EFiled: Mar 06 2019 04:26PM EST
Transaction ID 63035626

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

IN RE: YEAGER AIRPORT LITIGATION **CIVIL ACTION NO. 16-C-7000**

THIS DOCUMENT APPLIES TO:

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

Plaintiff,

v. **Civil Action No. 15-C-1022 KAN**

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

MEMORANDUM OPINION AND ORDER DENYING THE TRAVELERS INDEMNITY COMPANY'S MOTION FOR SUMMARY JUDGMENT REGARDING INSURANCE COVERAGE AND GRANTING TRIAD ENGINEERING, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST TRAVELERS AND WESTFIELD INSURANCE COMPANY'S MOTION FOR SUMMARY JUDGMENT ON COVERAGE ISSUES WITH RESPECT TO TRAVELERS POLICIES

The Presiding Judges have reviewed and maturely considered the *Motion For Summary Judgment Regarding Insurance Coverage* (Transaction ID 62579412) filed in Civil Action No. 15-C-1022 KAN by The Travelers Indemnity Company ("Travelers"), the *Motion For Partial Summary Judgment Against Travelers* (Transaction ID 62578588) filed in Civil Action No. 15-C-1022 KAN by Triad Engineering, Inc. ("Triad"), and the *Motion For Summary Judgment On Coverage Issues With Respect To Travelers Policies* (Transaction ID 62579818) filed in Civil Action No. 15-C-1022 KAN by Westfield Insurance Company ("Westfield"). Having heard oral argument with respect to said motions on November 30, 2018, and having conferred with one another to ensure the uniformity of their decision, as contemplated by *Rule 26.07(a)* of the *West Virginia Trial Court Rules*, were of the opinion to and did unanimously make the following findings of fact and conclusions of law:

FINDINGS OF FACT

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

2. Defendant Triad Engineering, Inc. ("Triad") has been sued by the Plaintiff Central West Virginia Regional Airport Authority, Inc. ("the Airport"), for damages arising from the failure of a 500-foot extension of the runway and the construction of an Engineered Material Arresting System ("EMAS") as part of a project referred to as the "Runway 5 Safety Area Improvements (the "project").

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

4. In its *Third Amended Complaint*, the Airport alleges that this action arises from the failure of a Runway Safety Area ("RSA") for the Airport's Runway 5 and Runway 23. In particular, the Airport alleges that ". . . the best manner in which to provide the RSA for Runway 5 was a 500 foot extension of the runway's southernmost end and the use of an engineered material arresting system ("EMAS")." *Complaint* at ¶26. It further alleges that the EMAS is ". . . a system of specialized air-entrained cement blocks at the end of a runway onto which an airplane can travel in an emergency. The blocks are meant to collapse under the weight of the airplane thereby stopping or arresting the airplane's progress and preventing a crash." *Id.*

5. The *Third Amended Complaint* goes on to allege that, on July 28, 2013, Airport Authority employees "noticed separation in and around the EMAS blocks which was not present the week before." *Third Amended Complaint* ¶32. It then alleges that, on March 12, 2015, "the

Runway 5 EMAS/MSE catastrophically failed sending. . . fill and other material down and onto the Keystone Drive area of Charleston." *Third Amended Complaint* ¶38.

6. In Count I of its original *Complaint* and in each of its Amended Complaints, the Airport alleged that the Defendants, including Triad were negligent, in that defendants:

> a. Improperly designed and engineered the runway safety area, MSE, EMAS and other related improvements;
>
> b. Improperly designed and engineered the fill material/compaction requirements for the runway safety area, MSE and other related improvements;
>
> c. Improperly tested and investigated subsurface and other conditions of the runway safety area, MSE and other related improvements;
>
> d. Failed to take steps to prevent collapse, subsidence and soil consolidation of the runway safety area, MSE and other related improvements;
>
> e. Failed to properly inspect the construction of the runway safety area, MSE, EMAS and other related improvements;
>
> f. Failed to properly test or otherwise verify that the fill comprising the runway safety area and MSE met necessary requirements prior to certifications;
>
> g. Failed to properly monitor, warn or instruct as to the safety of the subject work even after concerns were raised with regard to the subject job;
>
> h. Improperly and negligently supervised the construction and installation of the EMAS and MSE systems;
>
> i. Improperly and negligently supervised the construction and installation of the EMAS and MSE systems;

> j. Improperly and negligently failed to design, contract (sic), inspect or ensure the proper placement and operation of the drainage system on the subject project;
>
> k. Improperly and negligently failed to design, construct, inspect or ensure the proper placement and operation of the Miramesh GR and Miragrid 1 OXT & 20XT on the subject project;
>
> l. Improperly and negligently failed to warn or otherwise instruct of the risk, dangers and hazards associated with the 1:1 slope on the subject project; and
>
> m. Other such duties which will be determined during the course of discovery in this action.

Third Amended Complaint, at ¶45.

7. The Airport alleged the Defendants, including Triad, negligently constructed the drainage system; negligently constructed the Miramesh GR and Miragrid; and negligently supervised the construction and installation of the EMAS and MSE systems on the subject property (See *e.g., Third Amended Complaint*, at ¶45).

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

A. failing to supervise and oversee Mr. Fogarty's work on the MSE, *Third Amended Complaint* at ¶124;

B. failing to ensure that Mr. Fogarty's MSE design conformed to accepted engineering standards and safeguarded the life, health, property and welfare of the public, *Third Amended Complaint* at ¶125;

C. negligently managing its general business operations resulting in the assignment of Mr. Fogarty's duties of designing the MSE and overseeing its construction to Mr. Ryan who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE, *Third Amended Complaint* at ¶126;

D. breaching statutory and regulatory duties to plaintiff by assigning Mr. Fogarty's duties to Mr. Ryan, who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE, *Third Amended Complaint* at ¶127;

E. failing to supervise and oversee Mr. Ryan's work on the MSE, *Third Amended Complaint* at ¶128;

F. failing to ensure that Mr. Ryan's MSE design modifications conformed to accepted engineering standards and safeguarded the life, health, property and welfare of the public, *Third Amended Complaint* at ¶129;

G. negligently managing its general business operations resulting in Triad's failure to inform the plaintiff that Triad assigned the duties of designing the MSE and overseeing its construction to Mr. Fogarty who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE, *Third Amended Complaint* at ¶130;

H. negligently managing its general business operations resulting in Triad's failure to inform the plaintiff that Triad assigned Mr. Fogarty's duties of designing the

