

NO. 13-1153

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
OWNERS INSURANCE COMPANY,

Petitioner,

v.

HONORABLE WARREN R. MCGRAW,
JUDGE OF THE CIRCUIT COURT OF
WYOMING COUNTY, WEST VIRGINIA
and MORLAN ENTERPRISES INC.,

Respondents.

FROM THE CIRCUIT COURT OF
WYOMING COUNTY, WEST VIRGINIA
Civil Action No. 06-C-182

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

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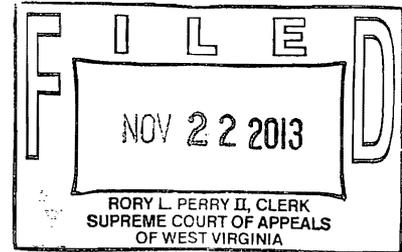


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QUESTIONS PRESENTED

1. Does the Circuit Court of Wyoming County, West Virginia (the Circuit Court), have jurisdiction over the Petitioner Owners Insurance Company (Owners) based upon Owners' business transactions in West Virginia and its issuance of a Certificate of Insurance to cover a risk located in West Virginia?

2. Does West Virginia substantive law apply to transactions between Owners and Respondent Morlan Enterprises Inc. (Morlan), when Owners issued a Certificate of Insurance representing that it had added Morlan as an additional insured under the Owners insurance policy and Morlan is a West Virginia citizen being sued in West Virginia over an accident which took place in West Virginia?

3. As the holder of a Certificate of Insurance representing that it has been added to the Owners policy as an additional insured, was Morlan entitled to coverage and a defense from Owners in the underlying litigation?

4. As the holder of a Certificate of Insurance representing that it has been added to the Owners policy as an additional insured, is Morlan a "first-party" insured for purposes of asserting claims for "bad faith" and violations of West Virginia's Unfair Trade Practices Act?

5. Does the "collateral source rule" prevent Owners from offering evidence that Morlan's attorneys fees and expenses were paid under a separate policy maintained by Morlan, when Owners refused to defend or indemnify Morlan?

STATEMENT OF THE CASE

This action arises from an accident which occurred on September 15, 2005, when Bobby Messer came into contact with an energized electrical transmission line while working as a lineman

in Mingo County, West Virginia. The Messers alleged that Mr. Messer's supervisors tested the line, confirmed that it was de-energized, grounded it, and told Mr. Messer to remove transformers and switches from a pole. (Petitioner's App. 057) They further alleged that a foreman had assured Mr. Messer that the line was safe to work on but, in fact, the line was energized. (Petitioner's App. 057) The location where the accident occurred was between a substation and the point where one phase diverged from the line to go to a cell phone tower owned by Alltel Communications. The Messers alleged that the tower had once drawn power from the substation and that Alltel, Respondent Morlan and Paul W. Kerns (Kerns), an independent electrical contractor working for Morlan, restored power to the tower without the owner's knowledge or permission. (Petitioner's App. 057-058).

The Coverage Issues

Kerns was insured at the time of the accident under a commercial general liability policy issued by Owners, identified as Policy No. 004603-05001113-04, which covered the policy period of October 9, 2004 through October 9, 2005. (See Petitioner's App. 465-511, the Owners Policy.) Kerns obtained the Policy through Gladstone Insurance Agency, Inc. (Gladstone), an Ohio insurance agent. (See Petitioner's App. 465, at the first page of the Owners Policy Declarations.)

On or about March 3, 2005, Owners issued a Certificate of Insurance to Morlan, and represented that Morlan had been made an additional insured under the commercial general liability insurance policy which Owners had issued to Kerns. (See Petitioner's App. 512, the March 3, 2005 Certificate.) Significantly, the address listed on the certificate for Morlan, the "Certificate Holder," was "1 Chateau Hills, Parkersburg, West Virginia." (Petitioner's App. 512) This promise of coverage on the Certificate was important because the "Other Insurance" provisions of the Commercial General Liability coverage of the Owners Policy provided that its coverage was

primary over and above any other available commercial general liability coverage available to “the insured.” (See Petitioner’s App. 479, the “Other Insurance“ provision located at pg. 9 of 14 of the Commercial General Liability Coverage Form.) Pursuant to this language, the March 3, 2005 Certificate of Insurance, and the representation made by Owners through its agent, Owners was contractually obligated to defend and indemnify Morlan in connection with the Messers’ claims in the underlying civil action.

The Coverage Litigation

Despite its clear obligations under Owners Policy No. 004603-05001113-04 (the Owners Policy), and its defense of the claims against Kerns beginning in March of 2008, Owners did not provide Morlan with a defense or coverage when it received notice of the claim. However, Owners’ acknowledges, at pg. 4 of its *Petition*, that on September 12, 2007, Morlan’s separate insurer, Westfield, sent a letter to both Kerns and Gladstone, placing them on notice of the Messers’ claim and providing them with a copy of a subsequently issued Certificate of Insurance, dated October 5, 2005 (See Petitioner’s App. 362).¹ On March 23, 2009, Morlan sought leave to file its *Third-Party Complaint For Declaratory And Other Relief* against Owners, seeking a defense and indemnification. In its *Third-Party Complaint*, Morlan seeks a declaratory judgment against Owners, but also seeks to recover for Owners’ breach of contract, bad faith, and violations of West Virginia’s Unfair Trade Practices Act in connection with its handling of the claims against Morlan.

¹ Because the Certificate sent on September 12, 2007 was not in effect at the time of the accident, Owners apparently asserts that this communication did not place it on notice of any duty to defend Morlan.

(Petitioner's App. 056-065) After being sued by Morlan, Owners voluntarily agreed to pay the Messers \$425,000 to resolve their claims against Morlan.

Rather than pursue the coverage issues before the Court where the underlying action was proceeding, Owners filed an action in the Court of Common Pleas of Guernsey County, Ohio, seeking a declaratory judgment regarding its duties to Morlan. Even though Morlan had no contacts with Ohio, Owners named Morlan as a party, and Morlan was forced to proceed with a motion to dismiss the Ohio action against it. The Judge in Guernsey County dismissed the case, indicating that the matters at issue should proceed in West Virginia. (See Petitioner's App. 513-514) Unwilling to have a West Virginia court resolve the coverage issue, Owners filed a second action in Allen County, Ohio, again seeking declaratory judgment regarding Owner's duties to Morlan. The Allen County Court, Judge Reed presiding, entered an Order on November 5, 2009, again dismissing the Owners case. Thereafter, on appeal, the Ohio Court of Appeals indicated:

Furthermore, the Ohio contacts with the present case are, at best, limited. Not only was West Virginia the venue where Messer's personal injury occurred creating the catalyst for this lawsuit; it is also the state where all of the transactions of direct relevance to Owner's present complaint occurred. The Certificate of Insurance and underlying policy upon which Owners now seeks declaratory relief was ultimately delivered to a West Virginia party and purports to provide coverage for Morlan, a West Virginia citizen. Owners tendered its defense of Morlan in West Virginia based upon its then-perceived obligations arising out of the Certificate of Insurance. Additionally, West Virginia was the site where Owners negotiated the settlement payment to the Messers on behalf of Morlan for which it now seeks contribution from Westfield in this case.

(See Petitioner's App. 515-526). After its appeals in Ohio were exhausted, Owners filed Civil Action No. 10-C-199, in the Circuit Court of Wyoming County, West Virginia, seeking to recover the amounts it paid to settle the Messer claims against Morlan from Morlan's personal insurance carrier, Westfield Insurance Company (Westfield). The two actions (Civil Action 06-C-182 and

Civil Action No. 10-C-199) were consolidated for discovery purposes and, at the close of discovery, the coverage issues became ripe for consideration by the Court.

