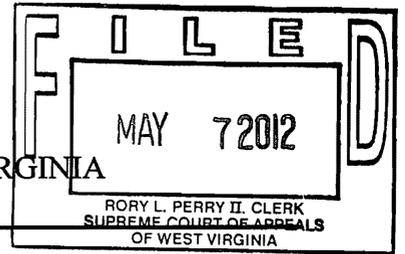


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
No. 12-0036



LISBETH L. CHERRINGTON,

Petitioner, Plaintiff below,

v.

THE PINNACLE GROUP, INC., a West Virginia corporation, ANTHONY MAMONE, JR., individually, and
OLD WHITE INTERIORS, LLC, a West Virginia limited liability company,

Defendants,

And

THE PINNACLE GROUP, INC., a West Virginia corporation, and ANTHONY MAMONE, JR.,

Third Party Plaintiffs,

v.

GLW CONSTRUCTION, INC.,

Third Party Defendant,

And

THE PINNACLE GROUP, INC., a West Virginia corporation, and ANTHONY MAMONE, JR.,

Petitioners, Third Party Plaintiffs below,

v.

NAVIGATORS INSURANCE COMPANY and
ERIE INSURANCE PROPERTY AND CASUALTY COMPANY,

Respondents, Third Party Defendants below.

BRIEF OF RESPONDENT ERIE INSURANCE PROPERTY AND CASUALTY COMPANY

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III. STATEMENT OF THE CASE

The Plaintiff below, Lisbeth L. Cherrington (hereinafter “Cherrington”), entered into a contract with The Pinnacle Group, Inc., Third Party Plaintiff below (hereinafter “Pinnacle”), for the construction of a \$1.1 million dollar home in The Greenbrier Sporting Club and was dissatisfied with the result. Indeed, Cherrington believes that the home was not only poorly built, but that she was overcharged to the point of fraud. Consequently, Cherrington sued Pinnacle, its representative, Anthony Mamone, Jr., Third Party Plaintiff below (hereinafter “Mamone”) and Old White Interiors, LLC. Pinnacle sought coverage for the defense of, and indemnification for, Cherrington’s suit under its commercial general liability insurance policy issued by Erie Insurance Property and Casualty Company, Third Party Defendant below (hereinafter “Erie”). Likewise, Mamone sought liability coverage under Pinnacle’s CGL policy as well as his Erie homeowner’s and umbrella policies. In light of the claims and damages alleged, coverage was denied. A declaratory judgment action ensued. Applying this Court’s long standing precedent, the trial court awarded Erie summary judgment and determined that no coverage existed under the three (3) Erie policies for the defense of, or indemnification for, Cherrington’s claims. Cherrington, Pinnacle and Mamone now appeal that decision.

Unfortunately, Petitioners unnecessarily overcomplicate the coverage aspects of this case. As more fully stated hereafter, the material facts are that Cherrington brought suit for breach of contract, breach of fiduciary duty, “poor workmanship” and fraud/misrepresentation, claims well-settled law overwhelmingly establishes are not “occurrences” triggering liability coverage. Moreover, Cherrington seeks the recovery of, among other damages, pecuniary losses and emotional distress, damages our law overwhelmingly establishes are not “property damage” or “bodily injury” so as to trigger liability coverage. Additionally, clear and unambiguous

exclusions long upheld by this Court operate to bar coverage. As the trial Court stated, Erie's position "accurately represents the law in the State of West Virginia as to insurance coverage". [AR at 00953]. Accordingly, Erie's award of summary judgment was appropriate.

Cherrington's suit against Erie's insureds contends that she "entered into a cost plus contract with The Pinnacle Group, Inc. and Anthony Mamone, Jr., for the construction of a house". [AR at 000321]. The "First Amended Complaint" further contends that "Pinnacle was negligent in the construction of said home". *Id.* at 000322. Specifically, Plaintiff's expert witnesses opine that "[t]he concrete floor on the lower level is uneven and ground moisture may be infiltrating through the floor slab", "the roof leaks at the chimney", "[a] sewer pipe full of liquid was covered with carpet in a closet in bedroom three on the lower level", and "[a] wall containing a pocket door in bathroom 3 on the lower level is not as stiff or rigid as other interior walls". [AR at 000337]. Additionally, it is alleged that gutters and downspouts are missing, that there is a lack of water diversion, that wood components are in direct contact with soil, that there are issues with the roof seams, and that there is inadequate or missing flashing, caulking and/or paint. [AR at 000343-000362].

Strikingly, the Cherrington Litigation further avers that "Pinnacle also undertook to provide furnishings to plaintiff's home through a third party." [AR at 000322]. According to the "First Amended Complaint", Pinnacle "charged plaintiff excess charges for said furnishings and plaintiff was damaged thereby." *Id.* at 000323. Purportedly, "Plaintiff was damaged by misrepresentations of Pinnacle". *Id.* Indeed, Ms. Cherrington testified about what she believed to be "fraud":

[Cherrington] So he contacted someone apparently from the Carolinas, Mr. Forbes, who could do copper roofs, and Tony told me and gave me in writing that the bill for the copper roof would be \$17 a square, and that he would give me credit for the \$18,000.

I called the architect in Hilton Head, asked him what the square - - how that's calculated on top of the roof so that I could determine whether or not it was the appropriate price.

In the meantime, I met with Mr. Forbes and asked him what he was going to do the roof for. Mr. Forbes told me \$12 a square, and not \$17 a square.

So once again, I began to doubt what I was hearing from Tony versus the person who was actually going to put on the roof.

The landscaping became an issue, because I thought the landscaping was included in the home, and was asked for near the end of the time when things were supposedly being repaired, that I come up with \$35,000 for the landscaping, and I was shocked, because that's not what I had been led to believe. So that price was over and beyond what I had been told. What could you say?

The chimney - - I'm setting in the area eating, watching television, and it rains, and water is coming through all of the stonework, not down the hole in the chimney, but gushing out; not little drips, gushing out, one thing after another.

So my credibility for what I was hearing began to erode, and I felt like someone was deceiving me with respect to handling what they said they would handle on my behalf, and then fixing what they said they would fix, and then the quality of materials and the work being done was not what he said would be done.

Q. Did all of these things come - - I understand gradually. You didn't necessarily, boom, each and every one of these items, not the same day.

But by the fall of '05, had the sum total of all of these things that you've described to us become aware to you?

A. By November or so, I began to think that there was potentially fraud involved, yes.

[AR at 000364 – 000365].

Cherrington asserts that she was damaged “in that her home’s fair market value has been and is substantially diminished; plaintiff paid excess moneys to Pinnacle above the amount actually owed; and plaintiff has been subjected to emotional distress and has otherwise been damaged.” [AR at 000323]. Moreover, according to the Cherrington Litigation, “[t]he

defendants' conduct was intentional and willful misconduct that entitles plaintiff to punitive damages." As discovery revealed:

Plaintiff claims she has and will suffer the following:

- (1) Plaintiff has paid more for building the house than was agreed. The amount will be provided after further discovery.
- (2) See report (attached), which describes some of the faulty workmanship.
- (3) Plaintiff's property value has been severely depreciated by at least 50% due to faulty workmanship.
- (4) Plaintiff has suffered annoyance and inconvenience and emotional distress.
- (5) Plaintiff's furniture was overpriced and sold to her at inflated values.
- (6) Plaintiff lost the use of her property.
- (7) Punitive damages

[AR at 000369 - 000375].

Pinnacle purchased a policy of commercial general liability insurance with Erie, policy number Q37-5150118 W, effective January 1, 2004, through January 1, 2005. [AR at 000377]. Additionally, Mamone purchased a policy of homeowner's insurance with Erie, policy number Q49-6400490, effective January 14, 2004, through January 14, 2005. [AR at 000485]. Mamone also purchased a personal umbrella policy Erie, policy number Q28-6950016, effective April 19, 2004, through April 19, 2005. [AR at 000521]. All three policies are "occurrence" policies with which this Court is well-acquainted. Additionally, the "property damage" covered under said policies is traditionally defined, so as to involve only "tangible property". Finally, the policies contain exclusions with which this Court is familiar, including intentional acts exclusions, business risk exclusions in the CGL and business pursuits exclusions in the personal policies.

Cherrington's suit began in February of 2006 and an Amended Complaint was filed in December of 2007. In March of 2009 Erie's insureds initiated a Third-Party Complaint against GLW Construction Co., Inc. A Third-Party suit was similarly initiated against Erie in October of 2009. As Cherrington's Expert Witness Disclosure identified an unnecessary insurance coverage expert witness, Erie filed a Motion to Exclude on or about April 26, 2010. However, the Trial Court "decided that while . . . [the Court] will make the decision as to coverage, [it saw no prejudice in] listening to the opinions of expert witnesses. Therefore, Erie obtained one, also, in rebuttal." [AR at 000869]. After multiple failed mediations, a hearing on Erie's Motion for Summary Judgment as to coverage was held on December 1, 2011. [AR at 000868]. Irrespective of the Rules of Civil Procedure governing summary judgment, Petitioners sought to further complicate an already unusual hearing by presenting factual testimony. *Id.* at 00869.¹ The Trial Court correctly declined to hear factual testimony at a summary judgment hearing. *Id.* at 000870.

At the summary judgment hearing, Erie's expert witness provided testimony consistent with the well-established law in this jurisdiction, including:

- The beginning of coverage analysis involves determining if the party seeking coverage is an insured and if the damages arose during a policy period; [AR at 000926]

¹ The record reveals:

MS. PIZIAK: . . . Now I understand that the plaintiff and the insured intend to present additional witnesses at the summary judgment hearing and I have to object to that in advance, if I may, given that it is a summary judgment hearing. They filed responses. They were capable of submitting affidavits and it's most unusual to take direct testimony at a summary judgment hearing.