MSE and overseeing its construction to Mr. Ryan who lacked the requisite education and experience in the specific technical fields of engineering involved in the design and construction of the MSE, *Third Amended Complaint* at ¶131;

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

J. breached common law duties to plaintiff by assigning the duties of designing the MSE and overseeing its construction to Mr. Fogarty who lacked the requisite education and experience, *Third Amended Complaint* at ¶133;

K. breached common law duties to plaintiff by failing to supervise and oversee Mr. Fogarty's work on the MSE, *Third Amended Complaint* at ¶134;

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

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

N. breached common law duties by assigning Mr. Fogarty's duties of designing the MSE and overseeing its construction to Mr. Ryan, *Third Amended Complaint* at ¶137;

O. breached common law duties by failing to supervise and oversee Mr. Ryan's work on the MSE, *Third Amended Complaint* at ¶138;

P. breached common law duties by failing to ensure that Mr. Ryan's MSE design modifications conformed to accepted engineering standards, *Third Amended Complaint* at ¶139;

Q. negligently managing its general business operations resulting in Triad's failure to inform plaintiff that Triad assigned the duties of designing the MSE and overseeing its construction to Mr. Fogarty who lacked the requisite education and experience, *Third Amended Complaint* at ¶140; and

R. negligently managing its general business operations resulting in Triad's failure to inform plaintiff that Triad assigned Mr. Fogarty's duties of designing the MSE and overseeing its construction to Mr. Ryan, who lacked the requisite education and experience, *Third Amended Complaint* at ¶141.

9. The project at issue was part of an agreement which Triad entered into with the Airport Authority in February, 2003 regarding the Runway 5 Safety Area Improvements, Taxiway-Runway 23 Safety Area Improvements and Lighting Rehabilitation.

10. Subsequently, in March, 2005, Cast & Baker Corporation entered into an agreement with the Airport Authority related to the construction of the Runway 5, Runway 23, and Taxiway Safety Area Improvements.

11. The Standard General Conditions of the Construction Contract, which was a part of Cast & Baker's 2005 contract with the Airport Authority, contained the following provisions regarding insurance to be provided by Cast & Baker (as "Contractor"):

5.04 Contractor's Liability Insurance

A. CONTRACTOR shall purchase and maintain such liability and other insurance as is appropriate for the Work being performed and as will provide protection from claims set forth below which may arise out of or result from CONTRACTOR's performance of the Work and CONTRACTOR's other obligations under the Contract Documents, whether it is to be performed by CONTRACTOR, any Subcontractor or Supplier, or by anyone directly or indirectly employed by any of them to perform any of the Work, or by anyone for whose acts any of them may be liable:

***

5. Claims for damages, other than to the Work itself, because of injury to or destruction of tangible property wherever located, including loss of use resulting therefrom;

***

B. The policies of insurance so required by this paragraph 5.04 to be purchased and maintained shall:

1. With respect to insurance required by paragraphs 5.04 A.3 through 5.04 A.6 inclusive, include as additional insureds (subject to any customary exclusion in respect of professional liability) OWNER, ENGINEER, ENGINEER's Consultants, and any other individuals or entities identified in the Supplementary Conditions, all of whom shall be listed as additional insureds, and include coverage for the respective officers, directors, partners, employees, agents, and other consultants and subcontractors of each and any of all such additional insureds, and the insurance afforded to these additional insureds shall provide primary coverage for all claims covered thereby;

***

3. Include completed operations insurance;

4. Include contractual liability insurance covering CONTRACTOR's indemnity obligations under paragraphs 6.07, 6.11, and 6.20;

5. Contain a provision or endorsement that the coverage afforded will not be canceled, materially changed or renewal refused until at least thirty days prior written notice has been given to OWNER and CONTRACTOR and to each other additional insured identified in the Supplementary Conditions to whom a certificate of insurance has been issued (and the certificates of insurance furnished by the CONTRACTOR pursuant to paragraph 5.03 will so provide);

***

7. With respect to completed operations insurance, and any insurance coverage written on a claims made basis, remain in effect for at least two years after final payment (and CONTRACTOR shall furnish OWNER and each other additional insured identified in the Supplementary Conditions, to whom a certificate of insurance has been issued, evidence satisfactory to OWNER and any such additional insured of continuation of such insurance at final payment and one year thereafter).

12. The Cast & Baker agreement also required it to indemnify the Airport and Triad from any liability arising out of the work, according to the following provisions:

6.20 Indemnification

A. To the fullest extent permitted by Laws and Regulations, CONTRACTOR shall indemnify and hold harmless OWNER, ENGINEER, ENGINEER's Consultants, and the officers, directors, partners, employees, agents, and other consultants and subcontractors of each and any of them from and against all claims, costs, losses, and damages (including but not limited to all fees and charges of engineers, architects, attorneys, and all other professionals and all other court or arbitration

or other dispute resolution costs) arising out of or relating to the performance of the Work, provided that any such claim, cost, loss, or damage:

1. Is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), including the loss of use resulting therefrom; and

2. Is caused in whole or in part by any negligent act or omission of CONTRACTOR, any Subcontractor, any Supplier, or any individual or entity directly or indirectly employed by any of them to perform any of the Work or anyone for whose acts any of them may be liable, regardless of whether or not caused in part by any negligence or omission of an individual or entity indemnified hereunder or whether liability is imposed upon such indemnified party by Laws and Regulations regardless of the negligence of any such individual or entity.

***

C. The indemnification obligations of CONTRACTOR under paragraph 6.20.A shall not extend to the liability of ENGINEER and ENGINEER's Consultants or to the officers, directors, partners, employees, agents, and other consultants and subcontractors of each and any of them arising out of:

1. the preparation or approval of, or the failure to prepare or approve, maps, Drawings, opinions, reports, surveys, Change Orders, designs, or Specifications; or

2. giving directions or instructions, or failing to give them if that is the primary cause of the injury or damage.

13. The Cast & Baker contract also has a survivability provision, which provides:

> 17.04 *Survival of Obligations*
>
> > A. All representations, indemnifications, warranties, and guarantees made in, required by, or given in accordance with the Contract Documents, as well as all continuing obligations indicated in the Contract Documents, will survive final payment, completion, and acceptance of the Work or termination or completion of the Agreement.

Finally, the Cast & Baker contract provides that it is to be governed by West Virginia law. ¶ 17.05.