The Choice Of Law Issue

Having failed in its repeated efforts to have the coverage issues decided by an Ohio Court, Owners served its original *Motion To Apply Ohio Law* in this case on May 24, 2011, asking the Circuit Court to decide the coverage issues under the laws of Ohio.² (Petitioner's App. 288-309) The parties engaged in discovery and a January 30, 2013 hearing date was set on Owner's *Motion To Apply Ohio Law*. Less than ten days before that hearing, Owners served its *Amended Motion To Apply Ohio Law And Motion For Summary Judgment*, which also asked the Court to award Owners summary judgment on both the coverage issues and Morlan's other claims against it. (Petitioner's App. 382-419) Morlan responded and asked that the Circuit Court apply West Virginia law to Morlan's claims for coverage under the Certificate of Insurance issued to it at its West Virginia address, based upon Owners' representation to Morlan that Morlan had been added as an additional insured under the Owners Policy. (Petitioner's App. 447-583) Morlan asked that the Circuit Court deny Owners' request for summary judgment and, instead, grant Morlan summary judgment on the coverage issues, inasmuch as there is no genuine question of fact with regard to whether the Owners

²Owners makes much of the fact that its motion was not ruled upon for quite some time, but fails to explain why that occurred. The issue of the law to apply to the case was an issue relevant to the Circuit Court's consideration of dispositive motions and for trial, which were not before the Circuit Court in 2011. In fact, Morlan correctly pointed out to the Circuit Court that the determination of which state's law applied to the claims at issue was necessarily dependent upon discovery which had not yet been completed. Accordingly, the Circuit Court properly deferred ruling on the Motion To Apply Ohio Law until the parties completed necessary discovery.

Policy provided primary liability coverage for the Messers' claims against Morlan in this action, regardless of which state's law applies.

On June 11, 2013, the Circuit Court denied Owners' *Amended Motion To Apply Ohio Law* (Petitioner's App. 011-020) and, on November 4, 2013, granted Morlan's *Cross-Motion for summary Judgment*. (Petitioner's App. 021-036) In addition, the Circuit Court granted Morlan's *Motion In Limine To Prohibit Argument That Its Damages Are Reduced Or Eliminated Because It had Other Liability Coverage Available From A Collateral Source*, which asked the Court to apply the "collateral source rule" to prevent Owners from presenting evidence that Morlan's attorneys fees and costs in the underlying litigation had been paid under a separate Policy maintained by Morlan with Westfield. (Petitioner's App. 048-055)

SUMMARY OF THE ARGUMENT

The Circuit Court correctly found that it has jurisdiction over Owners based upon Owners' business transactions in West Virginia and its issuance of a Certificate of Insurance to a West Virginia corporation to cover a risk located in West Virginia. For the same reasons, the Circuit Court also correctly found that West Virginia substantive law applies to Morlan's claims against Owners. In particular, the Circuit Court correctly found that West Virginia law applies since it was undisputed that Owners, through its authorized agent Gladstone, issued a Certificate of Insurance representing that Morlan had been added as an additional insured under the Owners Policy, where Morlan is a West Virginia citizen being sued in West Virginia over an accident which took place in West Virginia. Therefore, West Virginia has the most substantive relationship to the transactions and its law should apply.

With respect to the coverage issues, the Circuit Court correctly found that as the holder of a Certificate of Insurance indicating that it has been added to an Owners' insurance policy as an additional insured, Morlan was entitled to defense and indemnification under the Owners Policy. The Court also correctly found that because Morlan was an insured under the Owners Policy, it qualifies as a "first-party" insured for purposes of asserting claims for "bad faith" and violations of West Virginia's Unfair Trade Practices Act

Finally, the Circuit Court correctly applied the "collateral source rule" to prevent Owners from offering evidence that Morlan's attorneys fees were paid under a separate policy maintained by Morlan, where Owners refused to defend or indemnify Morlan.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Owners suggests that oral argument is needed under Rule 20 of the Revised Rules of Appellate Procedure because this case "involves issues of first impression," but fails to recognize that existing law addresses all of the issues raised. Morlan opposes Owners' request for oral argument because the Petition presents no new issues and because, as a matter of law, the Circuit Court's Orders are interlocutory and are not yet ripe for appeal.

ARGUMENT

I. This matter is not properly before the Court because the Circuit Court's Orders are interlocutory in nature.

Initially, Morlan would note that the Orders of the Circuit Court below which are the subject of Owners' *Petition* are not presently ripe for consideration by this Court. For example, the Circuit Court's November 4, 2013 *Order Granting Morlan Enterprises, Inc.'s Cross-Motion For Summary Judgment*, only dealt with the coverage component of Morlan's claims and did not address Morlan's

remaining claims against Owners for bad faith, breach of contract, and violations of West Virginia's Unfair Trade Practices Act. The Order states:

Having found that there are no genuine questions of fact to be determined with respect to the coverage issues, the Court is of the opinion that Morlan is entitled to summary judgment that, as a matter of law, Owner's commercial general liability policy provided primary coverage for the Messers' claims against Morlan.

(Petitioner's App. 035-036). Morlan's other claims against Owners remain pending and are presently set for trial in December.

The right to an appeal is governed by *W.Va. Code §58-5-1*, which provides, in relevant part:

A party to a civil action may appeal to the supreme court of appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment as to one or more but fewer than all claims or parties upon an express determination by the circuit court that there is no just reason for delay and upon an express direction for the entry of judgment as to such claims or parties.

Similarly, in Syl. Pt. 3 of *James M.B. v. Carolyn M.*, 193 W.Va. 289, 456 S.E.2d 16 (1995), this Court held:

Under W.Va. Code 58-5-1 (1925) appeals only may be taken from final decisions of a circuit court. A case is final only when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution of what has been determined.

James M.B., 193 W. Va. at Syl. Pt. 3. In this case, the subject Orders do not terminate this litigation as to any of the parties. Therefore, under *Rule 54* of the *West Virginia Rules of Civil Procedure*, the November 4, 2013 Order is not "final," but is instead "subject to revision at any time before the entry of judgment adjudicating all of the claims and the rights and liabilities of all the parties."

While Owners has requested that the Circuit Court enter a supplemental order with respect to the Circuit Court's November 4, 2013 ruling indicating that there is no just cause for delay under *Rule 54(b)* (Petitioner's App. 695-699), such a certification will not render the subject Order appealable. As this Court indicated in *Province v. Province*, 196 W.Va. 473, 473 S.E.2d 894 (1996):

The judgment must completely dispose of at least one substantive claim. A partial or interlocutory adjudication of a claim cannot be certified merely because it is labelled [sic] a "partial final judgment" . . . even if the requisite express determination [as set forth in Rule 54(b)] has been made.

Province, 196 W. Va. at n. 12. Similarly, in *Durm v. Heck's*, 184 W.Va. 562, 401 S.E.2d 908 (1991), this Court noted:

The key to determining whether the order granting summary judgment . . . is a final order subject to appeal is not whether the Rule 54(b) language is included in the order, but whether the order "approximates" a final order in its nature and effect." . . . Generally, an order qualifies as a final order when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.

Durm, 184 W. Va. at 566 (citations omitted). Here, the November 4, 2013 Order does not dispose of the claims against Owners and leaves the issue of contractual damages and Morlan's "bad faith" and Unfair Trade Practices Act claims to be decided at trial. Allowing Owners to pursue piecemeal appeals of each element of Morlan's claims will serve only to delay the final resolution of this action and will unfairly prejudice Morlan. As was explained in *Province*:

Certification should not, however, be routinely granted in any event Not all final judgments on individual claims should be immediately appealable, even if they are, in some sense separable from the remaining unresolved claims. . . . It should be granted only if there exists some danger of hardship or injustice through delay, that would be alleviated by immediate appeal. To be clear, the purpose of Rule 54(b) is to codify the historic practice of "prohibiting

piecemeal disposal of litigation and permitting appeals only from final judgments.” except in the “infrequent harsh case” in which the circuit court properly makes the determinations contemplated by the rule.

