IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
DOCKET NO. 22-848

SCA EFiled: May 15 2023
03:46PM EDT
Transaction ID 70016956

WESTFIELD INSURANCE COMPANY,
Petitioner,

v.

SISTERSVILLE TANK WORKS, INC., ROBERT N. EDWARDS, E. JANE PRICE, individually and as Executor of the ESTATE OF ROBERT G. PRICE, DOUGLAS STEELE, CAROL STEELE, GARY THOMAS SANDY, PEGGY SANDY, REAGLE & PADDEN, INC. and DAVID C. PADDEN,
Respondents,

PETITIONER'S BRIEF ON CERTIFIED QUESTION

(from the United States Court of Appeals For The Fourth Circuit, Case No. 20-2052)

Brent K. Kesner (WV Bar #2022)
bkesner@kesnerlaw.com
Ernest G. Hentschel, II (WV Bar #6066)
ehentschel@kesnerlaw.com
Kesner & Kesner, PLLC
112 Capitol Street
P. O. Box 2587
Charleston, WV 25329
Telephone: (304) 345-5200
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

West Virginia Statutes and Rules

CERTIFIED QUESTION PRESENTED

At what point in time does bodily injury occur to trigger insurance coverage for claims stemming from chemical exposure or other analogous harm that contributed to development of a latent illness. (JA 3)

STATEMENT OF THE CASE

A. Statement Of Facts

In its *Complaint For Declaratory Relief* (JA 9-79), Westfield sought a declaratory judgment that it does not owe coverage or a defense to Sistersville Tank Works, Inc. ("STW") for latent disease personal injury claims under certain long expired insurance policies issued between 1989 and 2010 (the "Westfield Policies" or the "Policies"). Claimants Robert N. Edwards, Deborah S. Edwards, E. Jane Price, Douglas Steele and Carol Steele (collectively referred to as "the Claimants"), have filed lawsuits in the Circuit Courts of West Virginia against STW in connection with alleged exposure to harmful chemicals, and Westfield is currently defending STW under reservation of rights in each of those lawsuits (collectively referred to as "the Underlying Actions"). Westfield's position is that none of the Policies provide coverage for the underlying claims and that it has no duty to defend or indemnify STW in the Underlying Actions. In particular, Westfield has asserted that because the Edwards, Price, and Steele claims were made in 2016 and 2017, and the injuries alleged in the Underlying Actions occurred and manifested between 2014 and 2016, long after any Westfield Policy was in effect, the Policies are inapplicable. In addition, Westfield has asserted that various exclusions in the Westfield Policies also preclude coverage.[1]

[1] While the Westfield Policies at issue contain a number of relevant exclusions and limitations which eliminate coverage for the claims being asserted against STW in the Underlying Actions, those exclusions and limitations are not the subject of the question certified by the Fourth Circuit Court of Appeals and are therefore not addressed in this Brief. Westfield does not waive its

In order to properly address why no coverage applies, it is first necessary to address the allegations made against STW in each of the Underlying Actions.

The Edwards Claim

Robert N. Edwards and Deborah S. Edwards ("the Edwards Claimants") filed Civil Action No. 16-C-32, in the Circuit Court of Marshall County, alleging that STW negligently manufactured and maintained storage tanks for one of its customers, Covestro, LLC ("Covestro"), which resulted in employees of Covestro, including Mr. Edwards, being exposed to various dangerous chemicals. (JA 499-523.) They allege that Mr. Edwards was diagnosed with renal cell carcinoma on or about April 22, 2014, as a direct and proximate result of his exposure to nephrotoxic chemicals and solvents during his work at Covestro and its predecessor, which employed Mr. Edwards from 1962-2001. (JA 499-500.) Specifically, the Edwards Claimants assert that:

> STW negligently, carelessly, recklessly and willfully breached its duties of care: (a) by failing to properly manufacture, in an adequate and workmanlike manner, the chemical tanks at the herein discussed Marshall County, West Virginia facility; (b) by failing to properly install, in an adequate and workmanlike manner, the chemical tanks at the herein discussed Marshall County, West Virginia facility; (c) by failing to thoroughly inspect the herein discussed Marshall County, West Virginia facility chemical tanks for leaks, faults, flaws and/or imperfections to the integrity of the herein discussed Marshall County, West Virginia facility chemical tanks; (d) by failing to recognize the actual leaks, faults, flaws, and imperfections to the integrity of the herein discussed Marshall County, West Virginia facility chemical tanks; (e) by failing to properly repair and/or maintain in an adequate and workmanlike manner, the chemical tanks at the herein discussed Marshall County, West Virginia facility; and/or by failing to create a safety plan for chemical tank use and maintenance; and further failing to follow-up with Covestro LLC's predecessors-in-interest to ensure that these safety plan instructions were being followed, all of which resulted in nephrotoxic chemical liquids, vapors, fumes and/or gases escaping into the general population of workers at the herein discussed Marshall County, West Virginia facility, and in particular, into Edwards' work areas.

---

coverage position with respect to any of those additional exclusions and limitations and maintains that no coverage applies to the subject claims under any of its Policies.

(JA 504-505.) Importantly, all of the Edwards Claimants' allegations concern long-term exposure to harmful chemicals and no specific accident or incident involving STW is identified. At his deposition, Mr. Edwards testified:

> Q. Did anyone ever tell you, have you heard or seen from any source of information, that there was ever any accident or explosion or anything else that occurred in connection with any work being performed at the Bayer facility by Sistersville Tank Works?
>
> A. No, I can't say that because, you know, I don't remember.
>
> Q. Now, it would be a big thing if someone was working, trying to perform some task at the facility and they had an accident of some type that resulted in a chemical release of benzene or toluene or any other substance there. That would be something that probably would send off bells and whistles and alarms at the facility, would it not?
>
> A. Right.

(JA 1158.) While Mr. Edwards has alleged long-term exposure to chemicals over a period of many years, he did not provide any evidence suggesting that he sustained bodily injury as a result of any specific incident or occurrence.