MR. SHEATSLEY: . . . This circumstance arose in conjunction with the Court's determination to have this hearing and take evidence from the experts. The only intent on my part, on behalf of Pinnacle and Mr. Mamone, would be to briefly have Mr. Mamone testify with regard to the sub-contractor issues and factual issues related to this policy, or actually policies of insurance. . . .

[AR at 000869-870].

- An insuring clause is examined prior to examining policy exclusions; [AR at 000927]
- “In the three Erie policies, basically, there is - - - it’s like a gun with six clicks before it shoots. There are six basic requirements. One, there has to be a legal obligation to pay. Second, it has to be for bodily injury or property damage. Now this is under the liability portions and not the personal injury in the CGL. It has to be for bodily injury or property damage, as defined. The bodily injury or property damage must take place during the policy period. It must take place in the policy territory, and the insurance must, otherwise, apply.” [AR at 000927]
- Poor workmanship, standing alone, is not an occurrence. [AR 000928-929]
- Breach of contract is not an occurrence. [AR 000929]
- Breach of fiduciary duty is not an occurrence. [AR 000930]
- The intentional, willful overcharging for goods and services is not an occurrence. [AR 000930].
- Cherrington alleges economic damages which do not constitute “property damage” as defined by the policies. [AR 000930-931].
- Emotional distress does not constitute a “bodily injury” for purposes of insurance coverage. [AR 000931].
- Cherrington’s claims do not satisfy the insuring clauses of the three (3) Erie policies. [AR 000932].
- The “impaired property” exclusion precludes coverage under the CGL policy for Cherrington’s claims against Erie’s insureds and, moreover, that exclusion does not exempt subcontractor work from its operation. [AR 000933].
- Providing coverage for punitive damages does not negate the operation of the intentional acts exclusion. [AR 000936].
- The business pursuits exclusions operate to preclude coverage for Cherrington’s claims against Erie’s insureds under the two (2) personal policies. [AR 000937].
- Dr. Kensicki’s expert opinion, to a reasonable degree of certainty, is that there is no coverage for Cherrington’s claims against Erie’s insureds under any of the three (3) Erie policies at issue. [AR 000940].

Even more striking, however, are the *concessions* about the lack of coverage testified to by the expert witness hired by Cherrington, Pinnacle and Mamone:

- Overcharging is not covered by insurance policies. [AR at 00905].
- Emotional distress is not a covered “bodily injury.” [AR at 00908].
- If Mamone is not considered a “salesperson”, then the “business pursuits exclusion” operates to bar coverage for Cherrington’s claims under the two (2) personal policies. [AR at 00918].
- Diminished property value is an “economic situation” and is not covered by insurance policies. [AR at 00908].

Indeed, in seeking coverage in this appeal for more than punitive damages and poor workmanship, Petitioners are asking for more coverage than even their own expert asserts is afforded under the Erie policies. *See, e.g.*, [AR at 00909].

Clearly, the Trial Court appropriately awarded Erie summary judgment on the declaratory judgment action based upon this Court's long-standing precedent, much of which even Petitioners' expert agrees with. *See, e.g.*, AR at [000847-000866]. The Trial Court properly held that Cherrington's alleged emotional distress does not constitute "bodily injury" as is necessary to trigger coverage under the subject policies [AR at 000855]; Cherrington's alleged "property damage" are pecuniary losses and, therefore, not "property damage" as is necessary to trigger coverage under the subject policies [AR 000857]; Cherrington alleges only "poor workmanship" which does not constitute an "occurrence" as is necessary to trigger coverage under the subject policies [AR 000860]; even if the Cherrington litigation triggers coverage, the "impaired property" exclusion precludes coverage under the CGL policy [AR 000861]; even if the Cherrington litigation triggers coverage, the "business pursuits" exclusion precludes coverage under the personal policies [AR 000862]; and punitive damages are excluded from coverage under the two (2) personal policies. [AR 000865]. Accordingly, the Trial Judge properly held that "there is no coverage under any coverage part of the three (3) Erie policies at issue for the defense of, and indemnification for, the Plaintiff's claims against the Defendants." *Id.* Erie respectfully submits that the well-reasoned decision of the Trial Court should remain undisturbed.

IV. SUMMARY OF ARGUMENT

This Court has repeatedly held, "the doctrine of stare decisis is of fundamental importance to the rule of law" as it "ensures that 'the law will not merely change erratically'

and ‘permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals’.” *Murphy v. Eastern American Energy Corp.*, 224 W.Va. 95, 680 S.E.2d 110, 116 (citations omitted). Make no mistake, Petitioners would have this Court overturn *Erie Ins. Prop. And Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 526 S.E.2d 28, Syl. pt. 2 (1999) and its progeny, *Smith v. Animal Urgent Care, Inc.*, 208 W.Va. 664, 542 S.E.2d 827, 830 (2000), *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W.Va. 498, 625 S.E.2d 260, Syl. pt. 3 (2005), and countless other decisions of this Court, including those pertaining to the principles of contract application and construction. Indeed, Petitioners have even asked this Court to rule that the same insurance policy provisions it has upheld numerous times are ambiguous.

This Court’s decisions on the lack of CGL coverage for “poor workmanship” are sound and should be left undisturbed. Breach of contract, breach of fiduciary duty and misrepresentation are not “occurrences”. Pecuniary interests are not “property damage” as generally defined by liability insurance policies. Nor is “emotional distress” a “bodily injury” under a traditional liability insurance policy definition. The “business pursuits exclusion” is valid in personal insurance policies. “Poor workmanship”, standing alone, is not an “occurrence” triggering CGL coverage. As this Court stated in *Pioneer Home Improvement, supra*:

Pioneer purchased a CGL policy. These policies do not insure the work or workmanship which the contractor or builder performs. They are not performance bonds or builders’ risk policies. CGL policies, instead, insure personal injury or property damage arising out of the work. The ‘completed operations hazard’ coverage applies to collateral property damage or personal injury caused by an occurrence ‘arising out of your work that has been completed or abandoned.’

Id. at 33. Petitioners herein want to continually change the facts below in order to fit the latest anomalous decision, or change this Court’s well-settled law to fit the facts below, instead of

purchasing the appropriate forms of insurance as advised by this Court nearly fifteen (15) years ago. The Trial Court heeded this Court's instruction and that decision should not be overturned.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Inexplicably, Petitioners assert that this appeal is appropriate for R. App. P. 20 argument,² yet request argument under the R. App. P. 18 criteria. [Brief of Appellants at 7]. Respectfully, neither R. App. P. 19 nor R. App. P. 20 argument is necessary. Admittedly, the parties have not waived oral argument and there is a dispute as to the validity of the Petitioners' appeal. However, the dispositive issues herein have been authoritatively decided and Erie does not believe this Court needs to hear additional argument on well-settled legal principles. Nevertheless, should this Court deem argument appropriate for Petitioners, Erie would request it be allowed to orally present its position in response to that argument.

VI. ARGUMENT

A. THE STANDARD OF REVIEW

As this Court has repeatedly held, "[t]his Court's standards of review concerning summary judgments are well settled. Upon appeal, '[a] circuit court's entry of summary judgment is reviewed *de novo*.'" *Perrine v. E. I. DuPont De Nemours and Co.*, 225 W.Va. 482, 694 S.E.2d 815 (2010) (citations omitted). This Court has instructed that "'[t]he term '*de novo*' means ' [a]new; afresh; a second time.'" *State ex rel. Clark v. Blue Cross Blue Shield of West Virginia*, 203 W.Va. 690, 510 S.E.2d 764, 775 (1998) (citations omitted). Thus, as this Court has recognized:

In conducting our *de novo* review, we are mindful that, pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, summary

² Respectfully, this matter is not a "Rule 20" matter. As previously set forth, the decision below is not one of first impression, nor does it involve fundamental issues of public importance. There are no constitutional issues present and, to Erie's knowledge, there are no inconsistencies or conflicts among the Circuit Courts of West Virginia regarding the coverage issues present in this matter. W.Va. R. App. P. 20.

judgment is proper where the record demonstrates ‘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.’

Perrine, supra at 839 (citations omitted).

Moreover, the award of summary judgment at issue herein was granted in the context of a declaratory judgment action. In *Mountain Lodge Ass’n v. Crum & Forster Ind. Co.*, 210 W.Va. 536, 558 S.E.2d 336, 341 (2001), this Court noted “that the standard of review for both types of judgments is the same” as “ ‘[a] circuit court’s entry of a declaratory judgment is reviewed *de novo*.’” [citations omitted]. Although “[w]hen employing the *de novo* standard of review, [the Court] reviews anew the findings and conclusions of the circuit court, affording no deference to the lower court’s ruling”, *Blake v. Charleston Area Med. Center*, 201 W. Va. 469, 498 S.E.2d 41, 47 (1997) (citations omitted), it is readily apparent that the Trial Court’s decision was rendered in accordance with the well-established precedent of this Court. Accordingly, the underlying decision must be affirmed.

B. THE TRIAL COURT CORRECTLY RULED THAT THERE WAS NO DUTY TO DEFEND, OR INDEMNIFY, ERIE’S INSUREDS AGAINST THE CHERRINGTON LITIGATION UNDER THE THREE (3) ERIE POLICIES AT ISSUE.

