v. Acordia of Kentucky, Inc., 2010 WL 1814959 (Ky.App. May 7, 2010). . In Western Leasing (which is "not [a] final" decision and cannot be cited as authority in courts in Kentucky), the Kentucky Court of Appeals held that an agent that sends out a certificate of insurance containing misstatements of material facts regarding the coverage actually in effect, is subject to tort liability for negligent misrepresentation, specifically under the rules stated in §552 of the Restatement (Second) of Torts. There is not a single word in that decision that addresses whether an insurer is obligated to afford the coverage stated in the certificate of insurance. Indeed, there is not even a word in the opinion about whether an insurer can be vicariously liable for negligent misrepresentation on

the part of the agent. The Western Leasing case, even if it were valid authority in any state, does not adopt the reasoning or holding of Marlin, contrary to the misstatement made by RCDI in its brief. Rather, the Western Leasing court only cited Marlin for the proposition that the disclaimer language contained in the standard certificate of insurance does not *a fortiori* bar the recipient of the certificate from establishing reasonable, detrimental reliance thereon.

Nonetheless, assuming *arguendo* that either state would recognize some type of claim arising from an erroneous certificate of insurance and regardless of which state's law applies, the end result would be the same as to RCDI's claim that it should have coverage under Davis & Burton's policy for the McCormick claims in Civil Action No. 01-C-251. Marlin is also the primary West Virginia authority regarding the effect of a certificate of insurance. As in this case, the agent in Marlin issued a certificate of insurance to the Wetzel County Board of Education ("the Board") but did not inform the contractor's insurer that it had done so. Accordingly, the insurer did not add the Board as an "additional insured" to the contractor's liability policy. The circuit court held that the Board was not an "additional insured" under the contractor's policy for claims asserted against the Board arising from the underlying construction project.

In reversing the circuit court's finding that the Board was not an additional insured, this Court held that:

> A certificate of insurance is evidence of insurance coverage, and is not a separate and distinct contract for insurance. However, because a certificate of insurance is an insurance company's written representation that a policyholder has certain insurance coverage in effect at the time the certificate is issued, the insurance company may be estopped from later denying the existence ***of that coverage*** when the policyholder or the recipient of a certificate has reasonably relied to their detriment upon a misrepresentation in the certificate.

Syllabus point 9, Marlin (emphasis added).

Thus, the first question under the Marlin analysis (or a negligent misrepresentation analysis if applicable) is whether the certificate holder can demonstrate reasonable reliance on the certificate. In this case, the Circuit Court correctly concluded that RCDI could produce no evidence that it reasonably relied on the October 19, 1994 certificate of insurance because RCDI allowed Davis & Burton to commence work on the WalMart project in September 1994, before the certificate was even issued by the Putnam Agency. As the Circuit Court properly found:

> RCDI has not presented evidence or an argument showing how it detrimentally relied on the certificate of insurance in any way. To the contrary, the evidence demonstrates that RCDI allowed Davis & Burton to begin construction on the storm water management system in September, before RCDI even received the certificate. There is no evidence of any action RCDI took in reliance on the certificate that it would not have taken in its absence. Conversely, there is no evidence of RCDI abstaining from action in reliance on the certificate. Perhaps RCDI could have forced Davis & Burton to cease construction if it did not receive the certificate, but there is no evidence of that. This Court must rule based on the evidence of record rather than speculating as to what RCDI could, should, or would have done. The evidence is that davis & Burton began work prior to the certificate being issued then continued work after it was issued, and the certificate had no effect on RCDI in any way.

October 7, 2007 Order at 8.

More importantly however, a ruling in favor of RCDI on the issue of reliance would not have resolved the ultimate issue of whether Bituminous had any duties to RCDI with regard to the McCormick claims. In discussing the application of estoppel in Marlin, this Court focused its analysis "on the first exception [to the rule that estoppel may not be used to create coverage where none exists], whether the insurer or its agent made a misrepresentation by issuing a certificate of insurance at the inception of coverage which resulted in the Board ***not having the coverage it desired.***" 212 W.Va. at 225, 569 S.E.2d at 472, emphasis added. Under this Court's holding, "because a certificate of insurance is an insurance company's written representation that a

policyholder has certain insurance coverage in effect at the time the certificate is issued, the insurance company may be estopped from denying the existence ***of that coverage***..." 212 W.Va. at 225-26, 569 S.E.2d at 472-73, emphasis added.

Indeed, RCDI's Amended Complaint for Declaratory Relief in this action asserted that, because of RCDI's alleged reliance on the certificate of insurance, "Bituminous is estopped from denying RCDI's status as an additional insured..." *Amended Complaint ¶ 14.* Even if RCDI could have established the elements of estoppel under Marlin, Bituminous would only be estopped from denying the existence of the insurance coverage listed on the certificate, which was the coverage that RCDI expected under the subcontract with Davis & Burton. However, that would still not answer the question of whether the insurance coverage that the RCDI expected under the subcontract is coverage that would be implicated for the McCormick claims against RCDI in Civil Action No. 01-C-251.