Province, 196 W. Va. at 479. Because Morlan’s remaining claims arise from Owner’s improper refusal to provide coverage, they constitute the damages portion of Morlan’s coverage claim, which will not be fully resolved until they are also addressed. In Syl Pt. 3 of *C&O Motors, Inc. v. West Virginia Paving, Inc.*, 223 W.Va. 469, 677 S.E.2d 905 (2009), this Court held:

An order determining liability, without a determination of damages, is a partial adjudication of a claim and is generally not immediately appealable. However, an immediate appeal from a liability judgment will be allowed if the determination of damages can be characterized as ministerial. That is, a judgment that does not determine damages is a final appealable order when the computation of damages is mechanical and unlikely to produce a second appeal because the only remaining task is ministerial, similar to assessing costs.

C&O Motors, Inc., 223 W. Va. at Syl. Pt. 3. Here, a jury will have to determine the extent of Morlan’s damages, if any, for “bad faith” and violations of the Unfair Trade Practices Act. Thus, the Orders at issue are clearly not yet subject to appeal.

It should also be noted that Owners has a long history of seeking to delay Morlan’s efforts to pursue its rights under the subject policy. As discussed above, Owners filed two separate declaratory actions in Ohio, which sought the same relief and were both dismissed on effectively the same grounds. Then, after years of litigation here, it unsuccessfully sought to have this case transferred to the Business Court Division. That history is important as Owners is now again seeking to delay Morlan’s pursuit of compensation by inserting yet another procedural hurdle. As was noted by the Court in *James M.B.* supra., the requirement that an order be final before permitting an appeal “reduces the ability of litigants to wear down their opponents by repeated,

expensive appellate proceedings.” *James M.B.*, 193 W. Va. at n. 2. In this case, Owners is seeking to further delay Morlan’s right to seek compensation by appealing Orders which are clearly interlocutory.

II. Owners was properly subject to the Circuit Court’s jurisdiction because of its business dealings in West Virginia and its issuance of a Certificate Of Insurance to a West Virginia Insured.

Owners begins its arguments by suggesting that because it does not do business in West Virginia, the Circuit Court did not properly have jurisdiction over it in the first place. This argument ignores the fact that Owners, through its authorized agent, issued a Certificate of Insurance to a West Virginia citizen, Morlan (Petitioner’s App. 512), and then proceeded to retain and pay West Virginia counsel to defend Kerns in the present case.

In the case of *Lane v. Boston Scientific Corp.*, 198 W. Va. 447, 481 S.E.2d 753, (1996), this Court noted:

A Court must use a two-step approach when analyzing whether personal jurisdiction exists over a foreign corporation or other nonresident. The first step involves determining whether the defendant’s actions satisfy our personal jurisdiction statutes set forth in W.Va. Code, 31-1-15 [1984] and W.Va. Code 56-3-33 [1984]. The second step involves determining whether the defendant’s contacts with the forum state satisfy federal due process.

Lane, 198 W. Va. at Syl. Pt. 1. In that regard, *West Virginia Code §31D-15-1501* (which replaced §31-1-15) provides, at Subsection (d):

A foreign corporation is deemed to be transacting business in this state if:

- (1) **The corporation makes a contract to be performed, in whole or in part, by any party thereto in this state;**
- (2) The corporation commits a tort, in whole or in part, in this state; or

- (3) The corporation manufactures, sells, offers for sale or supplies any product in a defective condition and that product causes injury to any person or property within this state notwithstanding the fact that the corporation had no agents, servants or employees or contacts within this state at the time of the injury.

W. Va. Code § 31D-15-1501(d) (emphasis added). Similarly, *West Virginia Code §56-3-33*

provides, in pertinent part, as follows:

(a) The engaging by a nonresident, or by his duly authorized agent, in any one or more of the acts specified in subdivision (1) through (7) of this subsection shall be deemed equivalent to an appointment by such nonresident of the secretary of state, or his or her successor in office, to be his or her true and lawful attorney upon whom may be served all lawful process in any action or proceeding against him or her, in any circuit court in this state, including an action or proceeding brought by a nonresident plaintiff or plaintiffs, for a cause of action arising from or growing out of such act or acts, and the engaging in such act or acts shall be a signification of such nonresident's agreement that any such process against him or her, which is served in the manner hereinafter provided, shall be of the same legal force and validity as though such nonresident were personally served with a summons and complaint within the state:

(1) Transacting any business in this state;

(2) Contracting to supply services or things in this state;

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he or she regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he or she might reasonably have expected such person to use, consume or be affected by the goods in this state: Provided, That he or she also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(6) Having an interest in, using or possessing real property in this state; or

(7) Contracting to insure any person, property or risk located within this state at the time of contracting.

(b) When jurisdiction over a nonresident is based solely upon the provisions of this section, only a cause of action arising from or growing out of one or more of the acts specified in subdivision (1) through (7), subsection (a) of this section may be asserted against him or her.

W. Va. Code § 56-3-33(a)-(b) (emphasis supplied). In this case, Owners issued a Certificate of Insurance to Morlan (Petitioner’s App. 512), which represented that Morlan had been added as an additional insured under the Owners Policy, and Owners thereby contracted and agreed to insure a “person, property or risk located within” West Virginia. Owners also retained and paid defense counsel to represent Kerns, entered into a settlement agreement with respect to the Messers’ claims against Kerns and, later after being sued by Morlan, entered into a settlement agreement with respect to the Messers’ claims against Morlan. Under these circumstances, Owners is clearly subject to personal jurisdiction in West Virginia pursuant to *West Virginia Code §31D-15-1501* and *§56-3-33*. The fact that Owners is not formally licensed to do business in West Virginia and maintains no offices here does not control the jurisdiction issue.

Having considered the jurisdictional prerequisites of *West Virginia Code §31D-15-1501* and *§56-3-33*, the inquiry next turns to whether Owners has sufficient contacts with West Virginia to meet federal due process requirements. *Lane supra.* at Syl. Pt. 1. In that regard, it is “well established that a state’s sovereignty over persons, property and activities extends only within the state’s geographical borders.” *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, at 941 (4th Cir. 1994), cert. denied, 513 U.S. 1151 (1995) (citing *Pennoyer v. Neff*, 95 U.S. 714, 722, (1877)). Under

Pennoyer, a state's assertion of power beyond its borders violates the Due Process Clause of the Fourteenth Amendment. *Pennoyer*, 95 U.S. at 733-734.

Because the requirement that an entity be physically present in a state before the entity may be subjected to that state's exercise of judicial powers was seen as too restrictive to serve the increasing demands of interstate commerce, the United States Supreme Court established that a corporation is thought to be "present" in a state not only when it is physically there, but also when it has "certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316, 66 S. Ct. 154 (1945). This Court has also adopted this "minimum contacts" standard in West Virginia, stating:

To what extent a nonresident defendant has minimum contacts with the forum state depends upon the facts of the individual case. One essential inquiry is whether the defendant has purposefully acted to obtain benefits or privileges in the forum state.

Easterling v. Am. Optical Corp., 207 W.Va. 123, 130, 529 S.E.2d 588 (2000). In *International Shoe*, the United States Supreme Court explained:

But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. **The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.**

Int'l Shoe, 326 U.S. at 319 (emphasis supplied). In this case, Owners issued a Certificate of Insurance to Morlan and undertook the risk associated with insuring a West Virginia citizen located and doing business in West Virginia. (Petitioner's App. 512) Owners also provided a defense in this action for its other insured, Kerns, by retaining West Virginia counsel and ultimately settling the

Plaintiffs' claims against both Kerns and Owners. Those are "acts" by which Owners did business in West Virginia. Now, Owners has been brought into Court in an action to enforce the very insurance contract which was the subject of the Certificate it issued to Morlan, and the representation contained therein that Morlan had been added as an additional insured under the Owners Policy. Pursuant to the principles set forth in *International Shoe* and *Easterling*, Owners cannot complain that being forced to defend an action in West Virginia violates its federal due process rights.