1. The Trial Court Properly Held That The Insuring Clause Of The CGL Policy Was Not Triggered.

The Trial Court’s well-reasoned decision was rendered in accordance with the standards governing the application and/or interpretation of insurance policies. In light of some of the arguments made by Petitioners, who seemingly misunderstand how insurance policies are to be read and applied, Erie feels compelled to briefly revisit the relevant, fundamental principles. This Court has long recognized that “[w]here the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full

effect will be given to the plain meaning intended.” *Keffer v. Prudential Ins. Co. of America*, 153 W.Va. 813, 172 S.E.2d 714, Syl. (1970). In analyzing coverage, the first consideration is the policy’s insuring clause. *See Smith v. Animal Urgent Care*, 208 W. Va. 664, 667-8, 542 S.E.2d 827, 830-1 (2000) (stating that “[g]iven the fundamental restriction of the coverage at issue to claims which assert ‘bodily injury,’ we proceed initially to determine whether the complaint at issue contains averments of ‘bodily injury’” and “[l]ike the requisite ‘bodily injury’ necessary to invoke liability coverage, an ‘occurrence’ must similarly exist before American States is obligated to provide indemnification”). As the Colorado Court of Appeals once noted:

‘Triggering occurs when a threshold event implicates an insurance policy’s coverage. The fact that a policy has been triggered means that there may be liability coverage under that policy, subject to the policy’s terms, the application of any exclusions in the policy, and any other defenses the insurer may raise. Thus, a policy that has not been triggered does not provide any coverage, while a policy that has been triggered may or may not provide coverage, depending on the circumstances of the case.’

Village Homes of Colorado, Inc. v. Travelers Cas. And Sur. Co., 148 P.3d 293, 296 (2006) (citations omitted). Only if the insuring clause is satisfied is an examination of the exclusions necessary. The function of an exclusionary clause “‘is to restrict and shape the coverage otherwise afforded.’”³ Gary L. Johnson, “The Practical Art: On The Archaeology And Architecture of Liability Insurance Contracts,” 78 Def. Couns. J. 143 (2011) (Citing *Weedo v. Stone-E-Brick, Inc.*, 81 N.S. 233, 405 A.2d 788 (1979)). Moreover:

Each exclusion is to be read with the Insuring Agreement, independently of every other exclusion. The exclusions should be read seriatim, not cumulatively. If any one exclusion applies, there should be no coverage, regardless of inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions. There is no instance in which an exclusion can

³ Thus, *every* exclusion conflicts with the insuring clause. Petitioners’ statement that “the exclusion for ‘impaired property and property not injured’ is ambiguous and conflicts with the definition of ‘occurrence’” is nonsensical. [Brief of Appellant at 24].

properly be regarded as inconsistent with another exclusion since they bear no relationship with one another.

Id.; *See also* 2 Couch on Ins. § 22:30 (“an ambiguity in one exclusion does not make all exclusions ambiguous; each separate exclusion must be separately construed. Further, if two exemption clauses are entirely independent, as, for instance, a windstorm and a falling building clause in a sprinkler leakage policy, they are not construed together so as to make the falling building clause applicable only when the fall was caused by a windstorm.”) (footnotes omitted).⁴

a. The Trial Court Properly Held That The Cherrington Litigation Does Not Allege “Bodily Injury” As That Term Is Defined In The Erie CGL Policy.

Irrespective of this Court’s precedent, and the fact that their own expert witness testified that emotional distress is not a covered “bodily injury” under a liability insurance policy, the Petitioners continue to reference Cherrington’s alleged emotional distress.⁵ Clearly, “emotional distress” does not constitute a “bodily injury” under the Erie CGL policy and the Trial Judge’s Order properly reflected the same.

As amended, the insuring clause for the “bodily injury liability” and “property damage liability” portion of the CGL policy states:

a. We will pay those sums that the insured becomes legally obligated to pay as damages, including punitive or exemplary damages to the extent allowed by law, because of ‘bodily injury’ or ‘property damage’ to which this insurance applies. We will have the right and duty to defend the insured against any ‘suit’ seeking those damages. However, we will have no duty to defend the insured against any ‘suit’ seeking damages for ‘bodily injury’ or ‘property damage’ to which this insurance does not apply. We may, at our discretion, investigate any ‘occurrence’ and settle any

⁴ In light of these well-recognized principles, Petitioners’ attempt to argue that the “impaired property” exclusion is rendered ambiguous by the separate “your work” exclusion must be disregarded. [Brief of Appellants at 24].

⁵ Similarly inexplicable, Petitioners are apparently of the belief that only the “intentional acts exclusion” limits coverage for Cherrington’s intentional claims. *See* Brief of Appellants at 23 (maintaining, without citation, that the CGL policy provides coverage for breach of fiduciary duty, misrepresentation and overcharging). Irrespective of the existence of a variety of exclusions, Petitioners, again, fail to recognize that the foregoing claims do not constitute “occurrences” and the alleged damages arising therefrom do not constitute “bodily injury” or “property damage”.

claim or 'suit' that may result. But:

1) The amount we will pay for damages is limited as described in Section III – Limits of Insurance; and

2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages A and B.

b. This insurance applies to 'bodily injury' and 'property damage' only if:

1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory'; and

2) The 'bodily injury' or 'property damage' occurs during the policy period.

c. Damages because of 'bodily injury' include damages claimed by any person or organization for care, loss of services or death resulting at any time from the 'bodily injury'.

[AR at 000456]. "Bodily injury" is defined by the policy as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." *Id.* at 000462.

In accordance with the afore-quoted insuring clause, it is "bodily injury" that triggers any duty to indemnify under that portion of the commercial general liability policy. *See Smith v. Animal Urgent Care*, 208 W. Va. 664, 667-8, 542 S.E.2d 827, 830-1 (2000) (stating that "[g]iven the fundamental restriction of the coverage at issue to claims which assert 'bodily injury,' we proceed initially to determine whether the complaint at issue contains averments of 'bodily injury'" and "[l]ike the requisite 'bodily injury' necessary to invoke liability coverage, an 'occurrence' must similarly exist before American States is obligated to provide indemnification").

In *Smith v. Animal Urgent Care*, this Court examined a commercial general liability policy, which, like the policy at issue, obligated the insurer to indemnify the insured for sums it became legally obligated to pay as damages because of “bodily injury.” *Id.* at 666, 542 S.E.2d at 829. Under the *Smith* policy, the insurer sought a determination of whether it was required to provide a defense or indemnification in connection with a lawsuit brought by a former employee against Animal Urgent Care and one of its veterinarians. *Id.* In the lawsuit, the former employee alleged sexual harassment, wrongful discharge, and intentional infliction of emotional distress arising from acts purportedly engaged in by the defendant veterinarian for the purpose of harassing, degrading, and embarrassing the plaintiff through unwelcome sexual advances and exploitation. *Id.* at 665, 542 S.E.2d at 828. According to the plaintiff, the defendant veterinarian’s acts included both verbal and physical conduct of a sexual nature. *Id.*

Noting the “fundamental restriction of the coverage at issue to claims which assert ‘bodily injury,’” this Court discussed with approval the decision of *Citizens Insurance Company v. Leiendecker*, 962 S.W.2d 446, 450-4 (Mo.Ct.App. 1998), stating as follows:

In discussing the rationale for excluding purely emotional injuries from the category of bodily injury, the court in *Leiendecker* explained that ‘in insurance law “bodily injury” is considered to be a narrower concept than “personal injury” which covers mental or emotional injury.’ 962 S.W.2d at 453. Further elucidating the distinction between personal and bodily injury, the court commented:

It is well settled in insurance law that “bodily injury” and “personal injury” are not synonyms and that these phrases have two distinct definitions. The term “personal injury” is broader and includes not only physical injury but also any affront or insult to the reputation or sensibilities of a person. “Bodily injury,” by comparison, is a narrow term and *encompasses only physical injuries to the body and the consequences thereof.*

Id. (citation omitted) (quoting *Allstate Ins. Co. v. Diamant*, 401 Mass. 654, 518 N.E.2d 1154, 1156 (1988)).

Id. at 667-8, 542 S.E.2d at 830-1 (emphasis added). Finding the reasoning of the majority position, as espoused by the *Leindecker* court, to be persuasive, this Court determined that “in an insurance liability policy, purely mental or emotional harm that arises from a claim of sexual harassment and lacks physical manifestation does not fall within a definition of ‘bodily injury’ which is limited to ‘bodily injury, sickness, or disease.’” *Id.* at 668, 542 S.E.2d at 831 (footnotes omitted). Notably, this Court recently upheld *Animal Urgent Care*. See *Shrewsbury v. Mohan*, No. 35653 (W.Va. Supreme Court, April 1, 2011) (memorandum decision). Accordingly, the Trial Court correctly determined that allegations of “emotional distress” are insufficient to constitute “bodily injury” so as to trigger coverage under the Erie CGL policy. [AR at 000855].

b. The Trial Court Properly Held That The Cherrington Litigation Does Not Allege “Property Damage” As That Term Is Defined In The Erie CGL Policy.

Similarly, the Trial Court appropriately found that Cherrington fails to allege “property damage” under any of the relevant Erie policies. “Property damage” is defined by the subject policy as:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the ‘occurrence’ that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with

electronically controlled equipment.

[AR at 000464]. In *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W.Va. 498, 625 S.E.2d 260, Syl. pt. 3 (2005) (emphasis added), this Court held that “[a]bsent policy language to the contrary, a homeowner’s policy defining ‘occurrence’ as ‘bodily injury or property damage resulting from an accident’ does not provide coverage for an insured homeowner who is sued by a home buyer *for economic losses* caused because the insured negligently or intentionally failed to disclose defects in the home.” Indeed, this Court stated “courts ‘are virtually unanimous in their holdings that damages flowing from misrepresentation and/or fraud have no basis [as] property damage; rather, the only cognizable damages from such torts are *economic* and contractual in nature and as such do not fall within the scope of coverage afforded by [homeowners] policies[.]’” *Aluise* at 268 (citations omitted) (emphasis added). Thus, this Court recognized:

The Aluises sought damages for economic losses they sustained as a result of the negligent or intentional failure of the Forsseniuses to disclose defects in the home at the time of the sale. The claims asserted by the Aluises simply do not trigger an occurrence as defined under the policy. As one court appropriately noted, ‘[t]o find coverage existed in this case would be to find that based on an act of sale, a homeowner’s insurer becomes the warrantor of the condition of the insured property. This is not the type of coverage which is contemplated by . . . homeowner’s policies[.]’

