NO. 24-ICA-441

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

G&G BUILDERS, INC.
Plaintiff/ Counterclaim Defendant/Cross-Claimant/ Third-Party Plaintiff below,

Petitioner,

v.

CENTRAL MUTUAL INSURANCE COMPANY,
Third-Party Defendant below,

Respondent.

FROM THE CIRCUIT COURT OF
CABELL COUNTY, WEST VIRGINIA
Civil Action No. 14-C-250

PETITIONER'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

W.Va. Code

Rules

ASSIGNMENTS OF ERROR

1. The Circuit Court below erred in finding that G&G Builders Inc. (G&G) had no valid claim for breach of contract after previously finding that Central Mutual Insurance Company ("Central") had an independent contractual duty to defend G&G in connection with the claims of defective stonework by Stone By Lynch ("SBL").

2. The Circuit Court below erred in finding that *Soaring Eagle Development Co., LLC v. Travelers Indemnity Co. of America*, 19-0841, 2020 WL 6131741, 2020 LEXIS 699 (W. Va. Oct. 19, 2020), barred G&G's claims when *Soaring Eagle*, unlike this case, involved no breach of contract by Travelers and a claimant which had always been defended by the subcontractors' insurers on a primary basis and which had not incurred any cost in obtaining a settlement of the claims against it.

3. The Circuit Court erred in finding that the collateral source rule did not apply to the payments made by other subcontractors' carriers toward the defense of G&G.

4. The Circuit Court erred when it refused to permit G&G to have an opportunity for discovery with respect to its breach of contract, bad faith and unfair trade practices claims.

5. The Circuit Court erred when it granted Central summary judgment on G&G's bad faith and Unfair Trade Practices Act claims even though those claims raised genuine questions of fact to be decided by a jury.

STATEMENT OF THE CASE

Introduction

This action was initially instituted by G&G Builders, Inc. ("G&G") to recover sums owed for its services as the Owners' Representation in connection with the construction of a home for

Randie and Deanna Lawson ("the Lawsons"). The Lawsons responded by filing counter and cross claims in which they alleged the existence of various defects in the construction of their home. G&G was named as a counterclaim defendant by the Lawsons.

Prior to their work on the home, the individual contractors and suppliers who worked on the project entered into contracts which required them to indemnify and hold G&G harmless in the event of claims arising from and/or related to their work and to obtain insurance coverage to protect G&G in the event of such claims. G&G sought indemnification from the various contractors and suppliers and requested that their respective insurance carriers defend and indemnify it. When insurance carriers refused to do so, G&G joined them in the litigation so that all implicated insurance coverage could be made available. One of those contractors was Stone By Lynch, LLC. ("SBL") which was insured by the Respondent, Central Mutual Insurance Company ("Central").

This *Petition* addresses the Circuit Court of Cabell County's October 3, 2024, *Order Granting Motion for Summary Judgment of Central Mutual Insurance Company on G&G Builders, Inc.'s Claims for Breach of Contract, Common Law Bad Faith, and Unfair Trade Practices* (JA1447-1460). In that *Order*, the Circuit Court found that, because G&G had been defended by other subcontractors' insurance carriers against the claims being asserted by the Lawsons, G&G had no right to recover for Central's breach of contract, bad faith, or violations of the Unfair Trade Practices Act even though G&G was required to release its $250,000 mechanics lien to obtain the settlement of the Lawsons' claims arising from SBL's work. The Circuit Court based its decision on the West Virginia State Supreme Court's decision in *Soaring Eagle Development Co., LLC v. Travelers Indemnity Co. of America*, 19-0841, 2020 WL 6131741, 2020 LEXIS 699 (W. Va. Oct. 19, 2020), which unlike this case involved a party that had been fully

defended and indemnified throughout the underlying litigation by the insurers with primary coverage. In this appeal, G&G is asking the Court to reverse the Circuit Court's October 3, 2024 *Order* and remand this action for further development of G&G's claims against Central.

Factual Background

As noted above, this litigation arose from the construction of a residence belonging to the Lawsons. In that regard, SBL was involved in the project as a subcontractor and supplied and/or installed stone materials in connection with the construction of the Lawsons' home. In discovery, the Lawsons filed an August 1, 2019 Expert Witness Disclosure identifying Gregory L. Boso, P.E. as a expert to testify that there was a failure of the exterior masonry and drainage system and a failure to properly lay the stone. (JA600-603) It then became apparent that the Lawsons were alleging that the installation of the stone by SBL was defective and that the Lawsons were asserting claims against G&G in connection with those defects.

SBL's contract with the Lawsons required it to have G&G, as the Owners Representative, named as an additional insured on its policy of insurance with Central and to defend and indemnify G&G in connection with any claim or dispute related to SBL's work on the Lawson Project. (See JA663-677, the April 4, 2011 "Standard Form Agreement" entered into between the Lawsons and SBL.) Central's agent, Central Carolina Insurance, issued a Certificate of Insurance to G&G, dated May 4, 2011, confirming the existence of the required insurance coverage under SBL's Central Policy and representing that G&G had been added as an additional insured under the Policy. (See JA678, the May 4, 2011 Certificate.) Because Central refused to defend and indemnify G&G in the action, G&G filed a third-party claim against it for the purpose of obtaining a declaratory judgment regarding its duties to G&G by virtue of the contract the Lawsons entered into with SBL. After discovery, G&G sought summary judgment with respect to Central's duty to defend and

indemnify G&G. On May 28, 2024, the Circuit Court entered its *Order Granting G&G Builders, Inc.'s Motion for Summary Judgment And Denying Central Mutual Insurance Company's Motion for Summary Judgment on Coverage Issues* (JA1418-1445). The Circuit Court expressly found that Central had a contractual duty to defend G&G in connection with the Lawsons' claims.