The Court in *Easterling* noted:

[W]e have recognized that foreseeability is a necessary element in determining whether a defendant's contacts satisfy due process. In this regard, we have commented that "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate 'being haled into court there.' "

Easterling, 207 W. Va. at 130. In this case, Owners was aware of the fact that Morlan was a West Virginia corporation, located in West Virginia and doing business in West Virginia, at the time it issued its Certificate of Insurance to Morlan and agreed to make Morlan an additional insured. (Petitioner's App. 512) In addition, Owners' named insured, Kerns, was not an Ohio contractor who occasionally did work for customers in other states. Instead, Kerns has acknowledged that he worked exclusively for Morlan, a West Virginia corporation. In that regard, Kerns testified:

Q. From mid 2000 to 2006, did you work for any other companies other than Morlan?

A. No.

(See Petitioner's App. 225, excerpts from the January 30, 2009 deposition of Paul Kerns at pg. 9.)

Later, Mr. Kearns was asked:

Q. Did you store your tools on your own or at Morlan's facility?

A. I had a one-ton pickup and trailer, which I carried my tools and stuff with. Normally, it either stayed on the job or at Morlan's place because a lot of my work was down in that area. So, unless it was north, I didn't take my trailer home, no.

Q. You stored it either on the project or at Morlan's facility. Was it locked up at Morlan's facility?

A. Yes.

(Petitioner's App. 226) Having issued an insurance policy to a contractor who worked exclusively for a West Virginia customer and generally stored its equipment at that customer's Parkersburg, West Virginia facility, it is clear that Owners should have reasonably foreseen having to defend and indemnify Kerns with respect to claims arising from Kerns' substantial operations in West Virginia. Once Owners issued a Certificate and agreed to provide insurance coverage to Morlan as well, (Petitioner's App. 512) the possibility that Owners might be called upon to defend and indemnify Kerns and Morlan with respect to claims in West Virginia, and be subject to a suit over any coverage disputes, was obvious.

While Owners asserts that its agent, Gladstone, rather than Owners itself issued the Certificate of Insurance, this argument ignores the fact that Gladstone was Owners' authorized agent. In the case of *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E. 2d 728 (1994), this Court defined an "agent" as "a representative of his principle in business or contractual relations with third persons." *Teter*, 190 W. Va. at 719. Moreover, the Court has held:

A principal is bound by acts of an agent if those acts are either within the authority the principal has actually given his agent, or within the apparent authority that the principal has knowingly permitted the agent to assume.

Thompson v. Stuckey, 171 W.Va. 483, 487, 300 S.E. 2d 295 (1983) In this case, Gladstone was clearly holding itself out to be Owners' agent and acting on its behalf at the time the Certificate of Insurance was issued to Morlan at its West Virginia address. Moreover, Owners' corporate representative, Carla DeKuiper, testified that Owners was aware that its agents, including Gladstone, issued Certificates of Insurance adding additional insureds to Owners policies and they had the authorization to do so. (Petitioner's App. 534, excerpts from Ms. DeKuiper's deposition at pgs. 117.) While Owners now asserts that the Kerns Policy was based upon a risk located in Guernsey County, Ohio, and suggests that Gladstone did not send it the request to add Morlan to the Policy, those facts are irrelevant where Gladstone issued the Certificate to cover a risk in West Virginia with the apparent authority of Owners, and represented that Morlan had been added as an insured under the Owners Policy. Owners is bound by the act of its agent and is therefore subject to the jurisdiction of West Virginia Courts. Owners' argument that it was not on notice of the fact that it was insuring a West Virginia citizen ignores the longstanding "general rule that notice to the agent while acting within the scope of his authority is notice to his principle." *State ex. rel. Yahn Elec. Co. v. Baer*, 148 W.Va. 527, 532, 135 S.E.2d 687 (1964).

Owners' suggestion that it is not subject to the Circuit Court's jurisdiction also ignores the fact that issuing a Certificate of Insurance to Morlan at its West Virginia address, undertaking to cover a West Virginia risk, and providing a defense to Kerns has also subjected Owners to West Virginia's Unfair Trade Practices Act. In that regard, *West Virginia Code §33-11-3* provides:

No person shall engage in this State in any trade practice which is defined in this article as, or determined pursuant to section seven [§33-11-7] of this article to be an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

W. Va. Code § 33-11-3. Here, Morlan has alleged that Owners violated certain provisions of §33-11-4(9) during its handling of the underlying action, and such violations are considered to be torts in West Virginia. (See generally Syl. Pt. 4, *Poling v. Motorists Mut. Ins. Co.*, 192 W.Va. 46, 450 S.E.2d 635 (1994). As noted above, *West Virginia Code* §31D-15-1501(d)(2) provides that a foreign corporation may become subject to personal jurisdiction when “[t]he corporation commits a tort, in whole or in part, in this state.” When Owners violated *West Virginia Code* §33-11-4(9) by refusing to defend its West Virginia resident insured, Morlan, in a West Virginia civil action which arose out of an accident in West Virginia, Owners committed such a tort and became subject to personal jurisdiction in West Virginia regardless of where it normally does business.

III. The Circuit Court properly found that West Virginia Law should apply to a dispute over whether a Certificate Of Insurance issued to a West Virginia resident establishes that a policy provides coverage for claims arising out of a West Virginia accident.

Owners next asserts that even if the Circuit Court had jurisdiction over it, the case should be decided under the laws of Ohio rather than West Virginia because West Virginia’s only connection to the case is the fact that the accident happened here. Again, Owners wishes to ignore the fact that the matter in dispute is whether a Certificate of Insurance issued to a West Virginia citizen, which includes a representation that Morlan had been added as an additional insured under the Owners Policy, binds Owners to provide coverage for a West Virginia claim. Because West Virginia has the most substantive relationship to the transactions at issue, its law should apply.

In order to address the question of which state’s law should apply to the coverage issues in this case, it is necessary to examine how and why the subject Certificate of Insurance was obtained. In his deposition, Larry Morlan described the process by which the Certificate of Insurance was issued, stating:

Q. When Mr. Kerns first started working for you, did you ask him to get you some sort of insurance?

A. Yes.

Q. Tell me as much as you can recall about the conversation you and Mr. Kerns had relating to insurance.

A. Paul Kerns had been working for Alltel, and that's actually where I met Paul, was at a lightening grounding seminar in Cambridge, and he came recommended by the manager of the Alltel region, and Mr. Kerns already had the insurance that was required to work for Alltel, and I asked him, I said, "Do you have insurance," and he said, "Oh, yes," and I said, "Have you met the requirement?" "Yes." I said, "Name me as an additional insured," and they mailed it to me.

Q. Okay. When you say named you as an additional insured and they mailed that to you, you believe you got something in the mail from Mr. Kerns' agent?

A. Uh-huh. Yes.

(See Petitioner's App. 528, excerpts from the Deposition of Larry Morlan, at pgs. 39-40.) The "something" which Mr. Morlan received was the March 3, 2005 Certificate of Insurance, which represented that "Morlan Enterprises Inc its subsidiaries and assigns are included under the General Liability and Automobile policies as additionally insured." (See Petitioner's App. 512, the Certificate.) The Certificate clearly indicated that it was being issued to Morlan at its Parkersburg, West Virginia address. (Petitioner's App. 512) Having received the certificate and representation from the entity which held itself out to be Owners' authorized agent, Morlan had no reason to doubt that his West Virginia business was protected and insured under the Owners Policy.³

³ Such protection was necessary because as noted above, Paul Kerns worked exclusively as a subcontractor for Morlan from 2000 until 2006 (See Petitioner's App. 225 excerpts from the Deposition of Paul Kerns at pg 9), and typically stored his truck, tools and other equipment at Morlan's West Virginia facility. (See Ap. 226 at pgs. 46-47.)