14. Pursuant to ¶ 5.04.B.5 of the Contract, Cast & Baker obtained an April 4, 2005 Certificate of Insurance issued by Travelers' authorized agent, which represented that both the Airport and Triad had been named as additional insureds under Cast & Baker's Commercial General Liability Policy (Travelers Pol. No. DTCO-279D4159-IND-14) and its Umbrella Policy (Travelers Pol. No. CUP-279D4172-IND-14.)

15. The Certificate of Insurance indicated that the Certificate Holder (the Airport) and Triad had been added as additional insureds under the Traveler's Policies with respect to the specific project to be completed at Yeager Airport, stating:

> Certificate Holder and Triad Engineering, Inc. Are Additional Insureds With Respect To FAA A.I.P. Project No. 3-54-0003-031 - 2003 "Runway 5, Runway 23, And Taxiway A Safety Area Improvements". Triad project No. 04-03-0001.

16. The Certificate provided no indication that the coverage would expire two years after final payment was made to Cast & Baker.

17. The Travelers Commercial General Liability ("CGL") Policy issued to Cast & Baker (Policy No. DT-CO-279D4159-IND-14) provides, in relevant part, that Travelers will pay

those sums that an insured is legally obligated to pay as damages because of bodily injury or property damage caused by an "occurrence" that takes place in the "coverage territory," and that Travelers will provide a defense to a suit seeking to recover such damages from an insured at Travelers' expense. In particular, it provides:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

*** * ***

SECTION I - COVERAGES
COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages 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 claim or "suit" that may result.

* * *

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";

* * *

2. Exclusions

This insurance does not apply to:

* * *

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

* * *

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B

* * *

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit";

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** - Coverage **A** - Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

* * *

18. Under "Section III - Limits of Insurance" at Paragraph 7 "Separation Of Insureds." the CGL Policy provides "this insurance applies: . . [s]eparately to each insured against whom claim is made or "suit" is brought."

19. The Travelers CGL Policy also provides that any person or organization that Cast & Baker agrees in a written contract to include as an additional insured for that coverage shall meet the Policy definition of "Who Is An Insured." In that regard, the Policy contains a "Blanket Additional Insured (Contractors)" Endorsement, Form CG D2 46 08 05, which provides in relevant part:

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

BLANKET ADDITIONAL INSURED
(CONTRACTORS)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

1. WHO IS AN INSURED - (Section II) is amended to include any person or organization that you agree in a "written contract requiring insurance" to include as an additional insured on this Coverage Part, but:

   a) Only with respect to liability for "bodily injury", "property damage" or "personal injury"; and
   b) If, and only to the extent that, the injury or damage is caused by acts or omissions of you or your subcontractor in the performance of "your work" to which the "written contract requiring insurance" applies. The person or organization does not qualify as an additional insured with respect to the independent acts or omissions of such person or organization.

* * *

2. The insurance provided to the additional insured by this endorsement is limited as follows:

***

   b) The insurance provided to the additional insured does not apply to "bodily injury", "property damage" or "personal injury" arising out of the rendering of, or failure to render, any professional architectural, engineering or surveying services, including:

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

   c) This insurance provided to the additional insured does not apply to "bodily injury" or "property damage" caused by "your work and included in the "products-completed operations hazard" unless the "written contract requiring insurance" specifically requires you to provide such coverage for that additional insured, and then the insurance provided to the additional insured applies only to

such "bodily injury" or "property damage" that occurs before the end of the period of time for which the "written contract requiring insurance" requires you to provide such coverage or the end of the policy period, whichever is earlier.

***

5. The following definition is added to SECTION V. - DEFINITIONS:

"Written contract requiring insurance" means that part of any written contract or agreement under which you are required to include a person or organization as an additional insured on this Coverage Part, provided that the "bodily injury" and "property damage" occurs and the "personal injury" is caused by an offense committed:

a. After the signing and execution of the contract or agreement by you;

b. While that part of the contract or agreement is in effect; and

c. Before the end of the policy period.

* * *

20. Travelers' CGL policy contained two endorsements regarding notice of cancellation. The first endorsement, titled "Earlier Notice of Cancellations/Non-Renewal Provided by Us," required that either Cancellation or Non-Renewal required 60 days' notice. A second endorsement is provided that notice of cancellation would only be given by Travelers as follows:

Person or Organization:

Any person or organization to whom you have agreed in a written contract that notice of cancellation of this policy will be given, but only if:

1. You send us a written requires to provide such notice, including the name and address of such person or organization, after the first named insured receives notice from us of the cancellation of this policy; and

2. We receive such written request at least 14 days before the beginning of the applicable number of days shown in this schedule.

Address:

The address for that person or organization included in such written request from you to us.

21. The contract between the Airport and Cast & Baker qualifies as "a written contract requiring insurance" under the Travelers policies, for purposes of providing coverage for a property damage claim if the damage at issue occurred after the contract was signed and while both the contract and the Travelers policies were in effect.

22. All of the claims against Triad arose after the underlying contract was signed in 2005 and the Travelers Policy remained in force and effect through the dates of all of the damage claims and lawsuits at issue.

23. The contract between the Airport and Cast & Baker provided in ¶ 5.04.B.7 that the required insurance was to remain in effect "for at least two years after final payment" and further provided in ¶ 5.04.B.5 that the required insurance would "contain a provision or endorsement that the coverage afforded will not be cancelled, materially changed or renewal refused until at least thirty days prior written notice has been given to OWNER and CONTRACTOR and to each additional insured . . . . "

24. The period in which the required insurance was to remain in effect began to run in March of 2012, when the final payment to Cast & Baker was made and coverage for Triad as an additional insured under the Travers Policy was triggered if an occurrence giving rise to the underlying property damage claims began before the end of the policy period.

25. No written notice that the Travelers Policy had been cancelled, materially changed or renewal refused was ever given to the Airport or Triad by Cast & Baker or Travelers.

26. The Airport's *Third Amended Complaint* alleges that on July 28, 2013, Airport Authority employees "noticed separation in and around the EMAS blocks which was not present the week before." *Third Amended Complaint* ¶32.