The Price Claims

E. Jane Price filed Civil Action No. 17-C-62H, in the Circuit Court of Marshall County. She sued STW and other defendants, which she has identified as "Benzene Supplier Defendants" and/or the "Formaldehyde Supplier Defendants." (JA 524-542.) Price alleges that her husband, Robert G. Price, was employed by Bayer Corporation and/or its predecessors in interest, Miles, Inc. and Mobay Corporation, at its Marshall County, West Virginia facility, between 1960 and 1995. (JA 524.) She goes on to allege that on or about April 28, 2015, her husband was diagnosed with acute myeloid leukemia ("AML"), from which he died on June 6, 2015. (JA 524.) She asserts

claims for wrongful death and bodily injury leading up to her husband's death. As with the Edwards Claimants, all of the Price allegations concern long term exposure to chemicals and no specific accident or incident involving STW is alleged. (JA 524-542.) Mrs. Price testified:

> Q. Did your husband ever communicate to you or did you learn from any other source that there had been some accident that occurred during the course of some work at the plant or facility that involved the installation of, maintenance, servicing, repair, of a tank or vessel where the tank or vessel exploded, it ruptured, it failed, anything of that nature that involved a Sistersville Tank Works tank or any work by Sistersville Tank Works?
>
> A. He may have said something about something happening, but as far as being explicit, no.
>
> Q. As we are here today, do you remember your husband ever specifically referencing or making mention of anything related to Sistersville Tank Works?
>
> A. No.
>
> Q. That would include any reference that, "Hey, today some tank that had been manufactured by Sistersville Tank Works or that had been installed by them or had been serviced by them or maintained by them or repaired by them, leaked or failed or exploded" or anything like that?
>
> A. No.

(JA 1169-1170.) Like the Edwards Claimants, Price did not offer any evidence of any specific occurrence during the time any Westfield Policy was in effect.

The Steele Claim

Douglas Steele and Carol Steele (the "Steele Claimants") filed Civil Action No. 17-C-231-H, in the Circuit Court of Marshall County of West Virginia on November 15, 2017. (See JA 543-562.) They alleged that STW negligently manufactured, installed, inspected and/or maintained storage tanks for Axiall, LLC, a successor in interest to PPG Industries, Inc. ("PPG"), which

resulted in Douglas Steele, a former employee of PPG, being exposed to various dangerous chemicals. (JA 560-561.) The Steele Claimants allege that Mr. Steele was diagnosed with chronic lymphocytic leukemia ("CLL") in January of 2016, as a direct and proximate result of his exposure to Benzene products during his work at PPG, which employed Mr. Steele from 1968 to 2006. (JA 548.) As with the Edwards Claimants and Price, all of the Steele Claimants' allegations concern long-term exposure to harmful chemicals, and no specific accident or incident involving STW is identified. (JA 543-562.) Mr. Steele testified:

> Q. Do you know of or has anyone told you about any circumstance where some leak, failure, rupture occurred to a tank manufactured by Sistersville Tank Works at the PPG facility?
>
> A. Not that I remember.

(JA. 1185-1186.) Likewise, the Steele Claimants did not offer any evidence of any injury resulting from any ongoing operation or activity of STW on some specific date.

When questioned about whether any particular accident or incident ever took place during the time the subject Westfield Policies were in effect, Janet Wells, the president of STW, testified:

> Q. To the best of your knowledge, did your company ever have occasion to send any employees to work on a vessel sold by your company to PPG or Axiall that had malfunctioned, developed a leak, or otherwise performed in a fashion that was not consistent with its purpose of maintaining whatever was placed inside it?
>
> A. No.
>
> Q. If such an incident would have occurred, we are talking about a period of years here, obviously, and you have had more time to remember than I have, but I have enough trouble, so some things stick out in your mind and some don't. But if someone were to contact your company and say that a vessel that you sold had failed or malfunctioned or created a leak or whatever, would that be something that would stick out to you?
>
> A. Yes.

Q. Do you remember any occasion where that occurred with any customer?

A. No.

(JA 574-575.) In fact, Ms. Wells testified that STW did not even install storage tanks during the relevant period of time. (JA 1401.) Likewise, her testimony further established that any STW repair operations at an employer's facility would have only been performed after any chemicals had been removed. Ms. Wells testified:

Q. When your company employees would go out to do tank work repair or modification, was it necessary that the vessels be empty for that work to be performed?

A. Emptied and cleaned.

Q. And did you all do that?

A. No.

Q. So the vessel had already been emptied and cleaned for any product before you all could work on it?

A. Correct.

Q. And was it your all's position that the owning company either itself or through some other vendor would be responsible for preparing the vessel for your work?

A. Yes.

Q. So you never put your employees in a position where they were working on a vessel that would have benzene in it, for example?

A. No.

(JA 1402 and 573.) Accordingly, none of the Underlying Actions involve any specific incident or accident involving STW's operations. Instead, all concern (i) alleged defects in the products STW

manufactured and sold, or (ii) repairs or maintenance to storage tanks which purportedly caused them to leak and release harmful chemicals at the subject facilities over a long period of time.

Sistersville Tank Works

The corporate history of STW begins in October of 1984, when its owners purchased the assets of a prior corporation which had also done business as "Sistersville Tank Works." (JA 567-568.) While the new corporate entity, known at the time as "Tyler County Tank Works," acquired the assets of the prior corporation, it did not acquire stock in that entity or assume its prior obligations and liabilities. (JA 568-570.) Instead, after acquiring the assets, the new entity changed its name to "Sistersville Tank Works" in order to continue using the name of its predecessor. (JA 570-571.) Therefore, while the Claimants allegedly worked around storage tanks manufactured by "Sistersville Tank Works" beginning in the 1960s and throughout the 1970s, the only potential exposure to harmful chemicals at issue here involved tanks manufactured by STW **after** it came into existence in October of 1984.

The Coverage Issues

The Westfield Policies in question were issued to STW over a period of many years.[2] Specifically, Westfield located documents and records indicating that it insured STW over a 22-year period, from 1989 to 2010, under Policy No. 3471223, and from 1989 to 2001 under Policy No. 3471224.[3] Westfield Policy No. 3471223 was an "occurrence"-based Commercial General

[2] Due to the voluminous nature of the complete Westfield Policies, electronic copies were provided to the District Court on discs (JA 577-1101.) and were subsequently provided to the Fourth Circuit in electronic form only. In addition, for ease of reference, excerpts from the Policies setting forth only the relevant Policy language were also provided to the District Court as a separate exhibit to Westfield's *Motion For Summary Judgment*. (JA 1102-1155.)

3 As explained herein, STW asserted in its *Amended Counterclaim* that it has been able to locate incomplete copies of two other purported Westfield policies identified as Policy No.

Liability Policy ("the CGL Policy"), while Westfield Policy No. 3471224 was a claims made policy that provided coverage for liability arising out of "products completed operations" (the "Claims Made Policy").[4] With respect to the CGL Policy, it is undisputed that Westfield was not STW's insurer between 2014 and 2016, when Messrs. Edwards, Price, and Steele were diagnosed with the diseases and/or medical conditions complained of in the Underlying Actions. Instead, all of the Claimants' alleged injuries occurred and manifested long after Westfield ceased to insure STW. That fact is important because the CGL Policy only provides coverage for "bodily injury" which occurs during the policy period and which is caused by an "occurrence." For example, the 1993-1994 version of the CGL Policy provides:

> **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 any "suit" seeking those damages. 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:

CWP3457716-01 and Policy No. UXC129553, for the coverage period of 1988-1989. (JA 157-189.) It also asserted that it located Certificates of Insurance indicating that other Westfield policies may have also been in effect during various times between 1985 and 1989. (JA 156.) Because Westfield did not retain such materials pursuant to its document retention policy, Westfield has not been able to locate complete versions of these 1985-1989 policies in this litigation.