In *Keller v. First Nat'l Bank*, 184 W.Va. 681, 403 S.E.2d 424 (1991), the Court noted:

Generally, an insured deals with an insurance company through an insurance agent, who generally is authorized to act for the insurance company. W. Va. Code, 33-1-12 [1957] defines an insurance agent as “an individual appointed by an insurer to solicit, negotiate, effect or countersign insurance contracts in its behalf.” **Therefore, an insurance agent “who has actual authority to enter into a contract on behalf of a principal will bind the principal to all the elements of that contract, even though particular statements may have been unauthorized.”**

Keller, 184 W. Va. at 684. (Emphasis supplied). In this case, Gladstone clearly had the apparent authority to act as Owners’ agent for the purpose of binding coverage and issued a Certificate of Insurance which expressly extended liability insurance coverage to a West Virginia citizen. (Petitioner’s App. 512) Whether Owners intended to do business in West Virginia or not, its agent undertook to provide coverage for a risk located in West Virginia, and subjected Owners and the Owners Policy to West Virginia law.

The West Virginia Code clearly contemplates that issuing an insurance policy to cover a risk located in West Virginia subjects an insurer to West Virginia law. For example, *West Virginia Code §33-4-1* provides, “No person shall transact insurance in West Virginia or relative to a subject of insurance resident, located or to be performed in West Virginia without complying with the applicable provisions of this chapter.” In the same fashion, *West Virginia Code §33-12-3* requires that anyone who purports to “sell, solicit or negotiate insurance covering subjects of insurance resident, located or to be performed in this state” is required to be licensed in West Virginia as an agent. *West Virginia Code §33-6-14* indicates, “No policy delivered or issued for delivery in West Virginia and covering a subject of insurance resident, located, or to be performed in West Virginia” may contain certain prohibited policy provisions. In fact, an insurer who issues a policy covering a risk located in West Virginia is deemed to have appointed West Virginia’s Secretary of State to

accept service on its behalf. (See the discussion of *W. Va. Code* §56-3-33 above.) Since Owners, acting through its authorized agent Gladstone, contracted to provide insurance for a West Virginia risk and undertook to make Morlan, a West Virginia citizen who had no contacts with Ohio, an “additional insured” under the Owners Policy, Owners is clearly subject to West Virginia law in litigation involving that coverage.

Owners has asserted that Gladstone issued the Certificate without notifying Owners and without asking Owners to issue an endorsement listing Morlan as an ‘additional insured. However, Owners’ designated representative with respect to underwriting issues admitted that she was unaware of anything that would have informed Morlan that it had not been added an additional insured under the Owners Policy. (See Petitioner’s App. 535, excerpts from the deposition of Carla DeKuiper, at pgs. 175-176.) In the absence of some notice to the contrary, Morlan reasonably expected that the Owners Policy provided coverage for it in West Virginia. This Court addressed such expectations in *Keller*, supra, where a bank acting as the agent for an insurer created a reasonable expectation of coverage under a credit life insurance policy. The Court explained:

In order to eliminate an insured’s doubt about coverage, we find that once an insurer creates a reasonable expectation of insurance coverage, the insurer must give the coverage or promptly notify the insured of the denial. . . . **Under this rule, once an insurer creates a reasonable expectation of insurance coverage, the insured is assured of coverage or a prompt notice of denial, which would give the insured the opportunity to seek other ways of limiting the risk.**

Keller, 184 W. Va. at 684 (emphasis supplied). Like Owners, the insurer in *Keller* suggested that no policy was in effect because the offer in a loan renewal note generated by the agent bank was a mistake. The Court pointed out that when such “mistakes” create a reasonable expectation of

coverage, the fact that an insurer's agent failed to follow proper procedures will not absolve the insurer from providing coverage, stating:

The application for insurance is an offer, which the insurer then decides to accept, reject or modify. The insurer then issues a policy or certificate of insurance that evidences the insurance contract. . . . These procedures are designed to protect the insurer; however, when an insurer by its actions creates a reasonable expectation of insurance coverage, coverage will not be denied merely because the insurer neglected to use its procedures.

Id. The Court has since applied these principles from *Keller* to another case involving the creation of a reasonable expectation of coverage by an agent during the application process, in *Costello v. Costello*, 195 W.Va. 349, 465 S.E. 2d 620 (1995), noting:

As the above facts suggest, Louis J. Diguglielmo's conduct during the application process may have created a reasonable expectation of insurance coverage upon the part of the appellant. . . . Under the circumstances of this action, therefore, and upon the above language of *Keller*, this Court is of the opinion that the circuit court committed reversible error in refusing to instruct the jury concerning the appellant's theory of reasonable expectation of insurance.

Costello, 195 W. Va. at 353-354. While Owners, may argue that it did not intend for the Kerns Policy to insure a West Virginia risk, its agent Gladstone created a reasonable expectation of such coverage by issuing a Certificate of Insurance which represented that coverage was provided to Morlan in West Virginia as an additional insured. Moreover, the Certificate of Insurance sent to Morlan does not indicate that Ohio law will apply, or that no coverage would exist for Morlan until Owners approved the Certificate and endorsed the Owners Policy. Instead, the Certificate represents that Morlan, a West Virginia citizen, has been made an additional insured under the Kerns Policy. Therefore, under the West Virginia statutes and cases discussed above, West Virginia law applies to the coverage issue.

The issue with respect to which State's law should apply is whether West Virginia or Ohio had the most significant relationship "*to the transaction and the parties.*" Syl. Pt. 2, *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W.Va. 329, 424 S.E.2d 256 (1992). In that regard, the "transaction" at issue is not simply the issuance of the original Policy to Kerns. Instead, it is the issuance of that policy combined with the issuance of the Certificate to Morlan in West Virginia, indicating that Morlan, a West Virginia citizen, was insured under the Policy. Morlan's domicile was clearly known to Gladstone, which listed Morlan's Parkersburg, West Virginia, address on the Certificate. (Petitioner's App. 512) The Certificate is not a separate contract. It is evidence of the fact that Owners broadened the Policy's coverage by adding Morlan as an insured. The "risk insured" under this broadened Policy included not only Kerns' activities, but also Morlan's activities, and it is undisputed that Morlan was principally located in West Virginia. *Nadler*, 188 W. Va. at Syl. Pt. 2. Regardless of where Owners intended the Policy to apply, the issuance of the Certificate and the addition of Morlan as an additional Policy insured means that it also applied to claims against Morlan arising in West Virginia.

Where the place of contracting and location of the risk are split, the law applicable to the Third Party Complaint depends upon which state has "the more significant relationship to the transaction and the parties." *Id.*; *Lee v. Saliga*, 179 W.Va. 762, 373 S.E.2d 345 (1988). Similarly, in *Liberty Mutual v. Triangle Industries, Inc.*, 182 W.Va. 580, 390 S.E.2d 562 (1990), this Court held that the "more significant relationship" test applied to a commercial general liability policy like the Owners' Policy at issue here. (See also Syl., *Liberty Mut.*, 390 S.E.2d 562 at 566.) In that regard, the *Liberty Mutual v. Triangle Industries* case involved three (3) states. The policy at issue was issued in New Jersey; the multi-state corporate insured produced toxic waste in West Virginia;

and waste dumping in Ohio was alleged to violate the Environmental Protection Act. On those complicated facts, the Court expanded *Lee*'s formula: "the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state." Syl., *Liberty Mut.*, 390 S.E.2d 562. While the Court held that New Jersey law applied to those facts, it noted that in another case involving "a similar situation ... that since West Virginia had more substantial contact with the transaction, its law should apply." *Id.* at 566 Footnote. 6 (citing *New v. TAC & C Energy, Inc.*, 177 W.Va. 648, 355 S.E.2d 629 (1987)). Thus, the question of which law should apply to the commercial general liability policy and Certificate of Insurance at issue here turns upon whether West Virginia or Ohio has the "more significant relationship" to the transaction. The Court later examined the issue of "significant relationships" and the choice of law governing insurance coverage in *Joy Technologies, Inc. v. Liberty Mutual Insurance Co.*, 187 W. Va. 742, 421 S.E.2d 493 (1992). In *Joy*, as in this case,

the injury occurred in West Virginia, the instrumentality of injury was located in West Virginia, and the forum selected to try the issues was in West Virginia. These factors suggest that West Virginia has had a very significant relationship to the transaction and the parties. In fact, the relationship would appear to be more substantial than that of Pennsylvania, where the contract was formed.