27. In fact, the evidence produced in discovery suggests that settlement caused the blocks of the EMAS to separate and move in a measurable fashion as early as June of 2007. Specifically, in a June 8, 2007 email, Hugh Delong, an engineer with Zodiac Aerospace, the firm that produced the EMAS blocks, discussed problems with the EMAS blocks at the Charleston Airport and noted that the blocks had moved, pulling off the tape that was used to cover joints. He noted:

> This is the first feedback that we have received from Tim Murnahan, the Number 2 guy at Yeager. He was off-site for training during the end of the install and the bed acceptance visit. I noted about six minor tape fixes and a similar number of minor paint touch-ups needed during my final inspection. The contractor had used-up all of the available tape and John Curry was going to ship them a roll or two of tape to make the very minor tape repairs. The four photos (8 megs!) That Tim sent were typical tape pull-offs along a joint and one tape puncture. Simple fixes but apparently much more numerous than what we saw on the bed a couple weeks ago. (I spent about 4 hours doing a block-by-block bed check on 17 May). Maybe going through a few weeks of thermal cycling is enough to draw out tape separations. Makes me wonder if I should wait a while after final tape install before doing final inspect. Of course, after the bed has been assembled, both the contractor and our guys tend to leave the site in a day or two. That creates the need for John or me to take some tape with us to do final inspections. No a problem, just a change in our operations. Maybe this phenomena at Yeager is too big to wait for the first quarterly in August.

28. In an earlier e-mail which was attached to the June 7, 2007 communication, Mr. Murnahan indicated:

> I just completed a walk through on the EMAS bed. We have far to [sic] many issues to even list concerning the taped joints. I have attached pictures of a few of the failures. This appears to me to be very serious issue. There are many areas where water has easy access to the internal joints and the tape does not appear to be holding.

29. In a follow-up e-mail dated June 15, 2007, Mr. Delong expressly indicated that the movement of the blocks may have been caused by settlement. He noted:

> Yesterday morning I spoke with Mike Barnes from the site in West Virginia because I had heard from John Curry that Mike was seeing what looked like pavement or embankment settlement under where the tape problems were occurring. I asked Mike to do some string-line checks and photograph what he found. Mike is back in the office this morning and Mike, John Curry, Jim Bailey, John Bosco and I met and reviewed his photos and notes. There may be some embankment or pavement differential settlement going on underneath the EMAS blocks. Given winter embankment construction with snow and ice being included in the 18 inch lifts of compacted material (6 inch or smaller rocks), some settlement is possible. With deeper warming/thawing of the lower lifts of material, the melting and outflowing water may have created voids in the soil which allowed smaller soil particles to migrate downward, leaving the soils just under the pavement weaker and subject to some deflection. The warmer summer temps have also contributed to the ability of the asphalt pavement to flex and subside differentially. From the close-in photos of the string-lining checks for settlement, it is not clear how much block-to-block height change might be attributable to the support materials.

Mr. Delong then closed his e-mail with a warning indicating, "Stay tuned - there's more to come on this issue."

30. When asked about these communications in a deposition, Mr. Delong confirmed that movement occurred in 2007 and testified as follows:

> Q. So did you ask Mike to do some string-line checks and photograph what he found?
>
> A. Trying to collect some feedback on if it was a block problem or something else.
>
> Q. What's a string-line test – check?
>
> A. You just put a string line tight across multiple block surfaces to see if one block is lower than the others around it and measure how much and if it's a block or if it's an area of blocks. Single block would be a problem with that unitized block. Multiple ones would tend to indicate maybe some movement underneath it.
>
> And this was an internal document. People were trying to figure out why would this even happen. They're not engineers and we had not experienced any pavement settlement on nay project before this. So they're asking me what could happen, what could have caused this, and I'm teaching them that.
>
> Q. And these are your hypotheses as what could potentially be causing the settling?
>
> A. Yes.

31. Travelers was first notified about issues with the MSE slope at the Airport by a Notice of Claim submitted on behalf of Cast & Baker on April 25, 2014. The last page of the notice was a letter from Richard Atkinson, the Airport Director, to Michael Baker, the President of Cast & Baker, in which Mr. Atkinson advised:

> As you are aware, problems are surfacing with regard to the fill area that supports the arrestor bed (EMAS) which your company constructed at Yeager Airport on the southerly end of Runway 5. The problems are now threatening the use of Runway 5 Runway Safety Area and EMAS bed, as well as buildings located at the base of the fill.

32. On December 5, 2014, Freedom Villa, a Technical Specialist for Travelers, became involved, and sent a reservation of rights letter to Cast & Baker. In the letter, Ms. Villa noted in The Facts portion "[s]omtime after construction was completed, Cast & Baker was called out to the project to investigate EMAS block that was splitting. It was obvious at that time that there was some minor movement in the blocks." She also noted that "[i]t has not yet been determined if the safety zone is in peril of complete failure." She further acknowledged in that letter that its CGL Policy had "been continuously in effect since its inception of September 30, 2001."

33. Travelers also confirmed in its December 5, 2014 reservation of rights letter that the claim was reported on April 25, 2014, and further indicated:

> It is our understanding that during the initial construction, excess water developed in the slope and drainage was installed to address the issue. Sometime after construction was completed, Cast & Baker was called out to the project to investigate EMAS block that was splitting. It was obvious at that time that there was some minor movement in the blocks.
>
> During a routine inspection of the ramp in spring 2014, it was determined that the top of the slope had settled about 2" since the fall of 2013. It is unknown why the settlement is occurring.

Then, at Pg. 7 of its letter, Travelers noted, "[h]ere, it appears that at least some issues with the arrestor bed came to light during construction of the project."

34. On February 12, 2015, Michael Baker, the president of Cast & Baker, forwarded to Ms. Villa an email from Mr. Atkinson, who noted that "[t]he fill is still settling and the settlement is noticeable to the naked eye. Water continues to seep out of the base of the fill dripping off the exposed geo-grids." On February 19, 2015, Ms. Villa sent an email to Mr. Atkinson, that stated "[i]t is our understanding that in July 2013, you began to notice cracking in

the EMAS joints and underlying pavement while performing routine maintenance work on runway #5."

35. On February 25, 2015, Ms. Villa retained attorney Michael Markins to defend Cast & Baker.

36. The partial failure of the MSE slope occurred on March 12, 2015. On March 13, Constance Melkus of Travelers emailed senior management to notify them of the partial failure, and noted that "[i]n July 2013, during routine maintenance, the Airport discovered cracks in the EMAS blocks. Initial monitoring determined that the slope had moved from its original elevation after construction was complete."

37. Mr. Markins' email to Mr. Kesner indicated that Triad had undertaken the role of construction manager on the project and, therefore, had exposure for ordinary negligence which would purportedly be covered under a CGL policy. He indicated:

> Please find the attached sampling of pay applications that I believe evidences Triad taking on the role of construction manager after the design phase of the subject project ended. Further, during the entire construction phase, Triad had non-engineering/non-design individuals at the site that would inspect and/or monitor the work of Cast and Baker. . . . To the extent that any act or omission of Cast & Baker is considered causative to the slope failure, those acts or omissions were specifically and tacitly approved by Triad as construction manager.