[4] The Claims Made Policy only applied to claims first made during an applicable policy period between 1989 to 2001, after which STW obtained products completed operations coverage from a different carrier. Because it is undisputed that the Edwards, Price and Steele claims were made in 2016 and 2017, long after the "Claims Made" Policy expired, STW has conceded that it does not apply to the Underlying Actions. (JA 202.)

> **(1)** The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory;" and
> **(2)** The "bodily injury" or "property damage" occurs during the policy period.

(JA 1146.) The CGL Policy defines "bodily injury" and "occurrence" as follows:

> "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
>
> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

(JA 1148-1149.) In the absence of such an "occurrence" causing bodily injury, no coverage exists for the claims against STW under any of the applicable Westfield Policies.[5]

B. Procedural History

In recognition of the coverage issues discussed above, Westfield began defending STW in the Underlying Actions under a full reservation of rights. Westfield then filed its *Complaint For Declaratory Relief* (JA 9-79) in the Northern District of West Virginia (the "Coverage Action") to resolve the coverage issues under the CGL Policy and the Claims Made Policy. Westfield's *Complaint* did not and could not address coverage under any purported policies issued to STW prior to 1989, because Westfield no longer had records reflecting the complete terms and conditions of any such policies, and STW had not provided copies of any such policies despite Westfield's requests that it do so. In response to the *Complaint*, STW filed its *Answer And*

[5] As noted above, the Westfield Policies also contain a number of relevant exclusions and limitations which eliminate coverage for the claims being asserted against STW in the Underlying Actions. While those exclusions and limitations are not being addressed here because they are not relevant to the question certified by the Fourth Circuit, Westfield does not waive its coverage position with respect to any of those additional exclusions and limitations and maintains that no coverage applies under any of its Policies.

Counterclaim (JA 80-122), seeking declaratory relief on the Westfield Policies and further asserting claims against Westfield for negligence in assisting in the procurement of the policies, breach of fiduciary duty, breach of contract, breach of implied covenant of good faith and fair dealing, and unfair claims settlement practices. (JA 114-119.)

During discovery in the Coverage Action, STW was able to locate in its records what appeared to be incomplete copies of a 1988-1989 Commercial General Liability Policy, identified as Westfield Policy No. CWP3457716-01, and a 1988-1989 Umbrella Policy, identified as Westfield Policy No. UXC5307375, along with documents indicating that such policies also existed during the 1985-1988 time period. (JA 156-189.) STW then filed an *Amended Counterclaim* against Westfield, asserting that those earlier policies provided coverage and again claiming that Westfield had breached the insurance contract and acted in bad faith by filing the Coverage Action. (JA 129-155.) Because Westfield was continuing to defend STW against the Underlying Actions under a reservation of rights while it litigated the Coverage Action, the District Court dismissed STW's *Amended Counterclaim* in its entirety as unripe on July 15, 2019. (JA 1724.)

Following the completion of discovery, Westfield filed its *Motion For Summary Judgment*, (JA 492-1210.) asserting that it had no duty to defend STW under the Claims Made Policy or the CGL Policy. Westfield argued that, because no "bodily injury" had manifested during the time any of the Westfield Policies were in effect, there had been no "occurrence" to trigger coverage under the Policies. (JA 1683-1690.) STW filed its own *Motion For Summary Judgment* (JA 190-491), asking the District Court to find that coverage and a duty to defend existed under the earlier 1985-1988 Westfield Commercial General Liability and Umbrella Policies, and that coverage under the Claims Made Policy and the CGL Policy was therefore moot. Specifically, STW argued

that coverage was triggered under the 1985-1988 Policies at the time the Claimants were allegedly exposed to harmful chemicals because the incomplete copies of the 1985-1989 Policies located by STW neither contained a specific "products completed operations" exclusion nor required that the Policy applies "only if" a claim for damages because of bodily injury or property damage "is first made" against any insured "during the policy period." (JA 198-229.)

On September 4, 2020, the District Court entered its *Memorandum Opinion And Order* in the Coverage Action (JA 1641-1661.), which granted STW's *Motion For Summary Judgment* and denied Westfield's *Motion For Summary Judgment* based upon the District Court's finding that coverage and a duty to defend exists under the 1985-1988 Westfield Commercial General Liability and Umbrella Policies. (JA 1654-1656.) The District Court further found that because coverage and a duty to defend existed under the 1985-1989 Westfield Commercial General Liability and Umbrella Policies and Westfield had a duty to provide coverage under those policies, the coverage issues related to the 1989-2001 Claims Made Policy and the 1989-2010 CGL Policy were moot. In doing so, the District Court found that, even though none of the Claimants' injuries manifested during the period that Westfield provided coverage to STW, coverage was nonetheless triggered because at least some of the Claimants' alleged exposure occurred during the 1985-1989 period. (JA 1654-1656.)

The District Court based this finding upon its prediction of how the West Virginia Supreme Court of Appeals would decide the applicable "trigger of coverage" under an occurrence-based liability policy in cases involving latent bodily injuries arising from exposures to hazardous substances. (JA 1654-1655.) After acknowledging that the West Virginia Supreme Court of Appeals had not specifically addressed the issue, the District Court predicted that this Court would adopt the "continuous trigger" or "multiple trigger" theory, under which coverage is triggered

under any policy in effect from the time of initial exposure through the manifestation of any injury. (JA 1654-1655.) The District Court based its prediction of how this Court would decide the issue upon two West Virginia Circuit Court cases: (i) *Wheeling Pittsburgh Corporation v. American Insurance Company*, 2003 WL 23652106 (Circuit Court of Ohio County Civil Action No. 93-C-340 October 18, 2013), wherein the Circuit Court of Ohio County applied the "continuous trigger" approach to an insurance coverage dispute involving environmental liabilities for the cleanup of an industrial site; and (ii) *U.S. Silica v. Ace Fire Underwriters Ins. Co.*, 2012 W.Va. Cir. LEXIS 4449, which involved the trigger of coverage for claims arising from exposure to silica dust and relied heavily upon the *Wheeling Pittsburgh* decision. The District Court also rejected various decisions by other federal Courts predicting that West Virginia would adopt the "manifestation trigger" approach, such as *State Auto Property and Casualty Insurance Company v. H. E. Neumann Company*, No. 2:14-CV-19679, 2016 WL 5380925 (S.D. W.Va. Sept. 23, 2016), *Westfield Ins. Co. v. Mitchell*, 22 F. Supp. 3d 619 (S.D. W.Va. 2014), and *Ball v. Joy Techs., Inc.*, 958 F.2d 36 (4th Cir. 1991), wherein the Fourth Circuit indicated that "mere exposure" to chemicals was insufficient to establish "bodily injury." *Ball*, 958 F.2d at 38-39. (JA 1654-1655.)