Id., 421 S.E.2d at 497. Moreover, unlike *Joy*, this case also involves a Certificate of Insurance issued to a West Virginia corporation at its West Virginia address, with the promise by Owners to make a West Virginia citizen, Morlan, an insured under the Owners policy.

Judge Copenhaver, of the United States District Court for the Southern District of West Virginia, applied those principles in *North American Precast, Inc. v. General Casualty Co. of Wisconsin*, No. 3:04-cv-1307 (S.D. W. Va. Mar. 31, 2008) (See the copy at Petitioner's App. 536-

559). Like this case, *North American Precast* involved a West Virginia accident and an Ohio CGL policy's coverage for its West Virginia risk. As Judge Copenhaver explained, the mere fact of the policy's issuance in Ohio was less significant than the State in which the insured risk was located and the accident occurred:

... The formation of the contract appearing to have taken place in Ohio, the law of Ohio governs, unless West Virginia is shown to have a more significant relationship to the events and the parties.

In Triangle Industries, the court noted its consideration of the Restatement (Second) of Conflict of Laws to determine which state has the most significant relationship. Triangle Industries, 182 W. Va. at 585, 390 S.E.2d at 567. Within two years, however, the court decided Joy Technologies, Inc. v. Liberty Mutual Insurance Company, 187 W. Va. 742, 421 S.E.2d 493 (1992), and though it relied on the holding of Triangle Industries, the court appears to have abandoned the formal Restatement analysis. The court instead began its survey by noting simply that "the injury occurred in West Virginia, the instrumentality of the injury was located in West Virginia, and the forum selected to try the issues was West Virginia." Joy Technologies, 187 W. Va. at 746, 421 S.E.2d at 497. The court continued, "These factors suggest that West Virginia has had a very significant relationship to the transaction and the parties. In fact, the relationship would appear to be more substantial than that of [the state] where the contract was formed." Id.

Under the guidance provided by Joy Technologies, it appears that West Virginia's relationship to this controversy is more substantial than that of Ohio. The General Casualty policy was issued to defendant North American, located in Stow, Ohio, through General Casualty's agent located in Solon, Ohio. (Stip. ¶ 1). The connection with Ohio ends there. The additional certificate of coverage was issued to G&G, a West Virginia corporation, specifically for the jail project, which the parties at all times knew would be located in West Virginia. The insured risk was found in West Virginia, and there is no dispute that the injury occurred in this state as well. For these reasons, the law of West Virginia should be applied in determining the coverage issue.

Id. at 10-12 (footnotes omitted) (See Petitioner's App. 545-546) While Owners attempts to distinguish Judge Copenhaver's decision by arguing that the Certificate of Insurance in *North American Precast* specifically identified the construction project located in West Virginia as the

subject of the insurance, that argument assumes that if any of Kerns' work was to be done in another state, there is no significant relationship with West Virginia. In fact, West Virginia's relationship to this dispute is greater than that of any other state because the accident which gave rise to the Messers' claims occurred in West Virginia, the Messers' civil action was filed here, and the Certificate of Insurance was issued to a West Virginia citizen that was Kerns' only customer. In contrast, the named insured in *North American Precast* was a manufacturer that sold concrete planks to customers for use in construction projects in multiple states. In this case, Kerns worked exclusively for a West Virginia citizen and so much of his work was performed in West Virginia that he routinely left his truck and equipment at Morlan's West Virginia office. (See Petitioner's App. 225 and 226) Therefore, Kerns and his insurer, Owners, had far more substantial connections to West Virginia than the defendant insurance company in *North American Precast*, and the Circuit Court correctly concluded that West Virginia law should apply to their dealings with Morlan.

IV. Morlan was properly entitled to summary judgment on the coverage issues.

Owners next asserts that because it did not actually add Morlan to the Kearns policy as an additional insured, the Circuit Court incorrectly found coverage to exist and improperly granted summary judgment to Morlan. Again, Owners chooses to ignore the fact that its authorized agent issued a Certificate of Insurance which expressly indicated that Morlan had been added to the Owners Policy as an additional insured. (Petitioner's App. 512)

In *Marlin v. Wetzel County Board of Education*, 212 W. Va. 215, 569 S.E.2d 462 (2002), this Court addressed certificates of insurance at length, stating:

A certificate of insurance is a form that is completed by an insurance broker at the request of an insurance policyholder, and is a document evidencing the fact that an insurance policy has been written and includes a statement of the coverage of the

policy in general terms. *Black's Law Dictionary* (5th Ed.1979). A certificate of insurance “serves merely as evidence of the insurance and is not a part of the insurance contract.”

Marlin, 212 W. Va. at 223. The Court then explained:

A problem with certificates of insurance, which appears to be common in indemnification contracts such as that in the instant case, is that insurance agents often issue certificates of insurance detailing a particular form of coverage, but then fail to notify the insurance company of the need to alter or amend the coverage to match the certificate. The result is that the insurance company-like in the instant case-refuses to provide coverage.

Id. As discussed above, that it is precisely what happened here.

The *Marlin* decision involved the Wetzel County Board of Education’s claim that it was entitled to indemnification and coverage under a contractor’s commercial general liability policy for claims brought by the employees of various sub-contractors who were allegedly exposed to asbestos while renovating a high school. The Court discussed the effect of a certificate of insurance, stating:

We therefore hold 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 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.**

Id. at 225-226 (emphasis supplied). The Court then found that the Board of Education was entitled to coverage, noting:

At the inception of “coverage” for the Board, on September 14, 1987, an agent for Commercial Union prepared a certificate of insurance naming the Board as an additional insured. The insurance company's “bare, conclusory averment that the certificate naming plaintiff [the Board] as an additional insured was the result of ‘clerical error’ was insufficient to overcome the estoppel effect of its

misrepresentation, since even an innocent misleading of another party may bar one from claiming the benefits of his deception.”

Id. at 226. The Court based this finding upon its determination that the insurer was estopped from denying coverage after its agent had issued a certificate of insurance which clearly represented that the coverage had been provided, explaining

The doctrine of estoppel “applies when a party is induced to act or to refrain from acting to [his/]her detriment because of [his/]her reasonable reliance on another party's misrepresentation or concealment of a material fact.” Syllabus Point 2, in part, *Ara v. Erie Ins. Co.*, 182 W.Va. 266, 387 S.E.2d 320 (1989). Estoppel is properly invoked to prevent a litigant from asserting a claim or a defense against a party who has detrimentally changed its position in reliance upon the litigant's misrepresentation or failure to disclose a material fact. *Ara*, 182 W.Va. at 270, 387 S.E.2d at 324. The doctrine is “designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience.” *White v. Austin*, 172 N.J.Super. 451, 454, 412 A.2d 829, 830 (1980).

Id. at 225. Because Gladstone’s issuance of the subject Certificate of Insurance in this case presents a virtually identical situation, Owners is clearly estopped from denying coverage or a duty to defend Morlan in this case under West Virginia law. The fact that Owners’ agent allegedly failed to forward the Certificate to Owners or otherwise advise Owners of the issuance of the Certificate is irrelevant since Morlan was lead to believe that it was covered under the Owners Policy.

Since the Owners Policy provides primary liability coverage for an “insured,” and Morlan was clearly an “insured” under the principles set forth in *Martin*, there was no genuine question of fact with respect to Owners’ duty to provide coverage and a defense to Morlan in this case. In that regard, a liability insurer must defend its insured if the allegations and the facts behind them “are reasonably susceptible of an interpretation” that the policy could cover the claims. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 194, 342 S.E.2d 156 (1986). Since Owners does not dispute

that the identical claims against Kerns were covered, the Messers' claims against Morlan were clearly subject to the same consideration and were covered as well because of Morlan's status as an insured under the Owners Policy.