38. Teresa Dumire, as counsel for Triad, emailed a letter on April 20, 2015, to Freedom Villa "to put Travelers on formal notice of Triad Engineering's Demand for Defense and Indemnity as an Additional Insured on Cast & Baker's Commercial General Liability Policy… and Excess Liability/Umbrella Policy…." Ms. Dumire attached to her letter a copy of the Certificate of Liability Insurance appended to the Cast & Baker agreement with the Airport

Authority, which named the Airport Authority and Triad Engineering as additional insureds under Travelers' policies.

39. Upon receipt of Ms. Dumire's letter, Ms. Villa noted in Travelers' electronic "claim notes" that "[i]t is our initial position that AI [additional insured] is likely not owed due to limited 2 yr tail under contract." Ms. Villa exchanged a number of emails with Michael Baker and Michael Markins, and telephone conversations with Michael Baker, to determine when Cast & Baker had received final payment.

40. Ms. Villa then sent a letter dated May 19, 2015, to Teresa Dumire, denying Triad's request for defense and indemnity. In her letter, Ms. Villa then examined the requirements of ¶ 5.04 in the Cast & Baker's contract, which she recited. She then stated:

> Pursuant to the above cited provisions, section 5.04(b)(1) *(sic)* of the Contract required Cast & Baker to include certain entities as additional insureds under its liability insurance for a period of time ending no later than two years after final payment.
>
> Cast & Baker made application for final payment of all work described in Article 1 on July 31, 2011. Final payment was made on October 5, 2011. Under the clear and unambiguous provisions of the Contract, Cast & Baker's obligation to have Triad named as an additional insured for completed operations coverage terminated two years after Cast & Baker received final payment. Accordingly, Cast & Baker's obligation to have Triad named as an additional insured with respect to the subject work ended October 5, 2013.
>
> ***
>
> Under the clear and unambiguous terms of the Travelers policy, Triad's status as an additional insured, being coextensive with Cast & Baker's contractual obligation to have Triad named as an additional insured, also terminated well before the March12, 2015 slope failure. The Blanket Additional Insured (Contractors) endorsement is clear that Triad was an additional insured only with respect to property damage that occurred before the end of the period of time for which the "written contract requiring

> insurance" required Cast & Baker to provide such coverage. The property damage resulting from the March 12, 2015 slope failure occurred long after the period of time that Cast & Baker was required to have Triad named as an additional insured. Consequently, Triad was not an additional insured under the Travelers policy when the slope failed.

41. In her deposition, Ms. Villa testified that the cracked EMAS blocks and the cracked asphalt underlayment would constitute "property damage" as is defined by Travelers' Policies. Indeed, this EMAS problem was alleged in the Airport Authority's Amended Complaint which was filed on June 18, 2015 (Transaction ID 60204755) (see e.g. ¶¶ 40 and 43).

42. The first page of Cast & Baker's contract provides:

> ARTICLE 1 – WORK
>
> 1.01 CONTRACTOR shall complete all Work as specified or indicated in the Contract Documents. The Work is generally described as follows:
>
> Runway 5, Runway 23, and Taxiway A Safety Area Improvements, which includes:
>
> Excavation and embankment for extended runway safety areas for Runway 5-23, and the realignment of Taxiway A, construction of reinforced earth/rock slopes, concrete paving, airfield lighting and signage, the installation of piping and drainage structures, regrading and revegetation, and airfield utility relocations.

Cast & Baker's contract also provided in ¶ 6.03 for Final Payment: "upon final completion and acceptance of the Work in accordance with ¶ 14.07 of the General Conditional, OWNER shall pay the remainder of the Contract Price as recommended by ENGINEER as provided in said ¶ 14.07." Final inspection is spelled out in ¶ 14.06, which is made by the ENGINEER with the OWNER and CONTRACTOR, leading to Final Payment under ¶ 14.07. It is clear that Final Payment covers all of the Work specified in Article 1, not merely some portion

of the work which Triad was involved in only on the Runway 5 MSE slope. The ENGINEER specified in ¶ 14.06 and 14.07 was Triad. In this regard, Triad's Agreement for Professional Services with the Airport provided, in SECTION II–INSPECTION SERVICES, that Triad shall:

> Conduct an inspection to determine if the Project is substantially complete and conduct a final inspection to determine if the Project has been completed in accordance with the contract documents, and if each contractor has fulfilled all of his objections thereunder, so that the Engineer [Triad] may approve, in writing, final payment to each contractor.
>
> Furnish Owner with a certification that all construction work has been performed and completed in conformity with the approved Drawings and Specifications….

Payment Application No. 68, dated January 27, 2012, includes a Letter of Transmittal from Triad to the Airport indicating that the Cast & Baker Pay Request No. 68 was approved by the Engineer, and signed by Dane Ryan. The copy of the check from the Airport to Cast & Baker is dated March 12, 2012. Therefore, the correct "final payment" date was March 12, 2012.

43. Notwithstanding Travelers' May 19, 2015, letter denying coverage, Triad made additional demands of Travelers for defense and indemnity as an additional insured under Cast & Baker's policies. By letter dated April 27, 2015, John Palmer wrote to Alan Miller, as counsel for Travelers, demanding defense and indemnity on behalf of Triad. On June 26, 2015, John Palmer forwarded the complaint filed by Theodore Carter and Rebecca Carter to Alan Miller with a request for defense and indemnity by Travelers, among other things. On July 10, 2015, Mr. Miller responded that the letter was forwarded to Freedom Villa. Freedom Villa responded on July 14, 2015, with a letter denying Triad's request for defense and indemnity.

44. On October 1, 2015, John Palmer wrote to Alan Miller regarding four complaints filed by Kenneth W. Carter, Debora Harrah, Robert Harrah and Terry and Rosemary LeTart, as well a claim being made by the Keystone Apostolic Church. Alan Miller's October 15 letter in response denied Triad's request.

45. By letter dated April 1, 2016, John Palmer notified Freedom Villa of the suit filed by Brotherhood Mutual Insurance Company and the Motion to Intervene in that case by the Keystone Apostolic Church, with a request to defense and indemnify Triad. By letter dated April 27, 2016, Freedom Villa denied that request.

46. On April 20, 2017, John Palmer sent an email to Freedom Villa regarding the mediation before the Resolution Judges on April 27 and 28, with a request for defense and indemnity regarding all of the cases brought by the various property owners. Freedom Villa replied by email on April 20, denying that request.