Id. at 269 (citations omitted). Consequently, the Trial Court properly held that the economic losses alleged by Cherrington are not “tangible” property so as to trigger property damage liability coverage under any Erie policy at issue.

Perhaps in an attempt to blur the lack of tangible property damage, Petitioners argue that “property damage” exists by virtue of the definition of “occurrence”.⁶ Petitioners heavily rely upon the decision of *Simpson-Littman Construction, Inc. v. Erie Ins. Prop. & Cas. Co.*, 2010 WL 3702601 (S.D. W.Va. Sept. 13, 2010) (slip opin.); however, that reliance is wholly misplaced.

⁶ Obviously, the analysis is flawed as both “property damage” and an “occurrence” must exist for coverage to be triggered. In the instant case, neither is present.

Initially, the *Simpson-Littman* decision is interlocutory as the case is still awaiting trial. *Id.* Even more importantly, however, in *Simpson-Littman*, the existence of “property damage” was conceded. *Id.* at *7 (“It is undisputed that there is property damage to Merlin Bush’s home, as defined in Policy No. Q33-6520012.”). Petitioners herein recognize the concession, yet continue to argue that Cherrington suffered “property damage” under *Simpson-Littman*. See Brief of Appellant at 14.

In this regard, Cherrington’s attempt to allege “property damage” by mimicking the damages alleged *Simpson-Littman* is futile as she continues to allege the economic nature of those damages. See, e.g., Brief of Appellant at 19, n. 16 (“Erie also argued that plaintiff did not claim damages for property damage or loss of use. ***However, a large portion of the discovery in this case revolved around the cost to repair the damages, including replacement cost of the cement flooring.***”) (emphasis added). Thus, the instant case is remarkably similar to that of *Viking Constr. Management v. Liberty Mut. Ins. Co.*, 358 Ill.App.3d 34, 294 Ill. Dec. 478, 831 N.E.2d 1 (2005). In *Viking Construction*, Viking was retained to provide construction management services with regard to the design and construction of a new middle school. Quinn was retained as the general contractor, and Quinn retained Crouch-Walker as the masonry subcontractor. Crouch-Walker named Viking as an additional insured on its Liberty Mutual CGL policy. During construction, portions of a masonry wall collapsed due to Crouch-Walker’s inadequate bracing. Woodland sued Viking for the repair and replacement of damaged property caused by the collapse. Liberty Mutual denied coverage for the suit and a declaratory judgment action ensued. In finding that there was no “property damage”, the Illinois Court stated:

A line of Illinois cases holds that where the underlying complaint alleges only damages in the nature of repair and replacement of the defective product or construction, such constitute economic losses and do not constitute ‘property damage.’ For example, in

Tillerson, State Farm filed a declaratory action against the defendant contractor, its insured, seeking a declaration that it was not required to defend the contractor in an underlying lawsuit filed by the homeowner plaintiffs against him for breach of express warranty of workmanship, implied warranty of habitability, and implied warranty of fitness. *Tillerson*, 334 Ill.App.3d at 405, 268 Ill.Dec. 63, 777 N.E.2d 986. The trial court concluded that State Farm had a duty to defend. On appeal, the *Tillerson* court addressed the issue of whether the underlying complaint alleged ‘property damage.’ In evaluating this question, the court stated that CGL policies ‘are not intended to pay the costs associated with repairing and replacing the insured’s defective work and products, which are purely economic losses.’ [Citation.]’ *Tillerson*, 334 Ill.App.3d at 410, 268 Ill.Dec. 63, 777 N.E.2d 986. Specifically, according to the court, ‘[f]inding coverage for the cost of replacing or repairing defective work would transform the policy into something akin to a performance bond.’ [Citation.]’ *Tillerson*, 334 Ill.App.3d at 410, 268 Ill.Dec. 63, 777 N.E.2d 986. The *Tillerson* court found that the plaintiffs in the underlying case ‘merely [sought] either the repair or the replacement of defective work or the diminishing value of the home.’ *Tillerson*, 334 Ill.App.3d at 410, 268 Ill.Dec. 63, 777 N.E.2d at 986. Accordingly, the court concluded that the allegations did not potentially fall within the policy’s coverage and State Farm owed no duty to the defendant.

Id. at 17 (additional citations omitted). The *Viking* Court thus held that the “complaint merely sought economic damages, which do not constitute ‘property damages.’ As also discussed above, the . . . complaint merely sought repair and replacement of the damaged product. This has clearly been held to constitute only economic losses that are not covered by the CGL policy.”

Id. at 17-18 (citations omitted).

Thus, irrespective of how Cherrington now chooses to identify her alleged damages, even though her First Amended Complaint sought repairs and alleged diminished property value, Cherrington seeks the recovery of *economic losses*. It is fundamental that economic losses are not “tangible property” so as to satisfy the definition of “property damage” and trigger a CGL policy. The Trial Court’s decision was correct and must remain undisturbed.

c. The Trial Court Properly Held That The Cherrington Litigation Does Not Allege An “Occurrence” As That Term Is Defined In The Erie CGL Policy.

As previously shown, the CGL policy must be triggered by an “occurrence” which is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” Petitioners maintain that the Trial Court’s analysis of the “occurrence” issue is “flawed” due to an improper reliance on *Groves v. Doe*, 333 F.Supp. 2d 568 (N.D. W.Va. 2004). Respectfully, the only thing “flawed” is Petitioners’ reading of the Summary Judgment Order. The Trial Court never cited *Groves* with respect to the “occurrence” issue.⁷ [AR at 000857-000860]. Rather, the Trial Court relied upon this Court’s long-standing precedent, *State Bancorp, Inc. v. United States Fid. And Guar. Ins. Co.*, 199 W.Va. 99, 483 S.E.2d 228 (1997); *Erie Ins. Prop. And Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 526 S.E.2d 28 (1999); and *Corder v. William W. Smith Excavating Co.*, 210 W.Va. 110, 445 S.E.2d 77 (2001). *Id.* As more fully set forth hereafter, the decision was proper and should not be reversed.

This Court has analyzed “occurrence” policies wherein an occurrence is defined as an accident, noting:

[a]n ‘accident’ generally means an unusual, unexpected and unforeseen event. . . . An accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces the damage. . . . To be an accident, both the means and the result must be unforeseen, involuntary, unexpected, and unusual.

State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co., 199 W.Va. 99, 483 S.E.2d 228 (1997) (citations omitted). This Court has further stated “a breach of contract which causes ‘bodily injury’ or ‘property damage’ is not an event that occurs by chance or arises from unknown causes, and, therefore is not an ‘occurrence’ as that word is defined. . . .” *Bruceton Bank v.*

⁷ *Groves, supra* was cited in conjunction with the Trial Court’s analysis of the “impaired property” exclusion. [AR at 000861].

U.S.F. & G., 199 W.Va. 548, 486 S.E.2d 19 (1997). The Trial Court correctly determined that, under this standard, Cherrington does not allege an “occurrence” so as to trigger coverage herein. As stated previously, “[a]bsent an occurrence, as that term is defined under the policy, there can be no coverage under the policy at issue, or any other commercial general liability policy.” *Webster County Solid Waste Authority v. Brackenrich & Associates, Inc.*, 217 W.Va. 304, 617 S.E.2d 851, 857 (2005).

Moreover, with regard to faulty workmanship, this Court has held that “[c]ommercial general liability policies are not designed to cover poor workmanship. Poor workmanship, standing alone, does not constitute an ‘occurrence’ under the standard policy definition of this term as an ‘accident including continuous or repeated exposure to substantially the same general harmful conditions.’” *Corder v. William W. Smith Excavating Co.*, 210 W.Va. 100, 556 S.E.2d 77 (2001). This Court subsequently elaborated upon that general principle in the *Brackenrich* decision. In *Brackenrich*, the underlying allegations involved “alleged defects in design, construction, supervision, and inspection of [a] landfill.” *Id.* at 854. This Court stated “[b]ecause faulty workmanship claims are essentially contractual in nature, they are outside the risks assumed by a traditional commercial general liability policy.” *Brackenrich, supra* at 858. It was further recognized, “[a]s we explained in both *Erie* and *Corder*, allegations of poor work performance are not the types of acts that qualify as an occurrence under a commercial general liability policy. Consequently, we reach the same conclusion that the circuit court did and hold that there has been no demonstration of an occurrence that would trigger coverage under the Nationwide policy at issue.” *Id.* at 858. In accordance with this precedent, the Court below

correctly held that the claims presented in the First Amended Complaint do not constitute an “occurrence” so as to trigger coverage under any of the three (3) Erie policies.⁸

⁸ On the same basis, coverage is precluded under the CGL policy and the umbrella policy by the intentional acts exclusion. In *West Virginia Fire & Cas. Co. v. Stanley*, 216 W.Va. 40, 602 S.E.2d 483 (2004), this Court reiterated that the term “accident” is “the equivalent of the intentional tort exclusion” and, therefore, includes only the damage “the insured neither expected or intended.” *Id.* (quoting *Dotts v. Taressa J.A.*, 182 W.Va. 586, 390 S.E.2d 568 (1990)) (emphasis in original). Thereafter, this Court relied upon its decision of *State Bancorp, Inc. v. U.S. Fidelity and Guar.*, 199 W.Va. 99, 483 S.E.2d 228 (1997), wherein it was held that “‘a breach of contract which causes ‘bodily injury’ or ‘property damage’ is not an event that occurs by chance or arises from unknown causes, and, therefore, is not an ‘occurrence[.]’” *Id.* Thus, this Court concluded:

We do not believe that the term ‘accident’ in the instant policy is ambiguous. The common and everyday meaning of ‘accident’ is a chance event or event arising from unknown causes. This meaning does not include the kinds of deliberate acts alleged in the complaint. The crux of the complaint is that Jesse Stanley deliberately sexually assaulted Cass-Sandra Stanley. Such a deliberate act is not covered by the subject policy because it does not constitute an ‘accident.’ Cass-Sandra and Sandra Stanley also allege the intentional torts of outrage, civil conspiracy, and civil assault. These too are deliberate acts which do not fall within the meaning of the term ‘accident.’ We conclude, therefore, that the allegations of deliberate acts committed by Glen, Helen, and Jesse Stanley are not covered by the subject insurance policy. Further, although Cass-Sandra and Sandra Stanley also assert allegations of negligence in their complaint, for the reasons to be discussed *infra*, we do not believe that these allegations bring the claims of Cass-Sandra and Sandra Stanley under the policy’s coverage provision.