Rule 56 of the West Virginia Rules of Civil Procedure governs motions for partial summary judgement and provides, "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In this case, the evidence clearly demonstrated that Morlan received a Certificate of Insurance directed to its West Virginia address, representing that it had been made an additional insured under the Owners Policy, and Morlan reasonably relied upon that representation. Therefore, the Circuit Court correctly determined that Morlan was entitled to partial summary judgment that, as a matter of law, the Owner's Policy provided coverage for the Messers' claims against Morlan.

V. Because Owners issued a Certificate Of Insurance indicating that Morlan had been added to the Kearns insurance policy as an additional insured, the Circuit Court properly found that Morlan was a "first-party" insured for purposes of asserting claims for "bad faith" and violations of West Virginia's Unfair Trade Practices Act.

In an effort to defeat Morlan's "bad faith" and Unfair Trade Practices Act claims, Owners contends that Morlan is not a "first-party claimant" under its policy and, therefore, has no standing to bring such claims. This assertion ignores applicable law.

The distinction between first and third-party claimants is important in this action because, under West Virginia law, first-party claimants may pursue a cause of action for an insurer's

violations of *W. Va. Code §33-11-4(9)*,⁴ and may recover additional damages when an insurer breaches its insurance contract. In the case of *Hayseeds, Inc. v. State Farm Fire & Casualty Company*, 177 W.Va. 323, 352 S.E.2d 73 (1986), this Court held that the common-law rule requiring each party to a lawsuit to pay their own attorneys' fees works a hardship upon persons who are forced to engage in litigation to recover benefits under insurance policies which provide them first-party benefits. *Hayseeds, Inc.*, 177 W. Va. 323. The Court stated:

To impose upon the insured the cost of compelling his insurer to honor its contractual obligations is effectively to deny him the benefit of his bargain.

Id. at 329. In accordance with this reasoning, the Court held:

Whenever a policyholder must sue his own insurance company over any property damage claim, and the policyholder substantially prevails in the action, the company is liable for the payment of the policyholder's reasonable attorneys' fees.

Id. Accordingly, *Hayseeds* damages are extra-contractual damages which an insured may recover in addition to the proceeds of the policy if the insured substantially prevails in litigation to recover those proceeds. However, such damages are not available to third-parties who have no contractual relationship with the insurer. (See *Elmore v. State Farm Mut. Auto. Ins. Co.*, 202 W.Va. 430, 434, 504 S.E.2d 893 (1998). Therefore, Morlan cannot recover for Owners' bad faith and violations of the Unfair Trade Practices Act unless it is determined to be a "first-party" claimant.

Morlan is clearly a first-party claimant in this case because it is seeking to recover directly from Owners pursuant to the insurance contract. In that regard, 114 C.S.R. 14-2.3 of the West Virginia Insurance Commissioner's regulations provides:

⁴ The third-party cause of action for violations of *W. Va. Code § 33-11-4(9)* has been abolished by statute. (See generally *W. Va. Code § 33-11-4a*)

“First Party Claimant or Insured” means an individual, corporation, association, partnership or other legal entity asserting a right to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by such policy or contract.

Here, the “contingency or loss” is the Messers’ claim against Morlan. In contrast, third-party claimants are defined under the regulations as follows:

“Third party Claimant” means any individual, corporation, association, partnership or other legal entity asserting a claim against any individual, corporation, association, partnership or other legal entity insured under an insurance policy or insurance contract of an insurer.

(See *114 C.S.R. 14-2.8.*) In this case, Morlan is asserting a claim for coverage against Owners, not a liability claim against Kerns. As a certificate holder, Morlan is an insured, or at the very least, an intended beneficiary of the Owners Policy.

In the recent case of *Dorsey v. Progressive Classic Ins. Co.*, 2013 W.Va. LEXIS 1286, 2013 WL 6050957 (W. Va. Nov., 2013), this Court applied the Insurance Commissioner’s regulations to find that a guest passenger in an insured automobile qualified as a “first-party” claimant for purposes of bringing a “bad faith” claim against an insurance company. While that guest passenger clearly did not pay the premiums and was not specifically listed on the policy declarations, the Court recognized that controlling was the fact that a claim was being asserted directly under the policy, stating:

Thus Dorsey, who never asserted any claims against the named insured and only asserted a claim under the policy, has the characteristics of a first-party insured.

Dorsey at 5. In the same fashion, Morlan is asserting that it is entitled to coverage as an insured based upon the Certificate of Insurance issued to it and the representation that Morlan had been

added as an additional insured under the Owners Policy. Morlan seeks a defense and indemnification under the policy. Such claims are clearly “first-party” claims because they can only be brought by an insured or the intended beneficiary of an insurance policy.

In the case of *United Dispatch, Inc. v. E.J. Albrecht Co.*, 135 W. Va. 34, 62 S.E.2d 289 (1950), this Court discussed the rights of intended beneficiaries under a contract, stating:

We think a consideration of the authorities in this, as well as other, jurisdictions leads to the conclusion that a person not a party to a contract may maintain an action thereon when such contract is made and intended for his sole benefit; **and, likewise, an action may be maintained if the contract is made and intended for the benefit of a class of persons definitely and clearly shown to come within the terms of the contract.** The intent of the contracting parties must appear from the contract or be shown by necessary implication; and be in accordance with the parol evidence rule when the contract under consideration is in writing.

United Dispatch, 135 W. Va. at 45, 296 (emphasis supplied). More recently, in *Goff v. Penn Mutual Life Insurance Co.*, 229 W. Va. 568, 729 S.E.2d 890 (2012), this Court expressly recognized that a beneficiary of a life insurance contract could pursue a first-party bad faith and UTPA claim. *Goff*, 229 W. Va. at 574. Therefore, the fact that Morlan was not the named insured and did not directly pay the premium itself does not affect its standing to bring an action to enforce the contract or to sue Owners for its “bad faith” failure to meet its contractual obligations.

The principles set forth in *Hayseeds* were extended to claims for other types of first-party coverage, including uninsured and underinsured motorist coverage, in the case of *Marshall v. Saseen*, 192 W. Va. 94, 450 S.E.2d 791 (1994). Obviously, such claims are often brought by passengers seeking uninsured or underinsured motorist coverage even though they are not the “named policyholder.” While Owners may assert that the use of the word “policyholders” in such

cases means that only the persons who were actually parties to the insurance contract can assert a claim for *Hayseeds* damages, the cases indicate otherwise. For example, in *Miller v. Fluharty*, 201 W.Va. 685, 500 S.E.2d 310 (1997), the term “policyholder” is used to refer to first-party claimants, but the 18 year-old Plaintiff in *Miller* “was a front-seat passenger in a vehicle owned by Sharon Fluharty and driven by Ms. Fluharty’s then 17-year-old son, Aaron Fluharty.” *Miller*, 201 W. Va. at 689. He was asserting an underinsured motorist claim under a State Farm policy issued to the Fluhartys and a second State Farm policy issued “to the plaintiff’s family.” *Id.* Under Owners’ theory, such a claimant could not recover *Hayseeds* damages unless he was actually the “named insured” on the subject policies, yet the Plaintiff in *Miller* was permitted to pursue his claims for “bad faith” and *Hayseeds* damages.

Owners also relies upon *Loudin v. National Liability & Fire Insurance Co.*, 228 W.Va. 34, 716 S.E.2d 696 (2011), but it does not apply. In *Loudin*, the Court found that a named policyholder would be considered a first-party insured when he was struck by his own vehicle which was being driven by someone else who also qualified as an insured under the policy. The Court found that Loudin had qualities of both a first and a third-party claimant but treated him as a first-party “under the unique facts of this case.” *Loudin*, 228 W. Va. at 40. Those “unique facts” are not present here. Morlan is listed on the Certificate as an “additional insured” and seeks to recover the contractual policy benefits promised by Owners, rather than tort damages from an insured. Therefore, this is clearly a first-party case.