Having concluded that coverage was triggered by the Claimants' alleged exposures during the 1985-1988 period, the District Court then examined the incomplete 1988-89 Commercial General Liability and Umbrella Policies and concluded that each provided coverage for the claims being asserted against STW. (JA 1655-1657.) Specifically, the District Court found that the occurrence language in the 1988-1989 Policies was ambiguous with respect to when the injury from a latent disease would be deemed to occur and should be construed in favor of coverage. Furthermore, the District Court found that no exclusions under either 1988-89 Policy would apply to exclude coverage and, therefore, concluded that Westfield owed a continuing duty to defend

STW under the 1988-89 Commercial General Liability Policy. (JA 1655-1657.) Finally, the District Court concluded that, because it had found coverage and a duty to defend under the 1985-89 Policies based on its application of the continuous trigger theory, it need not address at any coverage issues with respect to the 1989-2010 CGL Policy and the 1989-2001 Claims Made Policy (even though STW had actually conceded that no coverage existed under the Claims Made Policy). (JA 1658-1659.)

Westfield filed a timely appeal of the District Court's *Orders* to the United States Court of Appeals for the Fourth Circuit on September 30, 2020. (See JA 1731.) After briefing was complete, the Fourth Circuit determined that the "trigger of coverage" issue was undecided in West Virginia and certified the following question to the West Virginia State Supreme Court of Appeals:

> At what point in time does bodily injury occur to trigger insurance coverage for claims stemming from chemical exposure or other analogous harm that contributed to development of a latent illness.

(JA 3.) Westfield now submits this *Brief* and asks that the Court apply the "manifestation" trigger of coverage and find that because there was no accompanying manifestation of harm or injury while the Westfield Policies were in effect, there was no occurrence of "bodily injury" necessary to trigger coverage under any of the Westfield Policies.

SUMMARY OF ARGUMENT

In this case, the Court should find that, for purposes of triggering insurance coverage in the context of claims for latent illness resulting from alleged exposure to harmful chemicals, bodily injury is deemed to take place when the injuries first physically manifest themselves and can be detected. In that regard, the Westfield Policies at issue in this case clearly require "bodily injury" caused by an "occurrence" during the policy period in order to trigger coverage. Courts across the nation have found such requirements to be unambiguous and enforceable. Likewise, all of the

evidence in this case establishes that the injuries claimed by the Edwards, Price and Steele Claimants did not manifest until long after the Westfield Policies had expired.

While there does not appear to be any controlling decision on the trigger of coverage issue in West Virginia, the so-called "manifestation" trigger of coverage theory most closely follows existing West Virginia law on when a bodily injury can be said to have occurred. Specifically, West Virginia has recognized that some actual physical manifestation of harm is necessary to trigger coverage for a bodily injury claim, and none of the Claimants have alleged that such a physical manifestation of injury occurred while any of the Westfield Policies were in effect. In addition, a number of federal courts in West Virginia have found that the "manifestation" trigger of coverage theory provides the best mechanism for determining when coverage is triggered.

The District Court's determination that the "continuous trigger" should be applied is based upon two non-binding trial court decisions which are distinguishable because they did not take into account existing law in West Virginia or the requirement of some physical manifestation of harm to trigger coverage for a bodily injury. Likewise, the fact that West Virginia has recognized a cause of action for medical monitoring does not, as STW claims, support the application of the "continuous trigger" approach. Medical monitoring claims are claims for economic damage, and West Virginia has recognized that purely economic claims do not constitute bodily injury or property damage. Applying the manifestation trigger approach to when coverage is triggered will provide certainty and clarify the issue for future courts and litigants confronting the issue.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner notes that the Court scheduled this matter for oral argument under *Rule 20* of the *West Virginia Rules of Appellate Procedure* during the September 2023 term of Court in its March 31, 2023 *Order*. Petitioner believes that oral argument is necessary pursuant to the criteria

contained in *Rule 18(a)* of the *Rules of Appellate Procedure* because the parties have not agreed to waive oral argument and the dispositive issues have not previously been authoritatively decided by this Court. The Petitioners further represent, pursuant to *Rule 20(a)* of the *Rules of Appellate Procedure*, that this case involves inconsistencies or conflicts among decisions of lower tribunals.

ARGUMENT

I. Standard Of Review

The Court has held that " '[a] de novo standard is applied by this Court in addressing the legal issues presented by a certified question from a federal district or appellate court.'" Syl. Pt. 1, *Martinez v. Asplundh Tree Expert Co.*, 239 W. Va. 612, 803 S.E.2d 582 (2017) citing Syl. Pt 1, *Light v. Allstate Ins. Co.*, 203 W. Va. 27, 506 S.E.2d 64 (1998). In that regard, West Virginia has enacted the Uniform Certification of Questions of Law Act at *W.Va. Code 51-1A-1* et. seq. Specifically, *W.Va. Code 51-1A-3* provides:

> The Supreme Court of Appeals of West Virginia may answer a question of law certified to it by any court of the United States if the answer may be determinative of an issue in a pending cause in the certifying court and if there is no controlling appellate decision, constitutional provision, or statute of this state.

Likewise, in *Abrams v. West Virginia Racing Commission*, 164 W.Va. 315, 263 S.E. 2d 103 (W.Va. 1980), the Court recognized that the decision to answer a certified question is also discretionary and noted that "the basic usefulness of the certification statute 'was to resolve ambiguities or unanswered questions' about our State law." *Abrams* at 317-318, 105-106. Here, the Fourth Circuit recognized that there is no controlling law on this issue and that other Courts have reached differing conclusions as to whether the manifestation trigger approach or the continuous trigger approach should apply in West Virginia to claims stemming from alleged chemical exposure that purportedly contributed to development of a latent illness.

II. The Westfield Policies clearly and unambiguously require "bodily injury" caused by an "occurrence" during the policy period in order to trigger coverage.