47. Travelers argues that the date of final payment occurred in 2011 and asserts that all of the work "described in Article 1 of the Contract" for which "Triad was the supervising engineer" was completed by July of 2011 and paid for by October 11, 2011. Travelers then argues that all of the claims in this case arose in March of 2015, when the slope finally collapsed, such that no claims arose during the period for which coverage was to be provided under the Travelers' Policy.

48. Travelers also argues in its *Motion For Summary Judgment Regarding Insurance Coverage* (Transaction ID 62579412), that all of the allegations against Triad in this case concerned the professional design and engineering services it had provided on the project, and argues that liability arising from such professional services is excluded under its policies.

Specifically, Travelers points out that Westfield also asserted that all of the work Triad performed on the project involved professional services and suggests that this position is supported by the Court's recent decision to grant Westfield summary judgment with respect to coverage under its Policy.

49. Westfield and Triad argue in their *Motion For Partial Summary Judgment Against Travelers* (Transaction ID 62578588) and *Motion For Summary Judgment On Coverage Issues With Respect To Travelers Policies* (Transaction ID 62579818) that the final payment did not occur until March 12, 2012 and point to the evidence indicating that there was damage to the EMAS blocks in July, 2013, to suggest that the claims against Triad did arise within two years of the final payment and are therefore covered. They further argue that Travelers was obligated to provide completed operations coverage for "at least" two years for Triad and that neither Cast & Baker nor Travelers ever notified Triad that it had been cancelled or not renewed and that Triad was no longer an additional insured.

50. Westfield and Triad also argue that Travelers had a duty to defend Triad as an additional insured based upon the underlying allegations which were being made against Triad and that duty continued until the evidence supporting the claims of the Airport and the Keystone Property Owners could be explored through discovery and resolved by the Court.

51. Westfield and Triad then suggest that Travelers also had a separate and distinct duty to defend Triad under the CGL coverage because Triad was a party to an "insured contract" and argue that Travelers is estopped from denying coverage to Triad because it issued a Certificate of Insurance which represented that Triad had been made an additional insured under

the Travelers' policies and did not disclose the limitations of coverage and exclusions upon which Travelers now relies.

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

CONCLUSIONS OF LAW

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

2. To defeat summary judgment, an opposing party "may not rest upon [its] mere allegations[,]" W. Va. R. Civ. P. 56(e), but must "by affirmative evidence demonstrate that a genuine issue of fact exists." *Painter*, 192 W.Va. at 192 n. 5, 451 S.E.2d at 758 n. 5 (1994).

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

4. A liability insurer's duty to defend is broader than its duty to indemnify. *Camden-Clark Memorial Hosp. Ass'n v. St. Paul Fire and Marine Ins. Co.*, 224 W.Va. 228, 682 S.E.2d 566, 575; *Butts v. Royal Vendors, Inc.*, 202 W.Va. 448, 504 S.E.2d 911, 916 (1998).

5. Any question concerning an insurer's duty to defend under an insurance policy must be construed liberally in favor of the insured where there is any question about the insurer's obligations. *Bowyer v. High-Lad, Inc.*, 216 W.Va. 634, 609 S.E.2d 895, 912 (2004); *Moore v. CAN Ins. Co.*, 215 W.Va. 286, 599 S.E.2d 709, 714 (2004).

6. Where an insurance policy contains a duty to defend, the insurer must defend its insured for all the claims, although it might eventually be required to pay only some claims. *Tackett v. American Motorists Ins. Co.*, 213 W.Va. 524, 584 S.E.2d 158, 162; *State Bankcorp, Inc. v. U.S. Fidelity and Guar. Ins. Co.*, 199 W.Va. 99, 483 S.E.2d 228, 233 (1997); *Robertson v. Fowler*, 197 W.Va. 116, 475 S.E.2d 116, 118 (1996).

7. Likewise, "[t]he insurance company may be obligated to provide a defense 'even though the suit is groundless, false, or fraudulent.'" *Farmers and Mechanics Mutual Insurance Co. v. Cook*, 210 W.Va. 394, 399, 557 S.E. 2d 801, 806 (2001) In fact, "the duty to defend a policyholder may, by virtue of the language contained in the insurance policy, be broader than the obligation to indemnify the policyholder against some risk" and exclusionary policy language "will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." *Id.*

8. In the case of *State ex rel. Nationwide Mut. Ins. Co. v. Wilson*, 236 W. Va. 228, 778 S.E.2d 677 (2015), the West Virginia State Supreme Court recognized that after being notified of the claims arising from the project, an insurer such as Travelers has a duty to

determine whether any of the claims could fall within the coverage provided under its policy, indicating:

> We recognize that "[w]hen a complaint is filed against an insured, **an insurer must look beyond the bare allegations contained in the third party's pleadings and conduct a reasonable inquiry into the facts** in order to ascertain whether the claims asserted may come within the scope of the coverage that the insurer is obligated to provide." Syl., *Farmers & Mech. Mut. Fire Ins. Co. of W.Va. v. Hutzler*, 191 W.Va. 559, 447 S.E.2d 22 (1994)

State ex rel. Nationwide Mut. Ins. Co. v. Wilson, at 237, 686. (Emphasis supplied.) *See Farmers & Mechanics Mut. Ins. Co. v. Cook*, 210 W.Va. 394, 557 S.E.2d 801, 806 (2001). *See also Healthcare & Retirement v. St. Paul Fire & Marine*, 621 F.Supp. 155, 162-163 (S.D.W.Va. 1985).

9. Similarly, in *Tackett v. Am. Motorists Ins. Co.*, 213 W. Va. 524, 584 S.E.2d 158 (2003), the Court noted:

> A contract for indemnification from loss typically also includes a provision whereby the insuring entity agrees to provide legal representation to said insured with respect to any claims filed against him/her for which the subject policy provides coverage. This type of arrangement has come to be known as the insurer's duty to defend. *See, e.g.*, Black's Law Dictionary 523 (7th ed.1999) (defining "duty-to-defend clause" as "[a] liability-insurance provision obligating the insurer to take over the defense of any lawsuit brought by a third party against the insured on a claim that falls within the policy's coverage"). Unquestionably, the terms of the pertinent insurance contract govern the parties' relationship and define the scope of coverage as well as the existence of the insurer's duty to defend its insured.
>
> Less certain, however, is the extent of such a duty. In this regard, we have held that "included in the consideration of whether [an] insurer has a duty to defend is whether the allegations in the complaint ... are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance polic[y]." . . . However, " '[t]here is no requirement that the facts alleged in

> the complaint specifically and unequivocally make out a claim within the coverage.' " . . . . Thus, "the duty to defend an insured may be broader than the obligation to pay under a particular policy. This ordinarily arises by virtue of language in the ordinary liability policy that obligates the insurer to defend even though the suit is groundless, false, or fraudulent.". . . . In other words, "if part of the claims against an insured fall within the coverage of a liability insurance policy and part do not, the insurer must defend all of the claims, although it might eventually be required to pay only some of the claims." . . . .
>
> Likewise, we also have directed reviewing courts to liberally construe insurance policy exclusions in favor of the affected insured. "Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." . . . . Maintaining consistency with our prior precedent in this arena, we previously have observed that the same standard applies to determinations of an insurer's duty to defend its insured. Accordingly, we hold today that "any question concerning an insurer's duty to defend under an insurance policy must be construed liberally in favor of an insured where there is any question about an insurer's obligations."