Finally, Morlan would note that because Kerns worked exclusively for Morlan during the relevant time period, Morlan actually did pay the insurance premiums to Owners. In *Bowens v. Allied Warehousing Servs.*, 229 W.Va. 523, 729 S.E. 2d 845 (2012), this Court recognized that

when one business pays another for the exclusive use of a temporary employee, that business may also be entitled to Workers Compensation immunity because it effectively paid the premiums for such coverage. As the Court explained,

. . . this case involves a situation where the plaintiff's main employer, a temporary employment service, billed Allied, the special employer, "to compensate for expenses and profits, including Manpower's costs of subscribing to the Workmen's Compensation Fund. . . . Because Manpower billed Allied to compensate for expenses and profits of this nature, Allied, by proxy, paid for Bowens's workers' compensation coverage.

Bowens, 229 W. Va. at 538 (citations omitted). Similar considerations apply here because Morlan was the exclusive employer of Kerns and, by proxy, paid the premiums for the Owners Policy intended to protect both Kerns and Morlan from liability exposure.

VI. The Circuit Court properly applied the "collateral source rule" to prohibit Owners from offering evidence that Morlan's attorneys fees were paid under a separate policy maintained by Morlan where Owners refused to defend or indemnify Morlan in the underlying litigation.

In its final effort to obtain interlocutory review of the Circuit Court's holdings, Owners asserts that the Circuit Court improperly found that the collateral source rule prevents Owners from presenting evidence that Morlan's attorney's fees prior to the settlement were paid under a separate policy maintained by Morlan with Westfield. However, Owners fails to cite any authority for its central premise that the collateral source rule does not apply to the payment of defense costs by another insurer.

In this case, a portion of Morlan's claimed damages are the costs and expenses incurred in connection with the defense of the underlying civil action filed by Bobby Messer. (See Petitioner's App. 063) In that regard, this Court noted in *Aetna Casualty & Surety v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986):

Most Courts have held that where an insured is required to retain counsel to defend himself in litigation because his insurer has refused without valid justification to defend him, in violation of its insurance policy, the insured is entitled to recover from the insurer the expenses of the litigation, including costs and reasonable attorney's fees The theory for allowing this recovery is that these damages directly resulted from the insurer's breach of contract.

Pitrolo, 176 W. Va. at 193 (citations omitted). While Owners eventually settled and paid to settle the Messers' claims against Morlan, the attorney's fees and costs incurred before it did so have not been paid by Owners and represent a portion of the Morlan's damages in this case.

In its *Motion to Strike Damages Claims* (Petitioner's App. 422-430), Owners suggested that Morlan had no damages merely because it did not directly pay the costs and expenses incurred for its defense of the Messer claims. The Circuit Court properly found that the existence of other coverage to pay for those costs and expenses is irrelevant and inadmissible under the collateral source rule. In that regard, *Rule 402* of the *West Virginia Rules of Evidence* provides that only "relevant" evidence is admissible at trial. Relevant evidence is defined by *Rule 401* of the *West Virginia Rules of Evidence* as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Here, the fact that Morlan's maintained a separate policy with Westfield, available to pay Morlan's attorneys' fees and expenses in the absence of coverage from Owners, is irrelevant because such fees were incurred and Owners is clearly liable for them under *Pitrolo*. To assert otherwise is to suggest that because someone else could pay those fees and expenses, the party that is clearly liable for them simply does not have to pay. Likewise, *Rule 403* of the *West Virginia Rules of Evidence* provides, in pertinent part:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or ... waste of time [.]

W. Va. R. Evid. 403. In this case, Owners' argument that Morlan's liability insurance coverage with Westfield paid Morlan's attorney fees and expenses would unfairly prejudice Morlan by suggesting that those fees do not represent real damages, even though Owners, as the primary liability carrier, is clearly liable for them under *Pitrolo*, regardless of whether another insurance policy might be available to pay them if Owners was not involved. Even if those fees and expenses were paid by Westfield, the existence of such other coverage represents a collateral source and is therefore not admissible at trial.

West Virginia law is abundantly clear that evidence of funds received or available from a collateral source is not admissible at trial. In that regard, this Court has noted:

The collateral source rule was established to prevent the defendant from taking advantage of payments received by the plaintiff as a result of his own contractual arrangements entirely independent of the defendant. Part of the rationale for this rule is that ***the party at fault should not be able to minimize his damages by offsetting payments received by the injured party through his own independent arrangements.***

Ratlief v. Yokum, 167 W. Va. 779, 787, 280 S.E.2d 584 (1981) (emphasis supplied). This principle was further explained in *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 307 S.E.2d 603 (1983), where the Court stated:

Simply put, the collateral source rule excludes payments from other sources to plaintiffs from being used to reduce damage awards imposed upon culpable defendants. ***The rule is premised on the theory that it is better for injured plaintiffs to receive the benefit of collateral sources in addition to actual damages than for defendants to be able to limit their liability for damages merely by the fortuitous presence of these sources.***

Ilosky, 172 W. Va. at 446 (emphasis supplied). Importantly, the Court also indicated:

However, we believe that the induction of collateral sources into the jury's consciousness for whatever purpose is to be avoided. ***The purpose of the collateral source doctrine is to prevent reduction in the damage liability of defendants simply because the victim had the good fortune to be insured or have other means of compensation.*** There is always the danger that jury exposure to sources of collateral payments will cause it to award less than actual damages, thereby allowing defendants to reduce their liability. ***Regardless of who pays the bill for expenses prior to trial, someone is losing the use of that money.***

Id. at 447 (emphasis supplied).

In this case, Owners asserts that it can rely upon the existence of other coverage available to Morlan from a collateral source to reduce the *Pitrolo* damages for which it is primarily responsible. While it asserts that the collateral source rule is not applicable to disputes over the cost of defense, it cites no authority for that principle. On the other hand, as noted above, this Court has clearly held that under the collateral source rule, it does not matter who paid the expenses. Instead, what matters is that someone lost the use of that money. Owners should not be permitted to take advantage of Morlan's good fortune to have been separately insured by Westfield. Such an argument clearly violates the principles behind the collateral source rule and was properly excluded by the Circuit Court below.

CONCLUSION

For the reasons set forth above, the Circuit Court properly had jurisdiction over Owners and properly applied West Virginia law to find that Morlan was entitled to summary judgment on the coverage issues. Therefore, Owners interlocutory appeal of the Circuit Court's rulings should be denied and the Court should remand this action for proceedings on the merits.

Respectfully submitted,

MORLAN ENTERPRISES, INC.,

By counsel



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VERIFICATION

BRENT K. KESNER, being by me first duly sworn, upon his oath, deposes and says that he is counsel for the Respondent, State of West Virginia, ex. rel. Owners Insurance Company, in the foregoing verified RESPONSE TO PETITION FOR WRIT OF PROHIBITION; that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief; and that insofar as they are therein stated to be upon information and belief, he believes them to be true.



BRENT K. KESNER (WVSB 2022)

NO. 13-1153

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA ex rel.
OWNERS INSURANCE COMPANY,

Petitioner,

v.

HONORABLE WARREN R. MCGRAW,
JUDGE OF THE CIRCUIT COURT OF
WYOMING COUNTY, WEST VIRGINIA
and MORLAN ENTERPRISES INC.,

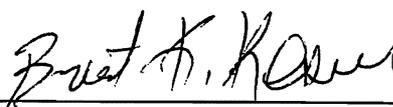
Respondents.

FROM THE CIRCUIT COURT OF
WYOMING COUNTY, WEST VIRGINIA
Civil Action No. 06-C-182

CERTIFICATE OF SERVICE

I, Brent K. Kesner, counsel for Morlan Enterprises, Inc., certify that the foregoing RESPONSE TO PETITION FOR WRIT OF PROHIBITION was served on counsel of record this 22nd day of **November, 2013**, by depositing a true copy thereof in the regular U.S. Mail, first-class postage prepaid, addressed as follows:

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