The Contract Between The Lawsons And Stone By Lynch

Even before SBL's work began on the project, the Lawsons and SBL agreed on the allocation of the risk of potential liability arising from SBL's work and the cost of purchasing insurance to cover that risk. The contract between the Lawsons and SBL required SBL to indemnify and hold harmless the Lawsons and their representative, G&G, from any liability arising from its work and to obtain insurance coverage for claims arising from its work, naming both the Lawsons (as "Owner") and G&G (as the "Owner's Representative ") as additional insureds. (See JA671-672) "Attachment A" to the April 4, 2011 "Standard Form Agreement" provides as follows:

"ATTACHMENT A"
G & G Builders Inc. Special Conditions

> For the purpose of this attachment G & G Builders, Inc. will be referred to as the Owners' Representative.
>
> **INDEMNIFICATION**: To the full extent permitted by law, Contractor/Material Supplier agrees to save, indemnify, and hold harmless the Owner's Representative and the Owner and their agents, employees, officers, directors, engineers, architects, and surveyors from any and all liability, suits, claims, demands, costs, loss of expense, judgments or demands for damages, including actual attorneys fees, whether arising before or after completion of the Contractor/Material Supplier's Work caused by, arising out of, resulting from, or occurring in connection with the performance of the Work or any activities associated with the Work by the Contractor/Material Supplier, its Subcontractors, suppliers or their agents or employees, or from any activity of the Contractor/Material Suppliers, its Subcontractors, suppliers or their agents or employees at the Site, whether or note caused in whole or in part by the active or passive negligence, fault, or any other grounds of legal liability of a party indemnified hereunder.
> ***

INSURANCE: Before Contractor/Material Supplier does any work at or delivers material to the site of construction, the Contractor/Material Supplier agrees to obtain and continue in force while performing work hereunder, at its own expense, the insurance coverage set forth below, with companies authorized to do business in the State of West Virginia with fully policy limits applying, but not less than, as stated. A certificate of insurance naming Owner's Representative, Owner, engineers, architects, and surveyors, their subsidiaries and affiliates, as well as their up stream parents, as an additional named insured and evidencing the following coverage's, specifically quoting the indemnification provision set forth in this Agreement, shall be delivered to Owner's Representative prior to commencement of the work. The additional named insured endorsement shall be endorsed as primary coverage on Contractor/Material Supplier's commercial general liability and excess insurance policy. Such certificate shall provide that any change restricting or reducing coverage or the cancellation of any policies under which certificates are issued shall not be valid with respect to Owner's Representative's interest therein until Owner's Representative has received sixty (60) days written notice of such change or cancellation.

***

3. General Liability Insurance - including contractual liability, professional liability and completed operations with Combined Single Limit Liability of $1,000,000.00.

***

5. Excess Liability Insurance - over comprehensive general liability and automobile liability insurance coverage afforded by the primary policies described above, with minimum limits of $1,000,000.00.

Such insurance shall not be deemed a limitation on any liability of Contractor provided for in this Agreement but shall be additional security thereof.

***

(JA671-672) Thus, the contract between the Lawsons and SBL clearly required SBL to obtain and maintain an insurance policy to provide liability coverage for G&G for claims arising from SBL's work and to have G&G named as an additional insured under the Policy. (JA671-672) In order to confirm such coverage, a "Certificate of Insurance" was required.

The Certificate Of Insurance

Through Central's agent, SBL obtained and provided to G&G a Certificate of Liability Insurance, dated May 4, 2011, which confirmed that SBL had obtained the required insurance

coverage from "Central Mutual Insurance" and that G&G had been added as an additional insured under the Central Policy. (See JA678) Based on the representations of the Certificate of Insurance, the contractual provisions set forth in "Attachment A" to the April 4, 2011 "Standard Form Agreement" (JA671-672), and the provisions of the Central Policy (JA882-965), G&G, as the "Owners Representative," qualified as an additional insured and an "indemnitee" under the Central Commercial General Liability Policy for claims arising out of the work performed by SBL on the Lawson project.

The Central Policy

The Central Policy issued to SBL (Policy No. CLP8886235) (Effective July 8, 2010 to July 8, 2011) provides, in relevant part, that Central will pay those sums that an insured is legally obligated to pay as damages because of bodily injury or property damage and that Central will provide a defense to a suit seeking to recover such damages from an insured, at Central's expense. (See JA924) Specifically, the Policy provides, in relevant part, under "**COMMERCIAL GENERAL LIABILITY COVERAGE FORM**," as follows:

> **COMMERCIAL GENERAL LIABILITY COVERAGE FORM**
>
> Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.
>
> Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations or Change Endorsement, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the Company providing this insurance.
>
> The word "insured" means any person or organization qualifying as such under Section **II** - Who Is An Insured.
>
> Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** - Definitions.
>
> **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. But:

* * *

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

* * *

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) The "bodily injury" or "property damage" occurs during the policy period;

* * *

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 a 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 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.

* * *

SECTION V - DEFINITIONS

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* * *

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

* * *

9. "Insured contract" means:

* * *

f. 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.

* * *

13. "Occurrence" means an accident, including continuous exposure to substantially the same general harmful conditions.

* * *

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

* * *

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY
GENERAL LIABILITY PLUS ENDORSEMENT

This endorsement modifies insurance provided under the following:
COMMERCIAL GENERAL LIABILITY COVERAGE PART
This endorsement amends the policy by adding the following; please read each section carefully.

* * *

ADDITIONAL INSURED - AUTOMATIC STATUS

* * *

These modifications are subject to the terms and conditions applicable to coverage in the policy except as provided below.

* * *

B. Additional Insured - Automatic Status (not applicable to Employee Benefits Liability Coverage)

1. **SECTION II - WHO IS AN INSURED** is amended to include as an insured any person or organization (called additional insured) whom you are required to add as an additional insured on this policy under:

A written contract, permit or agreement; and

a. Currently in effect or becoming effective during the term of this policy; and

b. Executed prior to the "bodily injury," "property damage," "personal injury and advertising injury."