West Virginia law recognizes that clear insurance policy provisions are to be applied. Syl. Pt. 5, *Farmers & Mechs. Mut. Ins. Co. v. Cook*, 210 W. Va. 394, 557 S.E.2d 801 (2001) (citing Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33 (1986)); *Green v. Farm Bureau Mut. Auto Ins. Co.*, 139 W. Va. 475, 80 S.E.2d 424, 426 (1954). In addition, West Virginia law requires that the language in an insurance policy should be given its plain, ordinary meaning. *Soliva*, 176 W. Va. at Syl. Pt. 1; Syl. Pt. 2, *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 422 S.E.2d 803 (1992); *Am. States Ins. Co. v. Tanner*, 211 W. Va. 160, 563 S.E.2d 825 (2002). Likewise, an insurer may validly limit coverage, and policy provisions that limit coverage are placed in a policy for that very reason. *Green*, 80 S.E.2d at 426. In this case, the policy limitation at issue in the Westfield CGL Policy is the requirement that the "bodily injury" for which a claim is being asserted must have been "caused by an occurrence" and must "occur during the policy period." (JA 1146-1149.)

Courts across the nation have found the requirement of a bodily injury which occurs during the policy period to be unambiguous. For example, in *Shaver v. Ins. Co. of N. Am.*, 817 S.W.2d 654 (Mo. Ct. App. 1991), the Court found:

> This language is clear-cut. The phrase "which occurs during the policy period" is unambiguous. It refers to the time at which the bodily injury occurs.

Id., at 657. Similarly, in *Schrillo Co. v. Hartford Accident & Indem. Co.*, 181 Cal. App. 3d 766, 226 Cal. Rptr. 717 (Ct. App. 1986), the Court found the "occurs during the policy period" language to be unambiguous and noted:

> Turning to the case at bench, it is uncontested that the two consecutive Hartford liability policies covered the time span from May 17, 1973 to April 17, 1975. The two policies, identical in terms, contains unambiguous terms, expressly limiting

> coverage to injuries occurring during the policy period in the following words: "*Bodily injury,* sickness or disease *sustained by any person which occurs during the policy period,* including death at any time resulting therefrom; ..."

Id., at 775, 722 (Emphasis in original). Likewise, the term "bodily injury" has also been found to be unambiguous by numerous courts. For example, the Court in *Citizens Ins. Co. of Am. v. Leiendecker*, 962 S.W.2d 446 (Mo. Ct. App. 1998) noted:

> the overwhelming majority of jurisdictions which have considered the issue hold that "bodily injury" standing alone or defined in a policy as "bodily injury [or harm], sickness or disease" is unambiguous and encompasses only physical harm.

Id., at 452. (Mo. Ct. App. 1998). In this case, no such "bodily injury" caused by an "occurrence" "during the policy period" has been alleged or is at issue. Instead, the Edwards, Price and Steele Claimants have all alleged long-term exposure to chemicals and diseases which manifested many years later.

III. The "manifestation" trigger of coverage theory should be applied to claims of latent injury due to long term chemical exposure in West Virginia.

As discussed above, it is undisputed that none of the Claimants in this case were diagnosed with any disease or injury during the time any of the Westfield Policies were in effect. Instead, each Claimant alleged long-term exposure to harmful chemicals which purportedly resulted in illnesses that manifested and were diagnosed between 2014 and 2016, long after the Westfield Policies had expired. That fact raises the issue of when a "bodily injury" occurs for purposes of triggering insurance coverage in a latent injury case. While that specific issue does not appear to have been addressed by this Court, it is the so-called "manifestation" trigger of coverage theory which most closely follows existing West Virginia law on when a bodily injury can be said to have occurred.

In the context of insurance, this Court has previously recognized that some actual physical manifestation of harm is necessary to trigger coverage for a bodily injury claim. For example, in *Smith v. Animal Urgent Care Inc.* 208 W.Va. 664, 542 S.E. 2d 827 (2000), the Court noted that "bodily injury" is based on the **physical** manifestation of harm *Id.*, at 667-68, 830-31. The Court explained:

> Both commentators and tribunals alike identify the majority view to espouse that "absent physical manifestations or physical contact, purely emotional distress allegations are insufficient to qualify as bodily injury.". . . In discussing the rationale for excluding purely emotional injuries from the category of bodily injury, the court in Leiendecker explained that "in insurance law 'bodily injury' is considered to be a narrower concept than 'personal injury' which covers mental or emotional injury.". . . Finding the reasoning underlying the majority position to be persuasive, we determine that in an insurance liability policy, **purely mental or emotional harm that arises from a claim of sexual harassment and lacks physical manifestation does not fall within a definition of "bodily injury" which is limited to "bodily injury, sickness, or disease.**"

Id., (Emphasis added.) Similarly, in *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 745 S.E.2d 508 (2013), the Court explained:

> Because there is no indication that Ms. Cherrington's emotional distress has physically manifested itself, we conclude that she has not sustained a "bodily injury" to trigger coverage under Pinnacle's CGL policy.

Id., at 484, 522. Thus, West Virginia law plainly requires some outward manifestation of physical injury or harm before a claim will trigger coverage for bodily injury.

While West Virginia does not appear to have specifically addressed the issue of when insurance coverage is triggered for bodily injury purportedly caused by long term exposure to harmful chemicals, a number of federal decisions addressing similar issues under West Virginia law have applied the manifestation trigger of coverage theory. For example, in *Simpson-Littman Const., Inc. v. Erie Ins. Prop. & Cas. Ins. Co.*, No. CIV.A. 3:09-0240, 2010 WL 3702601, (S.D.W. Va. Sept. 13, 2010), the Southern District of West

Virginia applied the manifestation theory in the context of property damage and held that "the date on which the property damage is deemed to have occurred is the date of the actual injury. *Id*., at *13-14. Stating:

> According to the plain language of the policy, property damage that occurs as a result of physical injury or destruction is deemed to have occurred at the time of the physical injury that caused the damage. See Ins. Policy (Doc. 17–4), at 6. In other words, the date on which the property damage is deemed to have occurred is the date of the actual injury (i.e., the date the cracks appeared in the interior walls of the home, in the brick exterior, or in the block and foundation). This finding is consistent with the language of Policy No. Q33 6520012, as well as with the case law submitted by Erie. See, e.g., Stillwell v. Brock Bros., Inc., 736 F.Supp. 201, 205 (S.D.Ind.1990) ("[T]he time an accident 'occurs' is the time when the complaining party is actually injured, not the time when the wrongful act is committed.") (applying Kentucky law); Jenoff, Inc. v. New Hampshire Ins. Co., 558 N.W.2d 260, 263 (Minn.1997) (same) (applying Minnesota law) (citing cases). It is also consistent with the West Virginia cases cited above and the general maxim that liability policies do not provide on-going coverage, or guarantees, for injuries or damages arising out of an insured's work. See, e.g., Corder, 556 S.E.2d at 82–84; Pioneer, 526 S.E.2d at 31–33; see also Oxner v. Montgomery, 794 So.2d 86, 93 (La.App.2001) ("We find that the manifestation theory is properly applied ... under the exposure theory, an insurer would arguably remain a guarantor of its insured's actions forever. We reject such an inequitable result."). Plaintiff submits no argument or authority to the contrary.
>
> Applying the so-called manifestation theory, this Court finds that the question of whether property damage occurred under Policy No. Q33 6520012 is determined by whether Merlin Bush's home was actually damaged before September 15, 2005. The easiest way to determine when the property damage (the cracks and other structural defects) actually occurred is to ascertain when it first appeared or was discovered.