Id.

Petitioners’ assertion that the existence of coverage for punitive damages negates the policies’ intentional acts exclusions is illogical, at best. As Erie’s expert witness testified, “there’s not much of a connection there, at all. We exclude intentional acts because insurance is supposed to be a transfer of risk. If I intentionally damage your property, there’s no risk involved in that, so there’s no reason for me to be insured. It just wouldn’t qualify for insurance, but insofar as punitive damages, we are just picking up damages other than bodily injury and property damage. We’re picking up some punishment that we did because when I put that wall up and that tile on that wall, I was so grossly negligent that it absolutely offended everybody, or whatever the legal standard would be. It’s just adding another layer to a special and general damages, but it still has to arise out of a covered bodily injury or property damage.” [AR at 000936-000937]. Moreover, Petitioners’ position ignores the fact that the policy provides “personal injury” coverage for enumerated offenses for which punitive damages may be recoverable.

Similarly untenable is Petitioners’ belief that because the term “occurrence” exists along with exclusionary language, such as the intentional acts exclusion, both provisions could not be operable in the same instance. In other words, Petitioners assume that the definition of “occurrence” does not bar coverage for intentional conduct, otherwise there would not be an intentional acts exclusion in the policy. This Court has found both provisions to be applicable to cases in numerous claims. *See, e.g., Webster County Solid Waste Auth. v. Brackenrich & Assoc., Inc.*, 217 W.Va. 304, 617 S.E.2d 851 (2005) (holding that an engineering firm’s allegedly negligent or faulty workmanship in design, engineering, and inspection of a landfill was not an “occurrence” under the firm’s commercial general liability policy and coverage was excluded under the policy’s professional liability exclusion); *West Virginia Fire & Cas. Co. v. Stanley*, 216 W.Va. 40, 602 S.E.2d 483 (2004) (holding that a homeowner’s liability policy did not provide coverage for allegations of negligent supervision of the homeowners’ minor child when the child allegedly sexually assaulted his niece; and noting that the sexual assault was not an “accident” within the meaning of the policy’s liability coverage, and that the intentional acts exclusion was applicable as a matter of law); *Smith v. Animal Urgent Care, Inc.*, 208 W.Va. 664, 542 S.E.2d 827 (2000) (holding that even though the complaint included “negligence-type allegations,” the essence of the claim was sexual harassment and did not fall within the definition of an “occurrence” which would be covered by a veterinarian’s commercial general liability

As they did below, Petitioners rely almost entirely upon the interlocutory District Court decision of *Simpson-Littman Construction Co. v. Erie Insurance Property & Casualty Co.*, No. 3:09-0240, 2010 WL 3702601 (S.D.W. Va. Sept. 13, 2010) (slip opin.). In *Simpson-Littman*, because the parties did not dispute that the homeowner's claimed damages constituted "property damage" under the policy, the Court analyzed whether an "occurrence" existed. 2010 WL 3702601 at *7. The policy defined "occurrence" as "an accident, including continuous or repeated exposure to the same general, harmful conditions." *Id.* (citation omitted). Using the definition of "accident" provided by this Court in *State Bancorp, Inc. v. U.S. Fidelity and Guaranty Insurance Co.*, *supra.*, the *Simpson-Littman* Court determined the issue before it was whether the structural damage to the homeowner's house (resulting from the subcontractors' failure to use "engineered fill" beneath the house, which in turn caused ongoing settlement of the soil and fill material beneath the residence) was unusual, unexpected, and unforeseen. *Id.* at *7; *see id.* at *8. More specifically, the Court framed the question before it as "whether the settlement of soil and fill (the result) and the faulty performance of the subcontractors (the

policy, and that the alleged sexual harassment fell within the intentional acts and employee exclusions in the insurance policy); *Erie Ins. Property and Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 526 S.E.2d 28 (1999)(holding that in a suit brought by homeowners against a construction company for breach of contract and faulty workmanship, the construction company's commercial general liability policy did not provide coverage because the faulty workmanship had not caused an "accident" under the policy, and also noting that the claims fell within a policy exclusion); *State Bancorp, Inc. v. U.S. Fidelity and Guar. Ins. Co.*, 199 W.Va. 99, 483 S.E.2d 228 (1997) (holding that a commercial general liability policy and excess liability policy did not provide coverage to insured bank and loan officers against borrowers' claims for outrage, civil conspiracy, and violation of banking laws because the claims did not allege an "occurrence" and also fell within the policies' intentional injury exclusions); *Bruceton Bank v. U.S. Fidelity and Guar. Ins. Co.*, 199 W.Va. 548, 486 S.E.2d 19 (1997) (holding that a lender liability suit against the insured bank for denying a loan application was based upon breach of contract principles and did not arise from an "occurrence" or "accident" as defined by the policy; the allegations also fell within the purview of the intentional action exclusion of the bank's commercial general liability policy); *Silk v. Flat Top Const., Inc.* 192 W.Va. 522, 453 S.E.2d 356 (1994)(holding that a policy exclusion for damages caused by reason of assumption or liability in a contract or agreement barred coverage for a suit brought against an insured construction company arising out of their consultation and supervision of construction of a home, and noting that an "insured contractor's willful and knowing violation of contract specifications does not constitute an occurrence within policy coverage." (internal citations omitted)); *Dotts v. Taressa J.A.*, 182 W.Va. 586, 390 S.E.2d 568 (1990) (holding that a motor vehicle liability insurance policy did not provide coverage for the intentional tort of sexual assault because it was not an "accident," and interpreting the policy provision defining covered "accidents" as an intentional tort exclusion).

means) were unforeseen [sic], involuntary, unexpected, and unusual,” *id.* at *7 (citation omitted), and answered this question affirmatively. *Id.* at *9. Thus, the Court found that the settlement of the soil and fill below the homeowner’s residence, which was caused by the subcontractors’ negligence, was an “occurrence” under the subject policy. *Id.*

Critically, however, the *Simpson-Littman* Court acknowledged in its reasoning that, “[CGL policies do] not cover an accident of faulty workmanship but rather faulty workmanship that causes an accident.” *Id.* at *8 (quoting *Erie Ins. Prop. and Cas. Co. v. Pioneer Home Improvement, Inc.*, 206 W. Va. 506, 526 S.E.2d 28, 31 (1999)) (additional citation omitted). The *Simpson-Littman* Court went on to explain that faulty workmanship, in and of itself, was not sufficient to give rise to an “occurrence”:

As a result, in faulty workmanship cases, there must be something more than the flawed performance to trigger coverage. There must be an unexpected or unforeseen [sic] event. In other words, as explained in *Corder*, ‘[t]he key to determining the existence of an “occurrence” is whether a separate act or event or happening occurred at some point in time that lead to the [property damage complained of] or whether the [property damage] is tied to the original acts of repair performed by [the insured].’ *Corder*, 556 S.E.2d at 84. If the property damage is tied to the original acts performed by the insured, then, despite any negligence, there is no coverage. This is because there is no ‘accident’ and thus no ‘occurrence.’ However, if the damage is tied to a ‘separate act or event or happening,’ then the separate act or event, when unexpected or unusual, may qualify as an ‘occurrence.’ This ‘occurrence,’ if it triggered damage during the policy period, will trigger coverage.

Id. (emphasis added). Applying this reasoning to the facts before it, the *Simpson-Littman* Court noted that **the subcontractors’ faulty workmanship in combination with a separate event** – the settlement of the soil and fill beneath the homeowner’s residence – qualified as an “occurrence.” *Id.* The subcontractors’ faulty workmanship, in and of itself, was **not** an “occurrence.” *See id.* The Court noted two cases that led it to this conclusion: *American Family*

Mutual Insurance Co. v. American Girl, Inc., 673 N.W.2d 65 (Wis. 2004), and *French v. Assurance Co. of America*, 448 F.3d 693 (4th Cir. 2006). *Id.* at *9. Both of these cases illustrate the reasoning that was crucial to the *Simpson-Littman* Court’s finding that an “occurrence” existed: in these cases, the courts found that a subcontractor’s faulty workmanship in combination with a separate event constituted an “occurrence.” *See American Girl*, 673 N.W.2d 65 (finding an “occurrence” under a general contractor’s CGL policy where a subcontractor’s advice as to soil preparation for the site of a warehouse resulted in the warehouse sinking, which in turn caused the warehouse to buckle); *French*, 448 F.3d 693 (finding an “occurrence” where a subcontractor’s faulty installation of a synthetic stucco system to the outside of a residence led to moisture intrusion and damage to the contractor’s otherwise non-defective work (the structure and walls of the residence)).