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

a. That person or organization is only an additional insured with respect to liability caused, in whole or in part, by:

1) Your premises;

2) "Your work" for that additional insured; or

3) Acts or omissions of the additional insured in connection with the general supervision of "your work."

4) Your maintenance, operation or use of equipment leased to you by the additional insured.

b. The Limits of Insurance applicable to the additional insured are those specified in the written contract or agreement or in the Declarations of this policy, whichever is less. These Limits of Insurance are inclusive and not in addition to the Limits of Insurance are inclusive and not in addition to the Limits of Insurance shown in the Declarations.

c. Except when required by written contract or agreement, the coverage provided to the additional insured by this endorsement does not apply to:

1) "Bodily injury," "property damage" or "personal injury and advertising injury" occurring after:

a) All work on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured at the site of the covered operations has been completed; or

b) The portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as part of the same project.

2) "Bodily injury" or "property damage" arising out of acts or omissions of the additional insured other than in connection with the general supervision of "your work."

d. The insurance provided to the additional insured does not apply to "bodily injury," "property damage," "personal injury and advertising injury" arising out of an architect's, engineer's or surveyor's rendering of or failure to render any professional services including:

1) The preparing, approving, or failing to prepare or approve maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; and

2) Supervisory, or inspection activities performed as part of any related architectural or engineering activities.

* * *

(See JA924-925, JA935-938 and JA954-963) The contract between the Lawsons and SBL qualifies as "a contract or agreement that is an 'insured contract'" under the Central Policy for purposes of providing coverage for the Lawsons' claims against G&G, as an indemnitee of SBL, such that Central had a primary contractual duty to defend and indemnify G&G in the Lawson litigation.

The Civil Action

This action was initially instituted by G&G on March 20, 2014, to recover for G&G's services as "Owners Representative" related to the construction of the Lawsons' home. (See JA79-163) The Lawsons responded by filing their *Answer, Counterclaim and Cross-Claims of Randie Gail Lawson and Deanna Dawn Lawson* (JA164-183) on June 13, 2014, in which they alleged the existence of various defects in the construction of their home and sought damages from G&G and a number of contractors and suppliers who were involved in the Lawsons' project. The Lawsons' *Counterclaim and Cross-Claims* did not provide a detailed analysis of each claimed defect or indicate when any allegedly defective work was performed and the parties were required to

conduct discovery in order to identify the issues with the home. For example, the Counterclaim against G&G alleged that it had:

> Failed to supervise the construction of various and significant areas of work required which were defectively built, constructed or installed negligently and carelessly or with defective materials, appliances or workmanship, including, but not limited to, damage to the wood work, stone is cracked and broken, windows leak, chimney leaks, patio is damaged, electronics in the house do not function correctly, finish work needs replaced, the tile is defectively installed and needs replaced with proper grout which is not defective, and other significant defects and failure of performance.

(JA170) As the discovery process was ongoing and different defects were identified, G&G began seeking indemnification from the sub-contractors and suppliers which performed the work and requested that their respective insurance carriers defend and indemnify G&G based upon the indemnification agreements set forth in each of their contracts. For obvious reasons, this process took time as different sub-contractors were identified and the applicable policy periods when the allegedly defective work was performed were determined so that the different insurance carriers could be put on notice to participate in the defense of G&G. Over time, this led to several different insurance carriers participating in G&G's defense with respect to specific issues related to the construction of the Lawson's home, splitting the cost of the defense between them on a pro-rata basis. When any subcontractor's insurance carrier refused to participate in its defense, G&G filed a third-party complaint joining the carrier as a third-party defendant, seeking a declaratory ruling that the carrier was obligated to defend and indemnify G&G in the Lawson litigation. (See the original March 7, 2018 *Third-Party Complaint Of G&G Builders, Inc.* (JA235-291), the September 3, 2019 *Third-Party Complaint* (JA292-306), the December 2, 2019 *Second Amended Third Party Complaint* (JA307-358), the March 2, 2020 *Third Amended Third Party Complaint* (JA359-417), which joined Central as a party to the Lawson litigation and the April 26, 2021 *Fourth Amended*

Third-Party Complaint (JA418-500) For this reason, the litigation developed on two separate tracks, with G&G eventually being defended against the Lawsons' underlying claims by some carriers while others engaged in litigation contesting coverage.

Summary Judgment On The Coverage Issues

Because there was no genuine question of fact to be decided with respect to coverage under the Central Policy, G&G served a *Motion For Summary Judgment* on November 18, 2021, and asserted that Central had a contractual duty and obligation to defend and indemnify it against the Lawson's claims. (JA570-830) Central responded, and also filed its own *Motion For Summary Judgment* addressing the coverage issues. (JA831-1074) In its briefing, Central conceded that SBL "obtained insurance coverage under the Central Policy that covered the work SBL performed on the Lawsons' home" (JA844), that Central's Policy covered SBL's "indemnification obligation to G&G Builders under the Contract" (JA844), and that a Certificate of Liability Insurance was issued by Central's agent that represented that G&G Builders had been added as an additional insured under the Central Policy (JA844). In addition, Central conceded that "the Lawsons claim "property damage" as that term is used in the Policy" (JA847), that "the Lawson residence is within the "coverage territory" of the Policy" (JA847), and that "the Contract represents an "insured contract" under the Policy for which coverage is provided for SBL's indemnification obligations to G&G Builders under the Contract" (JA848).

At the February 8, 2022 hearing on the coverage issues, Central acknowledged that G&G qualified as an additional insured under its Policy and asserted that the only reason why G&G was not entitled to coverage was G&G's alleged failure to comply with the notice requirements set forth in its Policy. (JA) Specifically, Central's counsel stated:

> Your Honor, Central Mutual is in a unique position in this case. It's in a unique position from every other insurance company that has filed a motion for summary judgment and the reason is Central Mutual's motion focuses on one thing and one thing only, and that is late notice. Very simply, Central Mutual was not provided notice by G&G of the claims by the Lawsons against it as a result of work by Central Mutual's insured -- named insured Stone by Lynch for five years. The sole legal issue for this Court in the motion filed by Central Mutual is very simple. Was the five-year delay by G&G in providing notice to Central Mutual of the claims against it asserted by the Lawsons so late under West Virginia law that it precludes coverage for G&G under Central Mutual's policy? That's the simple issue.
>
> * * *
>
> For purposes of this motion, Central Mutual will concede that G&G was an additional insured. For purpose of this motion, you can assume that the indemnification obligation was, in fact, an insured contract under the Central Mutual policy.