Tackett, at 528-29, 162-63 (citations omitted.)

10. Pursuant to the principles set forth in *Wilson* and *Tackett*, Travelers could not ignore the allegations of Triad's non-professional negligence when deciding whether the claims arising from the slope failure triggered its duty to defend Triad.

11. Travelers' suggestion that there were no allegations of non-professional negligence in this case is also unsupported. For example, the allegations of the *Carter* Complaint, in Civil Action No. 15-C-1074 KAN, clearly indicate that Triad was being sued for its failure to monitor the work of Cast & Baker, reasonably implying negligent supervision of the work of the contractors instead of negligent design, or engineering. Travelers was required to determine if even any of the claims were "reasonably susceptible of an interpretation" that they

might be covered (even if later shown to be without merit) and then defend subject to a reservation of rights if there was a possibility of coverage. Specifically, the issue in this case is not whether the claims being asserted against Triad actually arose from Triad's provision of professional services. Instead, the question to be answered is whether any of the allegations against Triad, whether valid or not, were "reasonably susceptible" of an interpretation that they might have been covered under the Travelers policies the time they were initially made. See *Pitrolo*, at 194, 160. Because non-professional negligence was alleged, the Court finds that those allegations triggered a duty to defend under the Travelers Policy, even if it was ultimately determined that those allegations were unsupported by the evidence.

12. Travelers' assertion that the Blanket Additional Insured Endorsement in its Policy only applies to property damage that occurs while the contract requiring Triad to be included as an additional insured is in effect also fails. Specifically, Travelers' corporate representative Freedom Villa testified in her deposition that the "final payment" to Cast & Baker was made on March 12, 2012, and the evidence suggests that the problems with the slope were first identified as early as 2007 and were certainly noticed by 2013, as alleged in Paragraph 32 of the *Third Amended Complaint.* Moreover, the Cast & Baker contract required that Triad be listed as an additional insured, by ¶ 5.06.B.1.; that completed operations insurance had to be included, by ¶ 5.06.B.3.; that completed operations insurance had to remain in effect for at least two years after final payment, by ¶ 5.06.B.7.; and that the policy had to contain an endorsement that the coverage would not be cancelled, materially changed or renewal refused until at least 30 days prior written notice was given to Triad as an additional insured, by ¶ 5.06.B.5. Since no such notice was given, Triad remained an additional insured when Cast & Baker renewed its policies

containing completed operations coverage after two years from final payment. Accordingly, the Court finds that coverage under the Travelers Policy did apply at the time the claims against Triad first arose.

13. Since the cracks in the EMAS blocks were discovered in July, 2013, less than two years after the final payment to Cast & Baker, claims arising from that damage are clearly susceptible to a reasonable interpretation that they constituted a covered occurrence less than two years after the final payment to Cast & Baker, triggering Travelers' duty to defend under its Blanket Additional Insured (Contractors) Endorsement.

14. Travelers also had a separate and distinct duty to defend Triad under the CGL coverage because Triad was a party to an "insured contract." Specifically, the indemnification provisions of the contract between the Airport and Cast & Baker constitute an "insured contract" under the Travelers policies and those provisions did not contain any time limitation or exclusion for all liability arising from professional services. Instead, those provisions only excluded liability arising from certain professional services, such as preparing drawings or maps or giving instructions, and did not mandate that any duty to indemnify or hold harmless would end two years after the final payment.

15. The Travelers CGL Policy expressly indicates that its exclusion for contractual liability does not apply to liability "[a]ssumed in a contract or agreement that is an "insured contract," and also provides that if Travelers defends an insured against a suit it must also defend an indemnitee of the insured under an "insured contract" against that suit if various conditions are met. However, the subject indemnification provisions in the Cast & Baker contract contained no time limits at all and did not exclude all claims arising out of Triad's "professional services."

The Cast & Baker contract never uses the term "professional services." Instead, the Cast & Baker contract exempted only claims arising from:

> 1. the preparation or approval of, or the failure to prepare or approve, maps, Drawings, opinions, records, surveys, Change Orders, designs, or Specifications; or
>
> 2. giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage. ¶ 6.20.C.

Travelers' Policies have a similar provision in paragraph 9.f.(2), which does not exclude all professional services.

16. Since many of the allegations against Triad concerned the alleged failure to inspect or monitor, rather than the preparation of drawings, maps, or surveys, or the giving of instructions, the claims fall within the indemnification provisions of the Cast & Baker contract and the Court finds that Travelers had the primary duty to defend Triad as an indemnitee of Cast & Baker under the insured contract provisions of its policies.

17. In Syllabus Pt. 7 of *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W. Va. 385, 508 S.E.2d 102 (1998), the West Virginia State Supreme Court noted:

> In a policy for commercial general liability insurance and special employers liability insurance, when a party has an "insured contract," that party stands in the same shoes as the insured for coverage purposes.

18. Similarly, in the case of *Marlin v. Wetzel Cty. Bd. of Educ.*, 212 W. Va. 215, 222, 569 S.E.2d 462, 469 (2002), the Court noted:

> "Liability assumed by the insured under any contract" refers to liability incurred when one promises to indemnify or hold harmless another, and does not refer to the liability that results from breach of contract.

> The phrase does not provide coverage for liability caused by a breach of contract; rather, the coverage arises from a specific contract to assume liability for another's negligence. The phrase has been interpreted "to apply only to indemnification and hold-harmless agreements, whereby the insured agrees to 'assume' the tort liability of another." *Gibbs M. Smith, Inc. v. U.S.F. & G.*, 949 P.2d 337, 341 (Utah 1997).
>
> We hold that the phrase "liability assumed by the insured under any contract" in an insurance policy, or words to that effect, refers to liability incurred when an insured promises to indemnify or hold harmless another party, and thereby agrees to assume that other party's tort liability.