In this case, as in *Simpson-Littman*, “[b]odily injury and property damage liability” coverage in the CGL policy is triggered by an “occurrence” which is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions”. [AR at 000460].⁹ Critically, however, this case is distinguishable from *Simpson-Littman* on the basis that Petitioners do not point to any “separate act or event or happening [that] occurred at some point in time that led to the [property damage complained of]” that the *Simpson-Littman* Court found necessary for an “occurrence” to exist. 2010 WL 3702601 at *8 (citation omitted). Instead, Petitioners point to faulty workmanship and erroneously contends this, in and of itself, constitutes an “occurrence.” Under this Court’s overwhelming precedent, this is simply not so. *See id.*; *Corder*, 210 W. Va. at 114, 556 S.E.2d at 83 (“[p]oor workmanship, standing alone, cannot constitute an ‘occurrence’ under the standard policy definition of this term as an ‘accident

⁹ Similarly, “[b]odily injury and property damage liability” coverage in the homeowner’s policy is triggered by an “occurrence,” which is defined as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions”. [AR at 000492].

including continuous or repeated exposure to substantially the same general harmful conditions.’). Accordingly, the Trial Court properly found that no “occurrence” exists under the subject policies, and summary judgment is appropriate herein.¹⁰

2. The Trial Court Properly Applied The CGL Policy Exclusions.

a. The Trial Court Did Not Rely Upon The CGL’s Exclusion For Damage To Your Work.

Petitioners assert that “the Court erred in finding that the ‘your work’ exclusion precluded coverage because there is an exception to the exclusion that provides coverage for the acts of subcontractors.” [Brief of Appellants at 19]. Petitioners argument in this regard is curious, as the Trial Court did not rely upon the “your work” exclusion in the CGL policy. Indeed, the Order states:

23. Having determined that no “bodily injury”, “property damage” or “occurrence” is alleged in Plaintiff’s “First Amended Complaint,” the Court concludes that the coverage is not triggered under any of the three (3) Erie policies at issue and, therefore, exclusionary provisions in said policies need not be examined. Nevertheless, the Court concludes that various exclusionary provisions would operate to preclude coverage for Plaintiff’s claims against the defendants.

24. Although several exclusionary provisions in the CGL policy are potentially applicable, and were fully briefed by Erie, the argument before the Court focused on three (3) “property damage” exclusions. The Pinnacle policy precludes from coverage:

¹⁰ Although Petitioners fail to properly address the issue, Cherringtons’ allegations of “fraud” and “breach of fiduciary duty” are also not “occurrences”. See *A.O. Smith Corp. v. Allstate Ins. Co.*, 222 Wis.2d 475, 588 N.W.2d 285, 294 (1998) (‘intent can be inferred as a matter of law from the fraudulent allegations contained in the complaints. Thus, the allegations in the complaint do not state facts that constitute an occurrence.’); *Aluise, supra*, 218 W. Va. at 506, 625 S.E.2d at 268 (citations omitted) (“The Aluises sought damages for economic losses they sustained as a result of the negligent or intentional failure of the Forsseniuses to disclose defects in the home at the time of the sale. The claims asserted by the Aluises simply do not trigger an occurrence as defined under the policy.”); *Johnson v. State Farm Fire and Cas. Co.*, 346 Ill.App.3d 90, 806 N.E.2d 223 (2004) (breach of fiduciary duty not an “accident”).

l. Damage To Your Work

'Property damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard'.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- 1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- 2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- 1) 'Your product';
- 2) 'Your work';
- 3) 'Impaired property';

If such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

[CGL Policy at 4].

25. Plaintiff and Defendants maintained that exclusion (l) was inapplicable as various work complained of was performed by subcontractors. Erie submitted, however, that exclusion (m) applied and *included* the work of subcontractors. Erie's rebuttal

expert witness testified accordingly. Notably, exclusion (m) operated to bar coverage, irrespective of the existence of subcontractors, in the strikingly similar case of *Groves v. Doe*, 333 F. Supp. 2d 568 (N.D.W. Va. 2004). Exclusion (m) was also referenced by the Supreme Court of Appeals of West Virginia in *Corder, supra*, at 85. Moreover, the Fourth Circuit Court of Appeals recently upheld a District Court’s award of judgment which had been based upon, among other issues, exclusion (m). *North American Precast, Inc. v. General Cas. Co. of Wisconsin*, 2011 WL 713768 at *577, n. 1 (4th Cir. Mar. 2, 2011) (per curiam) (unpublished).

26. *As a matter of law, the Court concludes that, even if the claims alleged by Plaintiff herein satisfy the CGL policy’s insuring clause, they are excluded from coverage by exclusion (m).*

[AR at 000860-000861 (emphasis added)].¹¹ It is axiomatic that a decision cannot be erroneous if it was never made.

b. The Trial Court Properly Applied The CGL’s Exclusion For “Impaired Property.”

As stated previously, the Trial Court properly determined that, “even if the claims alleged by Plaintiff herein satisfy the CGL policy’s insuring clause, they are excluded from coverage by exclusion (m) [the “impaired property” exclusion].” [AR at 000861]. Petitioners’ argument in opposition to this exclusion ignores an essential term in the policy provision, the word “or”, as well as well-established rules of contract application. When every word of the provision is applied, as the Trial Court did below, its applicability is clear.

The policy precludes from coverage:

m. Damage To Impaired Property Or Property Not Physically Injured

¹¹ Indeed, Erie took the position below that, while not conceding its inapplicability, in light of the subcontractor dispute, for purposes of summary judgment, Erie need not rely upon the “your work” CGL coverage exclusion. Rather, Erie relied upon the exclusion cited by the Trial Court, the “impaired property” exclusion, which *specifically* excludes the work of subcontractors. [AR at 000875]. Respectfully, the same is true at the appellate level. Erie believes that exclusion (l), for “your work”, is applicable. Nevertheless, as there are other bars to coverage, exclusion (l) need not be addressed.

“Property damage” to “impaired property” or property that has not been physically injured, arising out of:

- 1) A defect, deficiency, inadequacy or dangerous condition in “your product” or “your work”; or
- 2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to “your product” or “your work” after it has been put to its intended use.

[AR at 000461]. “Impaired Property” is defined by the policy as:

8. “Impaired property” means tangible property, other than “your product” or “your work”, that cannot be used or is less useful because:

a. It incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

a. The repair, replacement, adjustment or removal of “your product” or “your work”; or

b. Your fulfilling the terms of the contract or agreement.

Id. at 000462. By its own terms, therefore, the exclusion applies to “impaired property” *or* property that has not been physically injured. As this Court has repeatedly recognized, “where the disjunctive ‘or’ is used, it ordinarily connotes an alternative between the two clauses it connects.” *State v. Easton*, 203 W.Va. 631, 510 S.E.2d 465, 477 (1998) (citing *State v. Rummer*, 189 W.Va. 369, 377, 432 S.E.2d 39, 47 (1993)).¹² Thus, if Petitioners’ factual position on damages is accepted, Cherrington’s alleged damages are excluded as constituting “tangible

¹² The disjunctive choices set forth by this policy provision were recognized by the United States District Court for the Southern District of West Virginia in *North American Precast, Inc. v. General Cas. Co. of Wisconsin*, 2008 WL 906327 (U.S.D.C. S.D.W.Va. March 31, 2008) (“As they are *neither* impaired property *nor* property not physically injured, exclusion 2m does not apply to the masonry walls or concrete floor.”) (emphasis added).

property, other than ‘your product’ or ‘your work’¹³, that cannot be used or is less useful because it incorporates ‘your product’ or ‘your work’ that is known or thought to be defective, deficient, inadequate or dangerous; or You have failed to fulfill the terms of a contract or agreement” and “such property can be restored to use by The repair, replacement, adjustment or removal of ‘your product’ or ‘your work’; or Your fulfilling the terms of the contract or agreement.”

The “impaired property” exclusion was relied upon by Judge Keeley in rendering the decision of *Groves v. Doe*, 333 F.Supp.2d 568 (N.D. W.Va. 2004). Like the instant matter, the Plaintiffs in *Groves* contracted with an Erie insured for the construction of a home, later alleging that the insured “failed to complete construction and perform construction in a good and workmanlike manner.” The Plaintiffs later brought an action against Erie for coverage for the judgment they obtained. Also like the Plaintiff herein, the *Groves* Plaintiffs alleged that the poor construction was performed by subcontractors retained by Erie’s insured. Judge Keeley determined that there was no coverage under the Erie policy by virtue of the “impaired property” exclusion, stating:

In the case at bar, the Groveses seek liability coverage for damages caused by negligent subcontractor work on their home. According to the Policy, their home is either ‘impaired property or tangible property not physically injured or destroyed.’ Any negligent work on that home performed by Bland or those on his behalf (including subcontractors) was necessarily ‘defective, deficient, or inadequate’ work. See *Black’s Law Dictionary* (8th ed. 2004) (WESTLAW) (defining ‘negligence’ as ‘[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation; any conduct that falls below the legal standard established to protect others against unreasonable risk of harm’). Moreover, the failure to construct the home in a good and workmanlike manner constitutes a ‘lack of performance on a contract or agreement,’ or otherwise, deficient fulfillment of a

¹³ Respectfully, Petitioners cannot have their cake and eat it too. All of the “work” cannot be that of subcontractors to avoid applicability of the “your work” exclusion, only to *not* be that of subcontractors to avoid applicability of the “impaired property” exclusion.

warranty on construction. Therefore, based on the unambiguous terms of the Policy, insurance coverage does not extend to the negligent subcontractor work on the Groveses' home or the failure to construct the home in a good and workmanlike manner. Accordingly, the Groveses' claim is meritless.

Id. at 573. The applicability of this exclusion likely comes as no surprise to this Court who recommended it be examined on remand in *Corder, supra*, stating “when applied to the facts of this case, exclusion M may preclude coverage for ‘property damage’ – here, ‘loss of use’ – for property that has not been physically injured and in which the alleged damages arose out of a ‘defect, deficiency, [or] inadequacy’ in Smith Excavation’s work. Accordingly, exclusion M will operate to defeat coverage unless Appellants can demonstrate that the alleged ‘loss of use’ arose out of ‘sudden and accidental physical injury’ to the work of Smith Excavating on the sewer pipe.” *Corder, supra* at 85.