(JA1235)

After hearing the arguments of counsel on the coverage issues, the Circuit Court noted:

> Okay. All right. Well, again, thank you for the arguments. I think this was another well-briefed issue. I am going to, however, deny Central Mutual's motion for summary judgment at this time. I don't believe the delay was unreasonable or that the prejudice -- that there's an amount of prejudice due to the delay that cannot be overcome here; so I'm going to deny that motion for summary judgment.

(JA1240) The matter then proceeded toward trial of the Lawsons' claims until a settlement of those underlying claims was reached in September of 2022.

After the Lawsons' underlying claims were settled, nothing further was done until May 28, 2024, when the Circuit Court entered its *Order Granting G&G Builders, Inc.'s Motion for Summary Judgment And Denying Central Mutual Insurance Company's Motion for Summary Judgment on Coverage Issues* (JA1417-1445) In its *Order*, the Circuit Court explained:

> 87. Further, Central has failed to demonstrate prejudice that would necessitate barring G&G's claim for coverage against Central.
>
> 88. Central argues that it has sustained prejudice as a result of G&G's delay in providing it with notice of the Lawsons' claims, emphasizing the importance of Daily Logs to reflect work performed by SBL on the Lawson resident; the admission by G&G's representative, David Taylor, that he could not remember

details about SBL's work as reflected in the Daily Logs; and the loss of SBL's records related to work at the Lawson residence due to a fire in February 2015.

89. The fact that memories may have faded with respect to work performed by SBL and the fact that records were lost in a fire are not particularly indicative of prejudice to Central's defense, particularly in light of the reasonable delay discussed above. Any such prejudice would affect both Central and G&G.

90. Moreover, Central did not present any evidence that any of the subject claims were not being actively defended in the period between June 12, 2014, and June 21, 2019, or that its ability to defend G&G has been impaired through a default or any failure to adequately defend against the Lawsons' claims. In fact, it is apparent that a number of other insurers have been actively defending G&G such that this matter has been fully developed for trial.

91. Therefore, the Court finds that Central has failed to demonstrate that it suffered prejudice as a result of G&G's delay in providing notification of the Lawson's claims to Central such that the Court should find that G&G violated the notice provision in the CGL Policy.

92. The Court concludes that G&G's notice to Central of the Lawsons' claims against G&G does not preclude coverage for G&G for such claims under the CGL Policy.

(JA1443) In light of these findings, the Circuit Court granted G&G's request for summary judgment and denied the *Motion* filed by Central, finding that Central had a contractual duty to defend G&G. (JA1444) Despite the fact that the Court's *Order* on the coverage issue was interlocutory, Central then filed a *Petition For Writ Of Prohibition* with the West Virginia State Supreme Court of Appeals on July 15, 2024 (Supreme Court Case No. 24-399), which remains pending.

Summary Judgment On The Breach Of Contract And Bad Faith Claims

While awaiting the entry of an order reflecting the Circuit Court's verbal ruling at the February 8, 2022 hearing, Central filed its *Motion For Summary Judgment On G&G Builders Inc.'s Claims For Breach Of Contract, Common Law Bad Faith, And Unfair Trade Practices* on October 11, 2022. (JA1264-1303) Central argued that, despite its ruling on coverage, the Circuit

Court should grant it summary judgment with respect to G&G's claims for breach of contract, bad faith, and unfair trade practices arising from Central's failure to defend and indemnify G&G based upon the West Virginia State Supreme Court's unpublished memorandum decision in *Soaring Eagle Dev. Co., LLC v. Travelers Indem. Co. of Am.*, No. 19-0841, 2020 WL 6131741 (W. Va. Oct. 19, 2020). In that regard, Central argued that because G&G received a full defense and full indemnification from the insurance carriers for other subcontractors, G&G had no right to seek recovery from Central. (JA1279-1283) While G&G responded by pointing out that it had not been fully indemnified and had to release its $250,000 mechanics lien to obtain the settlement with the Lawsons (JA1313-1314), no further action was taken on Central's *Motion* until October 3, 2024, when the Circuit Court below entered its *Order Granting Motion for Summary Judgment of Central Mutual Insurance Company on G&G Builders, Inc.'s Claims for Breach of Contract, Common Law Bad Faith, and Unfair Trade Practices.* (JA1447-1460) In the *Order,* the Circuit Court found that, because it had been defended by other insurance carriers, G&G had no right to recover from Central for its breach of contract, bad faith, or violations of the Unfair Trade Practices Act even though G&G had released its $250,000 mechanics lien to obtain the settlement of the Lawsons' claim arising from SBL's work. (JA1460) In that regard, the Circuit Court applied the *Soaring Eagle* decision and noted:

> 31. G&G argues that Central should not be permitted to take advantage of the fact that other insurers defended and indemnified G&G at no cost to Central or G&G.
>
> 32. The *Soaring Eagle* court's decision effectively rejected this argument, focusing, as the lower court did, on whether the Developer "received a full defense and indemnity by insurers," even if that full defense and indemnity was paid for by insurers for the subcontractors, and not by Travelers. Id. at *2. The *Soaring Eagle* court quoted the lower court as follows:

> [I]f the other carriers . . . believe their policies were excess to Travelers and wish to litigate that issue to recover their defense and indemnity payments, those issues would have be [sic] resolved in a separate civil action. In other words, if insurance carriers disagree among themselves, it has no bearing on the fact that [petitioner] was defended and fully indemnified throughout the case.