As its Amended Complaint indicated, RCDI expected to have coverage under Davis & Burton's Commercial General Liability policy as an "additional insured." Additional insured coverage is generally governed by an "additional insured" endorsement issued by named insured's carrier. The scope and extent of additional insured coverage was extensively discussed by the California Court of Appeals for the Fourth District in Pardee Construction Co. v. Insurance Company of the West, 77 Cal. App. 4th 1340, 92 Cal. Rptr.2d 443 (2000).

The court in Pardee explained that:

> [I]n 1993, the Insurance Services Office (ISO) revised the language of the form 2010 endorsement utilized by the insurance industry to expressly restrict coverage for an additional insured to the "ongoing operations" of the named insured. This revised language effectively precludes application of the endorsement's coverage to completed operations losses. (Wielinski et al., Contractual Risk Transfer, *supra*, § XI.C, p. 26.) One insurance commentator stated regarding the 1993 revisions of the standard

> additional insured endorsement forms: "The restriction of coverage in the two endorsements to only ongoing operations makes it clear that additional insureds will have no coverage under the named insured's policy for liability arising out of the products-completed operations exposure....

77 Cal.App.4th at 1358-59, 92 Cal. Rptr.2d at 456. The court also noted that construction industry groups expressly recognized that standard ISO additional insured endorsements since the 1993 revisions "provide coverage only with respect to 'your ongoing operations,' which effectively eliminates coverage for completed operations." 77 Cal.App.4th at 359, 92 Cal. Rptr.2d at 456, citing Construction Risk Management (IRMI 1999) § VI, p. VI.C.25.

In a footnote, the court also indicated that:

> "When the ISO commercial general liability program was extensively revised in 1993, a number of additional insured endorsements were reworded to eliminate coverage of the completed operations hazard. Coverage under the revised endorsements applies, not to liability arising out of 'your work,' but to liability in connection with 'your ongoing operations'-in other words, work in progress only. When the named insured's operations for the additional insured are no longer 'ongoing,' the additional insured no longer has coverage, regardless of how long the endorsement is maintained as part of the policy. ISO explained this change in its additional insured endorsements by stating that it was never the intention of insurers to provide additional insureds with completed operations coverage, and that use of the term 'your work' inadvertently broadened the scope of additional insured coverage beyond its intended limits."

77 Cal.App.4th at 1359 n.16, 92 Cal. Rptr.2d at 456 n.16, citing Wielinski et al., Contractual Risk Transfer, supra, § XI.C, p. 20.

In 1994, RCDI could not have expected to obtain anything more than what the industry standard would have been for "additional insured" coverage. Indeed, RCDI's own CGL policy with USF&G contained an additional insured endorsement for WalMart. That endorsement, was

ISO Form CG 20 10 (10/93), the 1993 version of the endorsement titled "Additional Insured- Owners, Lessees or Contractors (Form B)." *See Bituminous Summary Judgment Exhibit F.* That endorsement limited WalMart's coverage as an additional insured under RCDI's policy to "liability arising out of [RCDI's] ***ongoing operations*** performed for [WalMart]." Emphasis added.

ISO Form CG 20 09 (10/93) was the 1993 version of the endorsement titled "Additional Insured- Owners, Lessees or Contractors (Form A)." *See Bituminous Summary Judgment Exhibit G.* Significantly as noted in the Pardee case, the additional insured coverage expressly does not apply to property damage occurring after the work of the named insured has been completed. Moreover, the coverage expressly does not apply to property damage arising out of any act or omission of the additional insured other than the general supervision of the named insured's "ongoing operations" for the additional insureds.

In 1994, Bituminous used a slightly modified version of this form for Additional Insured endorsements. *See Bituminous Summary Judgment Exhibit C at 20-25, Exhibit C-3.* However, like the ISO standard form, Bituminous Form L2084 (5-89) titled "Additional Insured- Owners, Lessees or Contractors," expressly did not provide coverage for property damage occurring after the work of the named insured had been completed. Additionally, the Bituminous Additional Insured coverage expressly did not apply to property damage arising out of any act or omission of the additional insured other than the general supervision of the named insured's work performed for the additional insured.

In short, neither the ISO standard additional insured coverage in 1994 nor the Bituminous additional insured coverage used in 1994, would apply to claims arising from the completed operations of the additional insureds. The McCormick claims against RCDI in Civil Action No.

01-C-251 were clearly claims arising from the completed operations of RCDI. Moreover, as the Circuit Court concluded, the "[McCormicks'] claims for damages stem from a fundamentally flawed design plan, not negligence with regard to the construction of the storm water drainage system." *June 14, 2006 Order at 9.* Claims of defective design against RCDI are not in any way related to RCDI's "general supervision" of Davis & Burton on the WalMart project. The insurance coverage as an "additional insured" that was listed on the October 19, 1994 Certificate of Insurance and that RCDI expected under the subcontract with Davis & Burton, would simply not be implicated by the McCormick claims.[3] Thus, even under Marlin, RCDI had no viable claim against Bituminous arising from the Certificate of Insurance.