As stated previously, Petitioners’ assertion that the “impaired property” exclusion is ambiguous simply because it *excludes* subcontractor work while a previous exclusion *includes* subcontractor work is contrary to fundamental insurance principles. *See Johnson, supra* (“Each exclusion is to be read with the Insuring Agreement, independently of every other exclusion. The exclusions should be read seriatim, not cumulatively. If any one exclusion applies, there should be no coverage, regardless of inferences that might be argued on the basis of exceptions or qualifications contained in other exclusions. There is no instance in which an exclusion can properly be regarded as inconsistent with another exclusion since they bear no relationship with one another.”) (citations omitted); *See also 2 Couch on Ins. § 22:30* (“an ambiguity in one exclusion does not make all exclusions ambiguous; each separate exclusion must be separately construed. Further, if two exemption clauses are entirely independent, as, for instance, a windstorm and a falling building clause in a sprinkler leakage policy, they are not construed together so as to make the falling building clause applicable only when the fall was caused by a

windstorm.”) (footnotes omitted). Moreover, the diverse exclusions clearly operate so as to insure that all business risks are excluded from coverage. There is no “conflict” in the policy. “The stated intent of the CGL policy form is to exclude coverage for contactors’ ‘business risks’ while protecting contractors against consequential damages.” Robert J. Franco, ‘Insurance Coverage For Faulty Workmanship Claims Under Commercial General Liability Policies,’ 30 Tort & Ins. L. J. 785, 786 (1995) (footnote omitted).¹⁴ As previously noted, every exclusion will conflict with the policy’s insuring clause because the function of an exclusionary clause “ ‘is to restrict and shape the coverage otherwise afforded.’” *Johnson, supra*. The “impaired property exclusion” was drafted to achieve the purpose of excluding business risks from a CGL policy and is clear, unambiguous and routinely applied. The Trial Court’s decision to likewise apply it herein was appropriate and should not be overturned.¹⁵

¹⁴ Moreover, also contrary to Petitioners’ position, the exclusion is not ambiguous. As the Court stated in *North American Precast, Inc. v. General Cas. Co. of Wisconsin*, 2008 WL 906327 (S.D. W.Va. March 31, 2008) (unpublished):

The court declines plaintiffs’ request to invoke the reasonable expectations doctrine in the interpretation of the policy, which plaintiffs seek particularly as to Exclusion 2m. ‘Before the doctrine of reasonable expectations is applicable to an insurance contract, there must be an ambiguity regarding the terms of that contract.’ *Robertson v. Fowler*, 197 W.Va. 116, 120, 475 S.E.2d 116, 120 (1996) (internal citations omitted). Inasmuch as plaintiffs have not pointed to an ambiguity that would merit invocation of the reasonable expectations doctrine, it has no application here.

¹⁵ Petitioners’ brief contains multiple references to Erie’s expert witness’ testimony but said examples were taken out of context and are incomplete. Petitioners rely upon said references s as to argue against the application of the “impaired property” exclusion; however, in the initial testimony cited, Dr. Kensicki was not being asked about the “impaired property” exclusion. [AR at 000941]. Moreover, Petitioners omit the portion of Dr. Kensicki’s testimony wherein he stated “[t]or the extent that the falling tile caused other damage, yes. To the extent that it caused other damage because it was laying there on the wall, no.” *Id.* Dr. Kensicki further indicated that exclusion m, the “impaired property” exclusion, applies to bar coverage herein “[b]ecause the damages that are claimed are arising out of a defect, deficiency, or inadequacy, or dangerous condition in your work” and the exclusion applies equally to work performed by subcontractors. [AR at 000933].

3. The Trial Court Properly Applied The Business Pursuits Exclusion Which Bars Coverage Under Mamone’s Homeowners And Umbrella Insurance Policies.

Petitioners have asked this Court to apply an exception to an exclusion so broadly that it would eviscerate the exclusion.¹⁶ It is well recognized that personal policies, such as Mamone’s homeowner’s and personal umbrella policies, exclude coverage for business-related torts. Erie’s expert witness, Dr. Kensicki, provided insight into such “business pursuits” exclusions, stating that the industry sells commercial policies for business risks, charging higher premiums, and personal policies for personal risks, at lower premiums. [AR at 000938]. Admittedly, there are exceptions to that exclusion, such as the “salesperson” exception relied upon by Petitioners, but Dr. Kensicki explained the purpose of such an exception as well. “[T]here are people that have businesses that they run out of their homes. Like, for example, what I do now is kind of a business that I’m running out of the home. Some people might have beauty shops, or they may make bows and sell them, but this is not intended to cover business risks. This is intended to cover the risks that arise out of my personal life and the fact that I live in a home and I own land and I may play softball for my church team.” [AR at 000937-938]. Petitioners’ position is that anyone who markets his or her services is a “salesperson”. Obviously, if such a position were accepted, then the business pursuits exclusion would be linguistically eliminated from the policies. Moreover, Petitioners fail to recognize an *exception* to the *exception* which eliminates coverage, even for salespersons, involved in installation. Clearly, the Trial Court’s decision was not erroneous and should be left undisturbed.

The Mamone policy excludes from coverage:

¹⁶ Petitioners unilaterally assert that “[t]here is no language in the policy that limits coverage for acts of the insured as a salesman”. Petitioners fail to recognize that the “business pursuits exclusion” is only one of a myriad of reasons coverage does not exist under the two (2) personal policies, which reasons include the foregoing analyses regarding “occurrence” and “property damage”. The Trial Court, however, did not overlook the policies’ multiple exclusionary terms and provisions. *See, e.g.* AR at 000862.

Bodily injury, property damage or personal injury arising out of business pursuits of anyone we protect.

We do cover:

- a. activities normally considered non-**business**;
- b. **business** pursuits of salespersons, collectors, messengers and clerical office workers employed by others. **We do not cover installation, demonstration and servicing operations;**
- c. **business** pursuits of educators while employed by others as educators, including corporal punishment of pupils;
- d. occasional **business** activities of **anyone we protect**. These include, but are not limited to, babysitting, caddying, lawn care, newspaper delivery and other similar activities.

We do not cover regular business activities or business activities for which a person is required to be licensed by the state.

- e. the ownership of newly-acquired one or two family dwellings, but only for a period of 30 consecutive days after acquisition unless described on the **Declarations**.

[AR at 000503]. The Mamone policy defines “business” as “any full-time, part-time or occasional activity engaged in as a trade, profession or occupation, including farming.” *Id.* at 000491.¹⁷

¹⁷ The Personal Catastrophe policy also excludes from coverage:

Personal injury or property damage arising out of the business pursuits or business property of anyone we protect.

We do cover:

- a. activities normally considered non-**business**;
- b. the ownership of newly-acquired one or two family dwellings, but only for a period of 30 consecutive days after acquisition unless covered by **underlying insurance**;
- c. **business** pursuits or their ownership or use of **business property** if **underlying insurance** affords coverage with respect to such **personal injury** or **property damage**, but not for broader coverage than is provided by the **underlying insurance**. This coverage does not apply to the rendering or failing to render professional services.

The information adduced during discovery, and presented to the Trial Court at the Summary Judgment stage, was abundantly clear; the instant litigation arose out of “a cost plus contract with The Pinnacle Group, Inc. and Anthony Mamone, Jr. for the construction of a house. . . .” [AR at 000321]. Although naming Anthony Mamone, Jr. individually, the Plaintiff specifically avers that “[a]t all relevant times, Anthony Mamone, Jr. was acting for and on his own behalf and on behalf of Pinnacle as its agent, servant and/or employee.” *Id.* Mr. Mamone testified that his “business and occupation” of 15-18 years is that of “a general contractor/developer”. [AR at 000543 - 544]. Mr. Mamone, on behalf of The Pinnacle Group, Inc., entered into the “Construction Agreement” with the Plaintiff for the construction of the home for which Pinnacle was to receive “\$150,000”, said sum including “overhead, profit and everything. . . .” *Id.* at 000545. Simply stated, it is undisputed that the subject litigation arose out of a continuous and regular activity engaged in by Mr. Mamone for the purpose of earning a profit or livelihood.

Commentators have noted that “[h]omeowners’ and farmowners’ liability policies typically exempt from coverage bodily injury or property damage arising out of or in connection

d. the ownership, use, loading or unloading of **automobiles** or watercraft by **anyone we protect**.

e. **business** pursuits of educators while employed by others as educators, including corporal punishment of pupils.

[AR at 000532]. “Business” is defined by the Personal Catastrophe policy as “any activity engaged in as a trade, profession or occupation, other than farming.” *Id.* at 000530. “Business property” is defined by the Personal Catastrophe policy as property:

1. on which a **business** is conducted;
2. rented in whole or in part to others; or
3. held for such rental.

Id.

with a business engaged in by an insured.” 9A Couch on Ins. § 128:12 (footnote omitted); *See also* David J. Marchitelli, Construction and Application of “Business Pursuits” Exclusion Provision in General Liability Policy, 35 A.L.R.5th 375 (“Business pursuits exclusions may be found in several types of personal liability insurance policies, including practically all homeowner’s policies.”). As the commentary indicates, “[p]eople characteristically separate their business activities from their personal activities, and, therefore, business pursuits coverage is not essential for their homeowners’ and farmowners’ coverage and is excluded to keep premium rates at a reasonable level.” *Id.* (footnote omitted); *See also Metropolitan Property and Cas. Ins. Co.*, 722 N.W.2d 319, 325 (2006) (“A business-purposes exclusion is intended ‘to confine the homeowner’s policy coverage to nonbusiness risks and to relegate business coverage to a commercial policy.’ *Erickson v. Christie*, 622 N.W.2d 138, 140 (Minn.App. 2001). Such an exclusion further serves to ‘delete coverage which is not essential to the purchasers of the policy and which would normally require specialized underwriting and rating, and thus keeps premium rates at a reasonable level.’”) (additional citations omitted). According to commentators:

The general rule is that to constitute a business pursuit for the purpose of an exclusion in a liability policy, there must be continuity [sic] a profit motive. It is not necessary that profit be the sole motivation for the conduct. The business need not be the insured’s principal occupation. For example, an insured’s involvement as a general partner in a limited partnership has been held to constitute a business pursuit.