Id.

33. G&G also argues that it was "forced to engage in years of litigation in order to compel the various insurers of subcontractors to participate in its defense."

34. The Developer made a similar argument in *Soaring Eagle*. See id. at *3 ("[The Developer] further argues that . . . the record shows that [the Developer] incurred substantial aggravation and expense over a three-year period trying to get respondents to acknowledge coverage and provide the primary, non-contributory defense."). The *Soaring Eagle* court ultimately determined this argument lacked merit, focusing instead on the fact that the Developer was provided a defense at no cost to it and that the claims against it were settled at no cost to it. *Id.* at 4.

35. Here, it is of no moment that G&G expended time and money in an effort to compel the various insurers and contractors to defend and indemnify it; what matters is that G&G was provided a defense at no cost to it and that the claims against it were settled at no cost to it.

(JA1457-1458) The Circuit Court ignored the fact that G&G had been forced to release its $250,000 mechanic's lien claim against the Lawsons in order to get them to settle their claims related to SBL's work and noted, at Paragraph 39 of its "Conclusions of Law":

> No insurance coverage existed under Central's policy for G&G's mechanic's lien asserted against the Lawsons. Under no circumstance would G&G have been "legally obligated to pay damages" to the Lawsons pursuant to G&G's mechanic's lien claim. Thus, G&G's release of all or part of that lien cannot, as a matter of law, be part of the indemnity owed to G&G by Central, and, consequently, cannot be considered as part of the evaluation of whether G&G has been fully indemnified for the claims asserted against it by the Lawsons.

(JA1458) Because the Circuit Court ignored critical differences between this case and *Soaring Eagle* and improperly granted summary judgement to Central, G&G filed a timely *Notice of*

Appeal on November 4, 2024 (JA1461-1477) and now asks that the Circuit Court's decision be reversed.

SUMMARY OF THE ARGUMENT

In this case, the Circuit Court properly found that Central had an independent contractual duty to defend G&G inasmuch as claims for construction defects arising from the work of subcontractors can be considered to be an occurrence under a commercial general liability policy, such as the Policy issued by Central, and G&G stands in the shoes of Central's named insured, SBL, for coverage purposes due to the existence of an insured contract. In particular, it is undisputed that SBL agreed to defend and indemnify G&G in its contract with the Lawsons and it is also undisputed that Central's Policy provides coverage for such additional insureds. Moreover, Central's agent issued a Certificate of Insurance to G&G which specifically represented that G&G was named as an additional insured under the Central Policy.

With respect to Central's reliance upon the notice provisions in its Policy, it is undisputed that such requirements were not mentioned on the Certificate of Insurance issued to G&G. It is also undisputed that Central did not provide a copy of the Policy to G&G when it issued the Certificate and did not otherwise bring the notice requirements which purportedly restrict coverage to G&G's attention. Under applicable West Virginia law, an insurer cannot rely upon restrictive policy language if it does not bring such language to the attention of insureds such as G&G. Likewise, the Circuit Court properly concluded that Central had failed to prove that it did not receive timely notice of the claim or that it was prejudiced by G&G's notice of the Lawson claim. The Circuit Court also properly found that Central could not demonstrate prejudice due to the lack

of earlier notice since no judgment had been entered against G&G prior to Central being notified of the claim.

Central based its request for summary judgment on the breach of contract and bad faith claims on the West Virginia State Supreme Court's memorandum decision in *Soaring Eagle*, a construction defect claim in which Travelers (the insurer for the general contractor) was being sued for failing to provide a defense to a development company which had been named as an additional insured on the Travelers policy. Travelers did not deny coverage for the developer, but instead noted that its coverage was excess to the coverage provided to the developer under the insurance policies for the various subcontractors whose work gave rise to the claims at issue. Because the developer had always been defended by the subcontractors' insurers in the underlying construction defect litigation on a primary basis, Travelers was entitled to summary judgment on the development company's claims for breach of contract and bad faith because, in short, Travelers did not breach its insurance contract since it had no primary duty to defend. In *Soaring Eagle*, unlike this case, the insurance carriers for the various subcontractors on the project provided the development company's defense costs from the beginning (as they were required to do by contract), and they also paid for the cost of the settlement of the claims against *Soaring Eagle*. Here, Central had a primary contractual duty to defend G&G against the claims arising from the work of SBL. In addition, G&G was required to release its $250,000 mechanics' lien for services to obtain the settlement of the Lawsons' claims. The Circuit Court failed to recognize that, by releasing its mechanic's lien for contractual sums owed to G&G for its services as the Owner's Representative, G&G contributed that amount to the settlement of the Lawsons' SBL-related claim. Therefore, *Soaring Eagle* is factually distinct from this case as a matter of law and provided no support for the Circuit Court's decision to award summary judgment to Central Mutual.

The Circuit Court below also erred when it found that G&G had no damages and rejected G&G's assertion that the existence of other insurance coverage to pay for G&G's defense was irrelevant and inadmissible under the collateral source rule. Specifically, the fact that G&G was eventually able to obtain the agreement of certain subcontractors' carriers to pay for attorneys' fees and expenses incurred in the defense of the Lawsons' claims despite the denial of coverage by Central is irrelevant because the fees were incurred and Central is clearly liable for them under the Circuit Court's own ruling in favor of G&G on the coverage issue. Even if the fees and expenses associated with G&G's defense were paid by the carriers of other subcontractors, the existence of such other coverage represents a collateral source.

The Circuit Court below also erred when it refused to allow G&G an opportunity to conduct discovery with respect to its claims for breach of contract, bad faith and violations of the West Virginia Unfair Trade Practices Act when it was undisputed that all such claims had been stayed. Specifically, the Circuit Court awarded summary judgment against G&G even though no depositions with respect to the bad faith issues had been taken, no written discovery on those claims had been served, and no Scheduling Order with respect to those claims was in place. Here, G&G's various claims against Central presented complex issues which warranted an appropriate opportunity for discovery. Therefore, the Circuit Court should have found Central's request for summary judgment to be premature.