Id., at 13-14. Similarly, in *Westfield Ins. Co. v. Mitchell*, 22 F. Supp. 3d 619 (S.D.W. Va. 2014), the Court noted that the Fourth Circuit Court of Appeals and courts in other jurisdictions have endorsed the manifestation theory as the proper rule for determining the trigger of coverage, stating:

> It does not appear that the Supreme Court of Appeals of West Virginia has ever determined whether the damage in a negligence claim occurs at the time of the

> alleged negligence or at the time damages from the alleged negligence results. However, looking at similar language in another policy, this court previously found that "the date on which the property damage is deemed to have occurred is the date of the actual injury[.]" *Simpson-Littman Const., Inc. v. Erie Ins. Prop. & Cas. Ins. Co.*, No. CIV.A. 3:09-0240, 2010 WL 3702601, at *13 (S.D. W.Va. Sept. 13, 2010) (Chambers, J.). Other courts have found likewise. *See, e.g., Mraz v. Canadian Universal Ins. Co., Ltd.*, 804 F.2d 1325, 1328 (4th Cir.1986) ("There are situations, however, in which the existence or scope of damage remains concealed or uncertain for a period of time even though damage is occurring. The leakage of hazardous wastes as in this case is a clear example. **Determining exactly when damage begins can be difficult, if not impossible. In such cases we believe that the better rule is that the occurrence is deemed to take place when the injuries first manifest themselves**."); *Stillwell v. Brock Bros., Inc.*, 736 F.Supp. 201, 205 (S.D. Ind.1990) (stating that "every jurisdiction, with the exception of Louisiana, has held that the time an accident 'occurs' is the time when the complaining party is actually injured, not the time when the wrongful act is committed"); *Mem'l Props., LLC v. Zurich Am. Ins. Co.*, 210 N.J. 512, 46 A.3d 525, 533 (2012) ("**When parties dispute the identity of the operative 'occurrence' for purposes of coverage, the actual damage to the party asserting the claim, not the wrongful act that precipitated that damage, triggers the 'occurrence.**'").
>
> As one court noted, "[t]he tort of negligence is not committed unless and until some damage is done. Therefore, the important time factor, in determining insurance coverage where the basis of the claim is negligence, is the time when the damage has been suffered." *Muller Fuel Oil Co. v. Ins. Co. of N. Am.*, 95 N.J.Super. 564, 232 A.2d 168, 175 (N.J.App.Div.1967).

Id., at 623 (Emphasis supplied.)

In the same fashion, in *State Auto Property and Casualty Insurance Company v. H. E. Neumann Company*, No. 2:14-CV-19679, 2016 WL 5380925, (S.D. W.Va. Sept. 23, 2016), the Southern District of West Virginia was required to predict how the West Virginia Court would determine the applicable coverage trigger in a case where an employer was sued for exposure to various chemicals and heavy metals resulting in lung diseases of pulmonary fibrosis and emphysema. The *State Auto* Court explained the trigger of coverage issue as follows:

> Courts refer to this disagreement as pertaining to "the so-called 'trigger of coverage,' *i.e.*, what it is that must happen during the policy period in order to trigger the insurance company's duty to defend and indemnify the insured." *Nat'l*

> *Union Fire Ins. Co. of Pittsburgh, Pa. v. Porter Hayden Co.*, 331 B.R. 652, 658 (D. Md. Sept. 9, 2005).
>
> The plain language of the CGLs and the Umbrella Policies does not resolve the trigger-of-coverage issue in the context of latent diseases. In particular, in order for there to be coverage, the "bodily injury" must be caused by an "occurrence." (*See, e.g.*, ECF No. 1-2 at 1 & 48.) However, the policies do not include any language limiting coverage based on the date of the "occurrence." (*See, e.g., id.*) Instead, the temporal requirement is provided by the language that "[t]he 'bodily injury' ... [must] occur[ ] during the policy period." . . . . In particular, a latent-disease "bodily injury" could "occur" at the time of initial exposure, during the latency period, or when the disease is ultimately discovered. . . .

Id., at *15-16, *vacated pursuant to settlement*, No. 2:14-CV-19679, 2017 WL 1536464 (S.D.W. Va. Mar. 17, 2017), and *appeal dismissed sub nom. State Auto Prop. v. H. E. Neumann Co.*, No. 16-2237, 2017 WL 5011982 (4th Cir. Mar. 23, 2017)[6]. After describing the competing theories for what event triggers coverage in the context of latent injuries, the *State Auto* Court adopted the manifestation trigger theory, which maintains that coverage under an occurrence-based policy is triggered when the injury or damage first manifests.[7] *Id.* The *State Auto* Court held:

> [T]he court finds that in applying West Virginia substantive law the manifestation theory is the appropriate approach for the timing-of-coverage issue relating to the latent-disease allegations in the Underlying Litigation. As such, Francis's "bodily injury" triggered coverage at the time his illness manifested.

Id., at *19. (Emphasis supplied)

[6] While the Court's Opinion in *State Auto Property and Casualty Insurance Company v. H.E. Neumann Company* was later vacated pursuant to a settlement agreement, its reasoning directly addresses the matters in dispute here.

[7] The Court reviewed four separate trigger theories:(1) the exposure theory; (2) the manifestation theory (or discovery rule); (3) continuous exposure, or triple trigger theory; and (4) the injury-in-fact theory. *See State Auto*, 2016 WL 5380925 at 17 (quoting *Imperial Cas. & Indem. Co. V. Radiator Specialty Co*. 862 F. Supp. 1437, 1441 (E.D. N.C. 1994) (citations omitted)).