It is also important to review the applicable language of the subcontract between RCDI and Davis & Burton to determine what Davis & Burton was required to do and, as a result thereof, what RCDI reasonably expected would be done. Paragraph 13.1 of the subcontract required Davis & Burton to purchase and maintain liability insurance coverage and to provide RCDI with a certificate of insurance "naming [RCDI, its affiliated company and WalMart] as additional insureds." The only specific contractual requirement about the policy purchased by Davis & Burton (other than the designated liability limits) was that RCDI be an "additional insured."

RCDI was not named as an "additional insured" on the Bituminous insurance policy issued to Davis & Burton. Thus, RCDI's claim in this declaratory judgment action was necessarily based on the October 19, 1994 certificate of insurance issued by the Putnam Agency

[3] Moreover, no premium was paid to Bituminous to add RCDI as an additional insured. Typically, an additional premium is charged when an additional insured is added to a named insured" policy. ***Bituminous Summary Judgment Exhibit C at 19.*** The law has long recognized that, "[c]onsideration is essential to the enforceability of an insurance contract." Syllabus Point 1, Adkins v. Western and Southern Indemnity Company, 117 W.Va. 541 186 S.E. 302 (1936). This Court has stated, "[t]he premium is the price of the insurance and payment of the premium is of the essence of the insurance contract. No payment-no insurance." Hare v. Connecticut Mut. Life Ins. Co. of Hartford, 114 W.Va. 679, 681, 173 S.E. 772, 773 (1934).

of Ashland, Kentucky. Marlin held that a certificate of insurance is not a separate and distinct contract for insurance, but rather, was "evidence of insurance coverage."

Thus, looking to the subcontract, the proper inquiry is: what coverage did RCDI desire? As noted above, the only contractual requirement was that RCDI be an "additional insured" on Davis & Burton's policy. Likewise, as noted above, RCDI's Amended Complaint for Declaratory Relief asserted that, because of RCDI's alleged reliance on the Certificate of Insurance, "Bituminous is estopped from denying RCDI's status ***as an additional insured***..." *Amended Complaint ¶ 14, emphasis added.*

RCDI attempts to muddy this water by asserting that the certificate of insurance issued by the Putnam Agency, "provided, in part, $2,000,000.00 in completed operations coverage to RCDI." *RCDI Brief at 11.* It does not. In fact, the certificate only notes that Davis & Burton has completed operations coverage under its policy. The only representation that the certificate made as to RCDI was that RCDI, RCDI Management, Inc. and WalMart "are listed as additional insureds."

The subcontract does not require "completed operations coverage" under any policy for either Davis & Burton or RCDI. Indeed, paragraph 13.2 of the subcontract permits the subcontractor to have either "occurrence" or "claims made" coverage to satisfy the insurance requirement for the period in which it is performing its work on the project. Completed operations coverage would be meaningless under a claims made policy that expired when the insured's work on the project was completed. RCDI could not have reasonably expected completed operations coverage for itself under its subcontractors' policies and RCDI clearly did not contractually require any such coverage from RCDI under its subcontract.

As noted above "additional insured" coverage is generally governed by an "additional insured" endorsement issued by named insured's carrier. The standard additional insured endorsement forms make clear that additional insureds have no coverage under the named insured's policy for liability arising out of the products-completed operations exposure.

The coverage that RCDI "desired" in 1994, could not have been anything more than what the industry standard would have been for additional insured coverage. Neither the ISO standard additional insured coverage forms in 1994 nor the Bituminous additional insured coverage forms used in 1994, would apply to claims arising from the completed operations of the additional insureds. The McCormick claims against RCDI in Civil Action No. 01-C-251 were clearly claims arising from the completed operations of RCDI. Thus the coverage that RCDI "desired" from its subcontractor's liability insurance policy (that was reflected on the October 19, 1994 certificate of insurance) would not have been implicated by the McCormick claims. Thus, regardless of whether RCDI could have demonstrated reliance on the certificate, the certificate cannot provide RCDI with coverage from Bituminous for the McCormick claim.

BITUMINOUS CASUALTY CORPORATION,
By Counsel

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CERTIFICATE OF SERVICE

I, John J. Polak, counsel for Defendant/Appellant, do hereby certify that service of the **"REPLY BRIEF ON BEHALF OF APPELLANT BITUMINOUS CASUALTY CORPORATION"** was made upon the parties listed below by mailing a true and exact copy thereof to:

Peter G. Zurbuch, Esq.
BUSCH, ZURBUCH & THOMPSON, PLLC
P.O. Box 1819
Elkins, WV 26241
Counsel for Resource Consultants and Developers, Inc.
in Civil Action No. 05-C-342

in a properly addressed envelope this 13th day of September, 2010.

John J. Polak
(WV State Bar No. 2929)