Finally, the Circuit Court erred when it granted Central summary judgment on G&G's bad faith and Unfair Trade Practices Act claims even though those claims raised genuine questions of fact to be decided by a jury. Specifically, G&G asserted that Central compelled it to file suit in order to obtain the coverage to which it was contractually entitled and failed to defend and indemnify G&G for the claims arising from SBL's work. At a minimum, this situation raised

genuine questions of fact regarding whether Central had violated multiple provisions of the Unfair Trade Practices Act as a business practice by failing to meet its obligation to defend G&G and compelling its insured to pursue litigation to recover amounts due under the Policy for defense, which precluded summary judgment in Central's favor. Likewise, Central never conceded the coverage issue and forced G&G to fully litigate the dispute through a ruling on summary judgment and beyond. Therefore, G&G clearly had "breach of contract" and "bad faith" claims since it prevailed on the coverage issue. The Circuit Court below erroneously ignored these claims based upon *Soaring Eagle,* even though the development company there, unlike G&G, received primary defense and indemnification from the subcontractors' insurers and had never been forced to sue to obtain defense or indemnification for the claims being asserted against it.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this matter as the Circuit Court's Order is subject to de novo review and the dispositive issues rely on a factual analysis that would be aided by oral argument. Petitioner requests that the Court set this matter for *Rule 19 (West Virginia Rules of Appellate Procedure)* argument because the *Order* of the Circuit Court improperly applied settled West Virginia law in the form of the West Virginia State Supreme Court's unpublished memorandum decision in *Soaring Eagle Dev. Co., LLC v. Travelers Indem. Co. of Am.*, No. 19-0841, 2020 WL 6131741 (W. Va. Oct. 19, 2020), and because this case involves the application of settled law to a particular set of operative facts.

ARGUMENT

I. Standard Of Review.

The Petitioner appeals the October 3, 2024, *Order Granting Motion for Summary Judgment of Central Mutual Insurance Company on G&G Builders, Inc.'s Claims for Breach of Contract,*

Common Law Bad Faith, and Unfair Trade Practices (JA1447-1460). Under settled West Virginia law, the *Order* is subject to *de novo* review. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*."); *see also*, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002) ("This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.").

While the standard of review is de novo, when this Court reviews a decision of the Circuit Court to grant summary judgment, it does so under the same standards that the Circuit Court applied to determine whether summary judgment was appropriate. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 335 (1995). The West Virginia State Supreme Court has indicated:

> In considering the evidence of record at the summary judgment stage, courts must apply the following guidelines: The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. Similarly, when a party can show that demeanor evidence legally could affect the result, summary judgment should be denied.

Maston v. Wagner, 781 S.E.2d 936, 946 (W.Va. 2015)

Summary judgment is proper only if "it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. 13 Pt. 2, *Mallet v. Pickens*, 206 W.Va. 145, 522 S.E.2d 436 (1999) (citing Syl. Pt. 3, *Aetna Cas. & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Drawing all

permissible inferences in the non-movant's favor, the Court must deny summary judgment if the non-movant establishes a "genuine issue of fact" for trial. *Painter v. Peavy*, at 192 n. 5, 758 n. 5.

II. The Circuit Court's Order is subject to appeal and proper for consideration by this Court:

The Circuit Court's October 3, 2024 *Order* is subject to appeal at this time because it completely disposes of G&G's claims against Central and directs entry of judgment in favor of Central on all such claims which effectively disposes of any issues of liability on the part of Central. (JA1460) While other parties and claims remain in the case and the *Order* does not contain the specific language set forth in *Rule 54* of the *West Virginia Rules Of Civil Procedure* that "no just reason for delay exists," the Circuit Court's October 3, 2024 *Order* approximates a final order in its nature and effect. In that regard, the West Virginia State Supreme Court has noted:

> The key to determining whether the order granting summary judgment and dismissing Foodland from this case with prejudice is a final order subject to appeal is not whether the Rule 54(b) language is included in the order, but whether the order "'approximates' a final order in its 'nature and effect.'"

Durm v. Heck's, 184 W. Va. 562, 566, 401 S.E.2d 908, 912 (1991). More recently, the Court has explained:

> In essence, we look to "whether the order approximates a final order in its nature and effect." *Id.* at 354, 811 S.E.2d at 884. Thus, one key question is whether an order is dispositive as to liability. *See* Syl. Pt. 2, *Durm v. Heck's, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991) ("**Where an order granting summary judgment to a party completely disposes of any issues of liability as to that party, the absence of language prescribed by Rule 54(b) of the West Virginia Rules of Civil Procedure indicating that "no just reason for delay" exists and "directi[ng] . . . entry of judgment" will not render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court's ruling approximates a final order in its nature and effect**."); Syl. Pt. 2, *Turner ex rel. Turner v. Turner*, 223 W. Va. 106, 672 S.E.2d 242 (2008) (same). The second key question is whether the order is dispositive as to damages. *See C & O Motors*, 223 W. Va. at 471, 677 S.E.2d at 907, Syl. Pt. 3 ("An order determining liability, without a determination of damages, is a partial adjudication of a claim and is generally not immediately

> appealable. However, an immediate appeal from a liability judgment will be allowed if the determination of damages can be characterized as ministerial. That is, a judgment that does not determine damages is a final appealable order when the computation of damages is mechanical and unlikely to produce a second appeal because the only remaining task is ministerial, similar to assessing costs.").

Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Westlake Chem. Corp., 249 W. Va. 575, 581-82, 900 S.E.2d 1, 7-8 (2024) (Emphasis added.) Therefore, because the Circuit Court's October 3, 2024 *Order* is final in its nature and effect and is dispositive as to damages, it is not interlocutory and is subject to appeal at this time.