The absence of a physical manifestation of injury was also critical in the case of *Ball v. Joy Techs., Inc.*, 958 F.2d 36 (4th Cir. 1991), wherein the Fourth Circuit predicted how West Virginia would address this issue. The *Ball* Court explained that "mere exposure" to chemicals was insufficient to trigger coverage:

> **The mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle the plaintiffs to recover for their emotional distress. Numerous courts have held that exposure to hazardous substances does not constitute a physical injury**. *See Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir.1986) (rejecting plaintiff's claim for mental distress damages under Louisiana law because he failed to establish that he sustained an injury from his exposure to asbestos products); *Plummer v. Abbott Laboratories,* 568 F.Supp. 920 (D.R.I.1983) (finding that plaintiffs' ingestion of diethylstilbestrol that allegedly increased the risk of contracting cancer did not *per se* constitute a physical injury under Rhode Island law); *Sypert v. United States,* 559 F.Supp. 546 (D.D.C.1983) (concluding that because the plaintiff had suffered no physical injury from his exposure to tubercle bacilli, he could not recover mental distress damages under Virginia law); *Eagle–Picher Industries, Inc. v. Cox,* 481 So.2d 517 (Fla. Dist.Ct. App.1985) (holding that Florida law did not recognize inhalation of asbestos as a physical injury); *Payton v. Abbott Laboratories,* 386 Mass. 540, 437 N.E.2d 171 (1982) (plaintiff's in utero exposure to diethylstilbestrol was not a physical injury or harm under Massachusetts law).
>
> Plaintiff urges this court to expand the law of torts in West Virginia and Virginia and recognize exposure to toxic substances as a physical injury. The *Erie* doctrine permits federal courts "to rule upon state law as it presently exists and not to surmise or suggest its expansion." *Washington v. Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir.1989). **Because the law of West Virginia and Virginia requires physical injury before a plaintiff may recover damages for emotional distress, the district court was correct in concluding that the exposure of the plaintiffs to toxic chemicals did not constitute an injury that would entitle them to recover damages for emotional distress**.

Id., at 38-39. (emphasis supplied.)

Thus, in this case, the District Court's finding that the Claimants' alleged exposure to potentially harmful chemicals between 1985 and 1989, without any accompanying manifestation of harm or injury, constituted an occurrence of "bodily injury" necessary to trigger coverage is inconsistent with how federal and West Virginia Courts have historically analyzed and adjudicated

general liability insurance coverage for claims involving bodily injury. Instead, the District Court should have found that coverage applies only when bodily injury actually manifests itself and can be detected during the policy period.

IV. The District Court's application of the "continuous trigger" theory was erroneous.

In its *Memorandum Opinion And Order*, the District Court predicted that the West Virginia Supreme Court of Appeals would likely reject the manifestation trigger of coverage in favor of a "continuous trigger," under which insurance coverage applies for all years of exposure. (JA 1654-1656.) To support that finding, the District Court relied upon two decisions by West Virginia Circuit Courts, both of which are readily distinguishable from this case. The first of these is *Wheeling Pittsburgh Corporation v. American Insurance Company*, 2003 WL 23652106 (Circuit Court of Ohio County Civil Action No. 93-C-340 October 18, 2013), wherein the Circuit Court of Ohio County applied the "continuous trigger" approach to an insurance coverage dispute involving environmental liabilities for the cleanup of an industrial site. The Court in *Wheeling Pittsburgh* explained the circumstances of that case as follows:

> In the context of insurance, trigger of coverage refers to the event or condition which determines whether a liability insurance policy applies to a particular claim for coverage. Generally, the event or condition triggering insurance coverage occurs within a close temporal proximity with the damage sustained. However, **the present action involves alleged contamination of certain sites owned and operated by Wheeling Pittsburgh dating back as early as 1917 and extending to the present time**. As alleged by the Plaintiffs, the EPA has determined that property damage to the sites at issue occurred continuously over the course of many years. **During the course of ownership of these sites, Wheeling Pittsburgh has purchased, through various Defendants, one or more umbrella liability or excess liability insurance policies designed to indemnify Wheeling Pittsburgh for "all sums" or the "ultimate net loss" which Wheeling Pittsburgh shall be obligated to pay by reason of liability. The obvious effect is that, in an environmental context, Wheeling Pittsburgh may be liable for remediation of property damage, the causation of which spans several decades and multiple policy periods. To further complicate the matter, it may be difficult, if not impossible, to connect the damage with a specific event or condition occurring**

> **at a specific point in time. As it relates to the Defendants, each insurer has issued policies that were in effect at various points throughout the relevant time periods when contamination is alleged to have occurred.** Thus, in the area of insurance coverage involving environmental contamination, questions surrounding the events or conditions that serve to trigger insurance coverage present the Court with a difficult problem to resolve.
> It is undisputed that the issue presented the Court is one of first impression within this jurisdiction inasmuch as the West Virginia Supreme Court of Appeals has never addressed the issue of when insurance coverage is triggered within the context of environmental claims. Therefore, the Court must look to other jurisdictions for guidance.
>
> In analyzing trigger of coverage issues, four primary theories have emerged: (1) the continuous or multiple trigger, which imposes a coverage obligation on all insurance policies in effect during the entire process of injury or damage; (2) the manifestation trigger, which imposes a coverage obligation only on those policies in effect at the time injury or damage becomes manifested;(3) the injury-in-fact trigger, which imposes a coverage obligation period on all policies in which injury or damage actually takes place; and (4) the exposure trigger which imposes a coverage obligation on those policies in effect when the first exposure to injury or damage causing conditions occurs.

Id., at *14 (Emphasis added.)

Initially, it should be noted that *Wheeling Pittsburgh* is wholly distinguishable, as it involved property damage, not bodily injury, and therefore did not apply the principles set forth in *Smith v. Animal Urgent Care, Inc.* and *Ball v. Joy Techs., Inc.* discussed above. Instead, *Wheeling Pittsburgh* dealt with a claim that pollutants continuously and progressively damaged the value of a piece of property beginning **as soon as the first contamination occurred (**a date which the Court could not determine with certainty). The Circuit Court noted:

> [I]t appears that the property damage alleged by the Plaintiffs to have occurred is the result of a continuous, progressive process spanning numerous years and encompassing multiple successive insurance policies. The end result of this continuous process is the alleged progressively deteriorating environmental property damage at issue in the present action.

Id., at *16. While the Claimants in this case have alleged long-term exposure to harmful chemicals, they have not alleged that they sustained any injury or disease **while a Westfield policy was in**

effect. Thus, they have not alleged some specific "injury to physical structure of human body" which meets the definition of "bodily injury," as discussed in *Smith*. Instead, they assert that they developed cancer at some later, undetermined date as a result of the exposure, and that this cancer was diagnosed long after the Westfield Policies at issue had expired. As the Court in *Mitchell* recognized:

> When parties dispute the identity of the operative "occurrence" for purposes of coverage, the actual damage to the party asserting the claim, not the wrongful act that precipitated that damage, triggers the occurrence.

Mitchell, 22 F. Supp. 3d at 623. The manifestation trigger approach simply recognizes this fact and, as discussed above, is more consistent with existing West Virginia law on the issue. To the extent the District Court found that the principles discussed in *Wheeling Pittsburgh* should also apply to a bodily injury claim, that finding was simply wrong.