Marlin v. Wetzel Cty. Bd. of Educ., at 222, 469.

19. Here, Triad clearly had an "insured contract" with Cast & Baker which provided for Cast & Baker's agreement to both indemnify and hold harmless Triad in the event of claims arising from Cast & Baker's work. While Travelers now asserts that Triad has not and cannot meet all of the conditions of the "supplementary payments" provisions of its policy, and argues that various exclusions limit its coverage, it ignores the fact that those supplementary payment provisions and policy exclusions were not part of the indemnification agreement set forth in the Cast & Baker contract nor were they mentioned in the Certificate of Insurance.

20. Travelers cannot unilaterally graft additional terms and conditions onto the Cast & Baker contract without disclosing them to its additional insureds. In this case, Cast & Baker assumed the tort liability of Triad in its contract with the Airport. The Travelers CGL Policy defines an "insured contract" to include:

> That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization.

> Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Therefore, the Cast & Baker contract meets the definition of an "insured contract" and Triad stands in the shoes of Cast & Baker for purposes of coverage and the duty to defend.

21. Travelers is also estopped from denying coverage based upon the Certificate of Insurance it issued to Triad. Specifically, ¶ 5.04(B)(4) of the Cast & Baker Contract required Cast & Baker to obtain insurance for its "indemnity obligations under paragraphs 6.07, 6.11, and 6.20." while ¶ 6.20 required Cast & Baker to indemnify Triad for claims arising from the work. These provisions did not contain an arbitrary limitation which would cut off that duty two years after final payment or impose any other conditions or limitations upon the coverage to be obtained.

22. In *Marlin v. Wetzel County Board of Education*, the Court also addressed certificates of insurance at length, and explained:

> We begin our analysis by considering the purpose of certificates of insurance. As previously mentioned, parties to a contract may contractually shift a risk of loss through an indemnity provision in the contract. The "indemnitee" in the contract can also require the "indemnitor" to provide some insurance protection for the indemnitee. However, while [i]ndemnitees can make very specific and comprehensive contractual requirements concerning the protection to be afforded, ... they have very few alternatives for verifying that indemnitors have complied with them....The certificate of insurance is the primary vehicle for verification that insurance requirements have been met.

Marlin v. Wetzel Cty. Bd. of Educ., at 223, 470

23. The *Marlin* decision involved the Wetzel County Board of Education's claim that it was entitled to indemnification and coverage under its 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).

24. In this case, the authorized agent of Travelers issued the subject Certificate of Insurance, which represented that Triad was an additional insured and did not set forth or disclose any of the limitations on which Travelers now relies in its attempt to support its denial of coverage to Triad. That fact is significant because the West Virginia State Supreme Court of Appeals has made it abundantly clear that an insurer must bring all exclusions on which it seeks to rely to the attention of the insured. At Syl. Pt. 10 of *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 737, 356 S.E.2d 488, 491 (1987), overruled on other grounds by *Parsons v. Haliburton Energy Servs., Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2016), the Court noted:

> An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured.

25. Accordingly, Travelers is now estopped from denying coverage or a duty to defend Triad in this case based on conditions and limitations which were not included in the

Certificate of Insurance which purported to provide the insurance coverage mandated under ¶¶ 5.04 and 6.20 of the Cast & Baker Contract with the Airport.

26. Travelers' reliance upon a "Memorandum of Understanding" signed by various claimants as part of a settlement is also misplaced. Specifically, Travelers has indicated that a "Memorandum of Understanding" completed as part of its settlement with various residents of Keystone Drive establishes that all of their claims were for professional services. The "Memorandum" states:

> All claims asserted against Triad are premised on the independent acts or omissions of Triad arising out of the preparations or approval, or the failure to prepare or approve, maps, drawings, opinions, reports, surveys, change orders, designs or specifications including any supervisory or inspection services related thereto.

However, the Court has found that Travelers' duty to defend arose as a result of the allegations asserted against Triad at the time Triad sought a defense. If those allegations were "reasonably susceptible" of an interpretation that they might be covered, Travelers had a duty to defend Triad against them. See *Pitrolo*, at 194, 160. The fact that, years later, certain residents of Keystone Drive were willing to sign a document suggesting that the basis of their claims was something different than what was clearly set forth in their Complaint does not prove that the original allegations were never made or eliminate Travelers' duty to have defended those allegations.

27. Based upon the foregoing, the Court concludes that Travelers Indemnity Company's *Motion For Summary Judgment Regarding Insurance Coverage* (Transaction ID 62579412) should be **DENIED** and that Triad's *Motion For Partial Summary Judgment Against Travelers* (Transaction ID 62578588) and Westfield's *Motion For Summary Judgment On*

Coverage Issues With Respect To Travelers Policies (Transaction ID 62579818) should be **GRANTED**.

WHEREUPON the Court, having made the foregoing Findings of Fact and Conclusions of Law, is of the opinion to and does hereby **ORDER** that Travelers Indemnity Company's *Motion For Summary Judgment Regarding Insurance Coverage* (Transaction ID 62579412) should be and the same is hereby **DENIED**, and that Triad's *Motion For Partial Summary Judgment Against Travelers* (Transaction ID 62578588) and Westfield's *Motion For Summary Judgment On Coverage Issues With Respect To Travelers Policies* (Transaction ID 62579818) should be and the same are hereby **GRANTED**.

The Court **ORDERS** that, with respect to the declaratory judgment claims of Triad and Westfield on issue of insurance coverage under the Travelers Policies issued to Cast & Baker, this is a final Order pursuant to *Rule 54(b)* of the *West Virginia Rules Of Civil Procedure,* as it ends the litigation on the merits concerning the issue of coverage under said Travelers Policies. See *Durm v. Heck's Inc.*, 184 W.Va. 562, 401 S.E.2d 908 (1991). The parties may appeal this Order, within thirty (30) days after entry, to the Supreme Court of Appeals of West Virginia, as there is no just reason for delay in the entry of final judgment. Furthermore, following the entry of this Order, Triad and Westfield may file motions regarding their respective claims for attorneys' fees and related nontaxable expenses for the defenses of Triad in the slope failure litigation involving the Airport Authority and the Property Owners and in prosecuting their declaratory judgment claims.

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

It is so **ORDERED.**

ENTER: March 6, 2019.

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