III. The Circuit Court erred by finding that G&G had no right to recover for breach of contract after finding that Central had an independent contractual duty to defend G&G in connection with the claims of defective stonework by SBL.

In order to explain why the Circuit Court's award of summary judgment to Central on G&G's breach of contract and bad faith claims was erroneous, it is first necessary to address the fact that Central had an independent primary contractual duty to defend G&G in connection with the claims of defective stonework by SBL which was not shared with the insurance carriers for the other sub-contractors involved in the construction of the Lawson home.

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.

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 a claim, an insurer such as Central has a duty to determine whether any of the claims could fall within the coverage provided under its policy, and indicated:

> 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)

Wilson, at 237, 686. The Court then explained the analysis by which the existence of a duty to defend must be determined, and noted:

> By contrast, an insurer's duty to provide its insured a defense is broader than the duty to indemnify. Allegations in a complaint against an insured trigger the duty to defend if they are "reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policies." Syl. Pt. 3, in part, *Bruceton Bank v. U.S. Fid. & Guar. Ins. Co.,* 199 W.Va. 548, 486 S.E.2d 19 (1997). Furthermore, "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[.]" *Horace Mann Ins. Co. v. Leeber,* 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988).

Wilson, at 236 W. Va. 233, 682.

Here, the allegations of the Lawsons' *Counterclaim* clearly indicated that G&G was being sued in connection with alleged construction defects related to the work of various subcontractors and the Lawsons subsequently identified an expert to testify regarding defects in the stone work. (See JA164-183 and JA600-603) Central did not dispute that SBL agreed to indemnify G&G as the Owner's Representative in its contract with the Lawsons. (See JA844) Because Central admitted that potentially covered claims were being asserted against G&G, an indemnitee of SBL and an insured contract holder under the express terms of the Central Mutual Policy, it was clear that Central's primary duty to defend G&G was triggered in this case and the Circuit Court

properly found that it had an independent contractual duty to provide such a defense. (JA1418-1446) Moreover, West Virginia has recognized that construction defects which cause damage to stone work, such as that alleged by the Lawsons, can be considered an occurrence under a commercial general liability policy. Specifically, in Syl. Pt. 6 of *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W.Va. 470, 745 S.E. 2d 508 (W.Va. 2013), the Court noted:

> Defective workmanship causing bodily injury or property damage is an "occurrence" under a policy of commercial general liability insurance.

(Emphasis supplied.) In so ruling, the Court in *Cherrington* explained:

> Application of our prior holdings to find that the defective work of subcontractors does not constitute an "occurrence" and thus is not covered by the subject CGL policy would, indeed, create an absurd result when the policy expressly provides coverage for damages occasioned by subcontractors acting on behalf of the insured. **Therefore, we conclude that the more sound approach to interpreting the subject policy is to find that defective work performed by a subcontractor on behalf of an insured does give rise to an "occurrence" under a policy of CGL insurance to maintain consistency with the policy's stated intention to provide coverage for the work of subcontractors.**

Cherrington at 483, 521. (Emphasis added.) Here, SBL, as a subcontractor, was alleged to have performed defective work, leading to purported liability on the part of G&G. As an "additional insured" under the Central Policy, G&G was clearly entitled to defense and indemnification for such an alleged "occurrence" and the Circuit Court below correctly found that Central had an independent contractual duty to defend G&G (JA1418-1446).

G&G was also clearly a party to an "insured contract" with SBL. Specifically, the contract between SBL and the Lawsons required SBL to defend and indemnify both the Lawsons and G&G from claims arising from SBL's work. (See JA663-677) Therefore, Central had a separate and distinct duty to defend G&G under its Policy as G&G was a party to an "insured contract." In that regard, the Central 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 Central defends an insured against a suit it must also defend an indemnitee of the insured under an "insured contract." (See JA925 under the exclusion for "Contractual Liability" in Section I of the Commercial General Liability Coverage Form.)

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 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.

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 explained the application of the law surrounding "insured contracts" at length, and 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.

Id. at 222, 469.

In this case, G&G clearly had an "insured contract" with SBL, inasmuch as the contract provided for SBL's agreement to indemnify G&G and the Lawsons and also required SBL to procure insurance to cover such liability. (JA663-677) In that regard, the Court examined a similar

"insured contract" definition in a CGL policy in the case of *Elk Run Coal Co. v. Canopius U.S. Ins., Inc.*, 235 W. Va. 513, 775 S.E.2d 65 (2015), and noted:

> The Canopius CGL policy defines an "insured contract" in relevant part as:
>
> 9.f. That part of any other contract or agreement pertaining to your business ... 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.
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> "Language in an insurance policy should be given its plain, ordinary meaning." Syl. pt. 8, *Cherrington v. Erie Ins. Prop. & Cas. Co.,* 231 W.Va. 470, 745 S.E.2d 508 (2013) (internal quotations and citations omitted). Applying the plain language above, it is clear that, insofar as the indemnity agreement between Elk Run and Medford was part of their H & D Agreement and required Medford to "assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization," it is an "insured contract" under the policy.

Id. at 518, 70. Like the insured contract holder under the policy at issue in *Canopius,* G&G stood in SBL's shoes for purposes of determining Central's duty to defend and the Circuit Court properly found that Central had a duty to defend G&G in connection with the Lawsons' claims arising from SBL's work.

As discussed above, G&G was also provided with a Certificate of Insurance by Central's authorized agent. (See JA678) In *Marlin v. Wetzel County Board of Education*, supra., the Court addressed such certificates of insurance at length, stating:

> A certificate of insurance is a form that is completed by an insurance broker at the request of an insurance policyholder, and is a document evidencing the fact that an insurance policy has been written and includes a statement of the coverage of the policy in general terms. *Black's Law Dictionary* (5th Ed.1979).

Marlin, 212 W. Va. at 223. The Court 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.