2 Insurance Claims and Disputes 5th § 11:15 (footnotes omitted).

The seminal case in West Virginia on the exclusion, *Camden Fire Insurance Ass’n v. Johnson*, tracks the commentators’ description of the provision. 170 W.Va. 313, 294 S.E.2d 116 (1982). In Syllabus point 1 of that decision, this Court held:

The term ‘business pursuits’, when used in a clause of an insurance policy excluding from personal liability coverage injuries ‘arising out of business pursuits of any insured’, contemplates a continuous

or regular activity engaged in by the insured for the purpose of earning a profit or a livelihood.

Camden, supra at Syl. pt. 1. The holding was reiterated in *Huggins v. Tri-County Bonding Co.*, 175 W.Va. 643, 337 S.E.2d 12 (1985). The *Huggins* Court further stated that “[t]he question of whether a particular activity or course of conduct comes within this definition of ‘business pursuits’ must necessarily be determined on a case-by-case basis, with due consideration given to the facts and circumstances of each case.” *Id.* at 12 (quoting *Camden, supra* at 119); *see also Smith v. Sears, Roebuck & Co.*, 191 W.Va. 563, 447 S.E.2d 255, 257 (1994).

This Court had an opportunity to describe some of the facts considered in the “case by case” business pursuits determination in *West Virginia Ins. Co. v. Lambert*, 193 W.Va. 681, 458 S.E.2d 774 (1995). In *Lambert*, an out of work carpenter started a fire which resulted in property damage while burning construction debris at the request of a neighbor for whom he had performed various ‘odd jobs’. One of the tasks performed by the insured was the installation of ‘drywall on a large outbuilding . . . which was used as a barn/workshop/garage. Although he was paid a nominal amount for this work, he did it in large part because he sang while others played music in the barn and wanted to stay warm.” *Id.* at 776 (footnote omitted). In examining the matter, this Court noted:

He performed a few random odd jobs for Mr. and Mrs. Shellhaas and he was not always compensated for his services. When he did receive payment, he received a minimal amount, much less than his expected hourly rate as a carpenter. Mr. Lambert was unemployed during this time period and did not advertise or seek odd jobs elsewhere. He worked on the Schellhaas barn in part for selfish reasons because he sang with a band that played there. Mr. Lambert’s actions were not ‘a continuous or regular activity for the purpose of earning a profit or making a living.’

Id. at 779.

However, this Court reached the opposite result when examining the case of *West Virginia Ins. Co. v. Jackson*, 200 W.Va. 588, 490 S.E.2d 675 (1997). In *Jackson*, the insured, who was employed elsewhere, constructed “marine life support systems” in a covered garage to experiment “with methods designed to extend the shelf life of lobsters and other marine life.” *Jackson, supra* at 676. The garage burned down and the insurance company sought to limit \$13,000 of the \$21,248 claim to \$2500, the policy limit for ‘business property.’ *Id.* This Court identified the issue as “Was this a ‘continuous or regular activity . . . for the purpose of earning a profit or livelihood?’” *Id.* at 678 (citing *Camden, supra* at 119). Critically, this Court answered the issue in the affirmative, stating “[w]e conclude that it satisfies the definition of business pursuit and that the lower court correctly granted summary judgment in favor of the Appellee.” *Id.*

Obviously, the “business pursuits exclusion” is operable herein, as even Petitioners’ expert agrees. *See* A.R. at 00918 (Testifying that, unless the exception to the exclusion applies, the business pursuits exclusion would operate to preclude coverage herein). Petitioners maintain that the “salesperson” exception applies; however, as stated previously, if we broaden the exception to such an extreme it would swallow the exclusion. This Court has long recognized that “‘language in an insurance policy should be given its plain, ordinary meaning.’” *Glen Falls Ins. Co. v. Smith*, 217 W.Va. 213, 617 S.E.2d 760, 767 (2005) (citations omitted). According to Merriam-Webster, a “salesperson” is “a person whose job it is to sell things”. <http://www.learnersdictionary.com/search/salesperson> (Retrieved on April 17, 2012). Mr. Mamone’s job was not to “sell things”, it was to build houses. Mr. Mamone was sued because he allegedly built an unsatisfactory house. It is undisputed that the subject litigation arose out of Mr. Mamone’s continuous or regular activity for the purpose of gaining a profit or livelihood.

Consequently, the Trial Court correctly determined that the business pursuits exclusion bars coverage under Mr. Mamone's homeowner's and umbrella policies.¹⁸

4. No Circumstances Warranting Application Of The "Reasonable Expectations" Doctrine Exist.

The doctrine of reasonable expectations is only applied under extremely narrow circumstances. Petitioners herein assert that the subject policy is ambiguous with regard to the business risk exclusions and that said ambiguity warrants an application of the doctrine. [Brief of Appellees at 31-32]. Admittedly, a policy ambiguity is one of the few circumstances which justifies reliance upon the "reasonable expectations" of the insured. As this Court has stated, "[b]efore the doctrine of reasonable expectations is applicable to an insurance contract, there must be an ambiguity regarding the terms of that contract." *Robertson v. Fowler*, 197 W.Va. 116, 475 S.E.2d 116, 120 (1996) (citing *McMahon & Sons*, 177 W.Va. at 742, 356 S.E.2d at 496). However, the *Robertson* Court further indicated that "[a]bsent an explicit finding of ambiguity . . . any application of the reasonable expectations doctrine was premature." *Id.* In this regard, this Court has repeatedly examined the policy language at issue herein, and has expressly found that it is *not* ambiguous. See, e.g., *Webster County Solid Waste Authority v. Brackenrick & Associates, Inc.*, 217 W.Va. 304, 617 S.E.2d 851 (2005) (Finding completed operations hazard language and professional liability exclusion clear and unambiguous and, notably, not deserving of an application of the reasonable expectations doctrine). Respectfully, there are no circumstances herein to warrant application of the "reasonable expectations" doctrine and, quite frankly, to expect CGL coverage for "poor workmanship" after *Pioneer*

¹⁸ Additionally, there is an "exception" to the "exception" to the "exclusion". As stated previously, while covering acts of a salesperson, the policy excludes coverage for installation and servicing operations. Thus, Dr. Kensicki testified that "any of the installation work in the building of the home then would have been excluded, anyway." [A.R. at 000940].

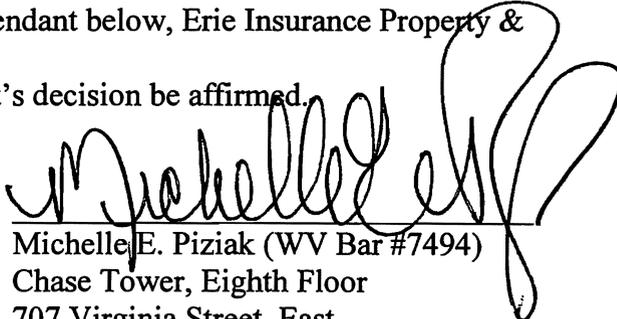
Home Improvement is not “reasonable”. Clearly, the Trial Court properly awarded Erie summary judgment and that decision must be affirmed.

VII. CONCLUSION

In 1999, this Court stated that CGL “policies do not insure the work or workmanship which the contractor or builder performs. They are not performance bonds or builders’ risk policies. CGL policies, instead, insure personal injury or property damage arising out of the work.” *Pioneer Home Improvement, supra* at 511. Moreover, this Court’s well-established principles of insurance contract application do not allow insureds or claimants to engage in artful pleading or repeatedly amend the alleged damages in order to secure coverage. Parties seeking indemnity are not allowed to “reasonably expect” coverage when clear and unambiguous language excludes it and are not allowed try to create an ambiguity by comparing policy exclusions to each other.¹⁹ The Trial Court properly applied this Court’s long-established law and awarded Erie summary judgment. Respondent respectfully requests that decision be affirmed.

WHEREFORE the Respondent/Third-Party Defendant below, Erie Insurance Property & Casualty Company, respectfully requests the Trial Court’s decision be affirmed.

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¹⁹ As stated previously, Petitioners cannot render one exclusion ambiguous by virtue of language in a separate exclusion. Nor can they render *all* exclusions “ambiguous” by virtue of their being contrary to the insuring clause. Because they are exclusions, they are necessarily contrary to the insuring clause.

VIII. CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2012, true and accurate copies of the foregoing Brief of Respondent Erie Insurance Property and Casualty Company were served via facsimile and deposited in the U.S. Mail contained in postage-paid envelopes addressed to counsel for all other parties to this appeal as follows:

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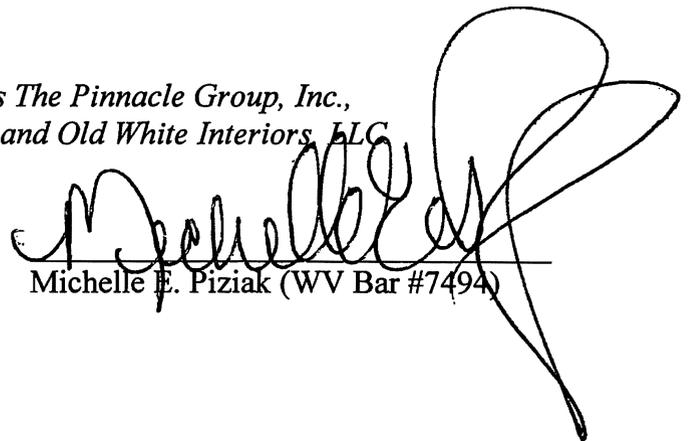
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