The second West Virginia Circuit Court case relied upon by the District Court was *U.S. Silica v. Ace Fire Underwriters Ins. Co.*, 2012 W.Va. Cir. LEXIS 4449 (JA 1654-1655), which involved the trigger of coverage for claims arising from exposure to silica dust. Relying heavily upon the *Wheeling Pittsburgh* decision and various Pennsylvania decisions, the Circuit Court applied the continuous trigger theory and found that coverage was triggered throughout the time of exposure. Significantly, the Circuit Court pointed out that the Pennsylvania decisions upon which it was relying based their respective holdings on scientific evidence that injury occurred immediately upon exposure to asbestos fibers. For example, at Footnote 2, the *U.S. Silica* Court quoted *J.H. France Refractories v. Allstate Ins. Co.*, 534 Pa. 29 (1993), for the explanation of why the "multiple trigger" should apply:

> The medical evidence in this case unequivocally establishes that injuries occur during the development of asbestosis immediately upon exposure, and that the injuries continue to occur even after exposure ends during the progression of the

> disease right up until the time that increasing incapacitation results in manifestation as a recognizable disease.

Id., at *3 n.2. Here, in stark contrast to *U.S. Silica* and the cases it cited where medical evidence supported the existence of immediate harm caused by asbestos fibers accumulating in the body, neither STW nor the Claimants have provided any such medical evidence of immediate physical harm upon exposure. Instead, the Claimants in this case allege only that long-term exposure caused cancer to develop at some later time. Because, unlike *U.S. Silica*, this case lacks the requisite scientific evidence to establish that the Claimants' exposure and "bodily injury" occurred simultaneously, this case is readily distinguishable from *U.S. Silica*. Accordingly, the District Court's reliance on *U.S. Silica* was misplaced, and the continuous trigger theory is inapplicable here.[8]

V. West Virginia's recognition of a cause of action for medical monitoring is irrelevant to the coverage issues here.

In its briefing before the Fourth Circuit, STW has argued that Westfield's coverage arguments do not take into account West Virginia's recognition of a cause of action for medical monitoring and has suggested that this also implies that West Virginia would reject the manifestation trigger approach. This argument is simply without merit.

In *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999), this Court permitted a cause of action for medical monitoring following a claimant's exposure to toxic substances, stating:

> We now reject the contention that a claim for future medical expenses must rest upon the existence of present physical harm. The "injury" that underlies a claim for medical monitoring—just as with any other cause of action sounding in tort—is "the invasion of any legally protected interest."

[8]Like the *Wheeling Pittsburgh* Court, the *U.S. Silica* Court also did not address the principles regarding what constitutes a "bodily injury" under West Virginia law set forth in *Smith v. Animal Urgent Care, Inc.* and *Ball v. Joy Techs, Inc.*

Id., at 139, 430. Importantly, however, in recognizing the cause of action for medical monitoring, the Court recognized that the harm at issue was **economic**, not physical. It explained:

> What these decisions uniformly acknowledge is that significant economic harm may be inflicted on those exposed to toxic substances, notwithstanding the fact that the physical harm resulting from such exposure is often latent.

Id., at 138, 429. The Court also noted:

> It is difficult to dispute that an individual has an interest in avoiding expensive diagnostic examinations just as he or she has an interest in avoiding physical injury. When a defendant negligently invades this interest, the injury to which is neither speculative nor resistant to proof, it is elementary that the defendant should make the plaintiff whole by paying for the examinations.

Id., at 139, 430. Thus, the damages at issue in a medical monitoring claim are economic, not physical and, therefore, do not represent a "bodily injury" necessary to trigger coverage under the subject Westfield Policies.

While the trigger of coverage issue does not appear to have been addressed in the context of a commercial general liability policy, West Virginia has recognized that claims for purely economic losses do not fall within the definition of a claim for "bodily injury" or "property damage." For example, in *Aluise v. Nationwide Mut. Fire Ins. Co.*, 218 W. Va. 498, 625 S.E.2d 260 (2005), the Court discussed claims for economic losses in the context of a homeowner's policy and noted:

> Based upon the overwhelming authorities, we now hold that, absent policy language to the contrary, a homeowner's policy defining "occurrence" as "bodily injury or property damage resulting from an accident" does not provide coverage for an insured homeowner who is sued by a home buyer for economic losses caused because the insured negligently or intentionally failed to disclose defects in the home.

Id., at 506-07, 268-69. Here, the Westfield Policies provide coverage for claims of "bodily injury," not economic injury related to the need for expensive medical monitoring. Therefore, the fact that

West Virginia has recognized a cause of action to recover for such economic losses is completely irrelevant to the coverage issue before the Court. Here, the issue is whether or not the Claimants sustained "bodily injury" during the time the Westfield Policies were in effect. The fact that they may have possessed a claim for medical monitoring expenses or that West Virginia generally recognizes the existence of such a claim is simply irrelevant to that issue and the question certified by the Fourth Circuit.

CONCLUSION

For all of the reasons set forth above, the Court should find that for purposes of triggering insurance coverage in the context of a claim for latent illness resulting from alleged chemical exposure, bodily injury is deemed to take place when the injuries first physically manifest themselves and can be detected. Such an approach is more consistent with existing West Virginia law on the issue and will provide needed certainty to both insurers and insureds as latent injury claims become more common due to industrial workers growing older.

WESTFIELD INSURANCE COMPANY

By Counsel

/s/ Brent K. Kesner
Brent K. Kesner (WV Bar #2022)
bkesner@kkblaw.net
Ernest G. Hentschel (WV Bar #6066)
ehentschel@kkblaw.net
Kesner & Kesner, PLLC
112 Capitol Street
P. O. Box 2587
Charleston, WV 25329
Telephone: (304) 345-5200
Counsel for Petitioner

IN THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA
DOCKET NO. 22-848

WESTFIELD INSURANCE COMPANY,
Petitioner,

v.

SISTERSVILLE TANK WORKS, INC., ROBERT N. EDWARDS, E. JANE PRICE, individually and as Executor of the ESTATE OF ROBERT G. PRICE, DOUGLAS STEELE, CAROL STEELE, GARY THOMAS SANDY, PEGGY SANDY, REAGLE & PADDEN, INC. and DAVID C. PADDEN,
Respondents,

PETITIONER'S BRIEF ON CERTIFIED QUESTION
(from the United States Court of Appeals For The Fourth Circuit, Case No. 20-2052)

I, Brent K. Kesner/Ernest G. Hentschel, II, counsel for Westfield Insurance Company, do hereby certify that on the 15th day of May, 2023, the foregoing Petitioner's Brief on Certified Question was filed electronically with the Court via West Virginia File and ServeXpress which will provide an electronic copy upon counsel of record.

/s/ Brent K. Kesner
Brent K. Kesner (WV Bar #2022)
Ernest G. Hentschel, II (WV Bar #6066)
Counsel for Petitioner