Id. at 223, 470. 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). The Court then found that the Board of Education was entitled to coverage based on the Certificate, noting:

> At the inception of "coverage" for the Board, on September 14, 1987, an agent for Commercial Union prepared a certificate of insurance naming the Board as an additional insured. The insurance company's "bare, conclusory averment that the certificate naming plaintiff [the Board] as an additional insured was the result of 'clerical error' was insufficient to overcome the estoppel effect of its misrepresentation, since even an innocent misleading of another party may bar one from claiming the benefits of his deception."

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

> The doctrine of estoppel "applies when a party is induced to act or to refrain from acting to [his/]her detriment because of [his/]her reasonable reliance on another party's misrepresentation or concealment of a material fact." Syllabus Point 2, in

> part, *Ara v. Erie Ins. Co.,* 182 W.Va. 266, 387 S.E.2d 320 (1989). Estoppel is properly invoked to prevent a litigant from asserting a claim or a defense against a party who has detrimentally changed its position in reliance upon the litigant's misrepresentation or failure to disclose a material fact. *Ara,* 182 W.Va. at 270, 387 S.E.2d at 324. The doctrine is "designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience." *White v. Austin,* 172 N.J.Super. 451, 454, 412 A.2d 829, 830 (1980).

Id. at 225.

In this case, the authorized agent of Central issued a "Certificate of Insurance," which did not set forth or disclose any limitations on the coverage. As the Court in *Marlin* noted:

> In some instances, insurance companies attempt to avoid liability by asserting policy exclusions which are inconsistent with the coverage noted in the certificate of insurance. One commentator indicates that some courts do not give these exclusions effect:
>
> > Certificates of insurance are often inconsistent with the related policy, and a prudent indemnitee should assume exclusions in the policy exist that do not appear on the certificate. In some jurisdictions, certificates do not govern coverage while in others, an exclusion of which a certificate holder is unaware will not be given effect.
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> Douglas R. Richmond, *et al.,* "Expanding Liability Coverage: Insured Contracts and Additional Insureds," 44 Drake L.Rev. 781, 796 (1996). *See also, Brown Mach. Works & Supply Co. v. Ins. Co. of North America,* 659 So.2d 51, 56 (Ala.1995) (holding that an insurance company that does not deliver a policy to a certificate holder is estopped from asserting exclusions contained in the policy but not revealed in the certificate); *Moore v. Energy Mut. Ins. Co.,* 814 P.2d 1141, 1144 (Utah App.1991) (holding that exclusions are invalid unless they are communicated to the certificate holder in writing); *J.M. Corbett Co. v. Ins. Co. of North America,* 43 Ill.App.3d 624, 2 Ill.Dec. 148, 357 N.E.2d 125 (1976) (holding that because exclusion was not provided to certificate holder, terms of the certificate controlled).

Marlin, at 224, 471. Here, the Certificate issued by Central made no mention of the notice requirements set forth in Central's Policy. Therefore, this case presented the Circuit Court with a classic example of an insurer seeking to rely upon restrictive policy provisions which it had never

disclosed to a party which was admittedly an additional insured under its Policy. In fact, the Certificate specifically identified G&G as the "Certificate Holder" and represented:

> Certificate Holder is listed as an additional insured with respect to the general liability under form 81889 1207 as required per written contract.

(JA678) Because the Certificate specifically promised that G&G was an additional insured under the Central Policy, Central was obligated to bring any restrictive provisions found in the Policy to G&G's attention if it wanted to be able to rely upon them to restrict the coverage it had agreed to provide. As expressly noted in the case law cited in *Marlin*, "an insurance company that does not deliver a policy to a certificate holder is estopped from asserting exclusions contained in the policy but not revealed in the certificate." *Marlin*, at 224, 471. Therefore, the Circuit Court properly found that Central was estopped from relying upon the notice requirements in its Policy (JA1418-1446).

Next, it should be noted that even a cursory review of the docket of this case (JA1-78) reveals that it involves complex claims against a large number of sub-contractors. In each instance, it was necessary to identify the work the Lawsons claimed to be defective, but also what contracts were in place, the time periods involved, what insurance had been obtained to provide coverage during those time periods, and the position the carriers would take when asked to defend and indemnify G&G. The interrogatories, requests for production, ensuing document searches and production of voluminous file materials necessary to answer these questions took time and involved many unavoidable delays. Therefore, Central's argument that it did not receive timely notice ignored the circumstances under which this complex litigation developed.

The notice requirement in an insurance policy is meant to give insurers such as Central "'an opportunity to investigate and marshal defenses at a time when events are fresh in the witnesses' recollections[,]'" so that the insurance company can "'acquire information upon which

it can form an intelligent estimate of its liabilities[.]'" *Colonial Ins. Co. v. Barrett*, 542 S.E.2d 869, 874 (W. Va. 2000) (citations omitted). Here, the underlying litigation was still ongoing when G&G tendered its defense and it is beyond dispute that multiple parties in the Lawson litigation amended their pleadings to bring in new parties as additional information was learned regarding the construction defects at issue. Likewise, Central's suggestion that it was somehow prejudiced by a lack of earlier notice ignores the fact that there had been no finding of liability against G&G. Therefore, the Circuit Court properly found that Central was not prejudiced by an alleged lack of timely notice. (JA1418-1446)

IV. The Circuit Court erred in finding that *Soaring Eagle* barred G&G's claims when *Soaring Eagle*, unlike this case, involved a claimant which had always been defended by the subcontractors' insurers on a primary basis and which had not incurred any cost in obtaining a settlement of the claims against it.

Central based its request for summary judgment on the West Virginia State Supreme Court's Memorandum Decision in *Soaring Eagle*. supra. In that case, Travelers had asserted that because its additional insured, the developer on the project, had always been defended in the underlying construction defect litigation, Travelers was entitled to summary judgment on the developer's claims against it for breach of contract and bad faith. The Court described the facts of that case as follows:

> In December of 2015, the plaintiffs below, Soaring Eagle Lodge Master Association, Inc., and Soaring Eagle Lodge Association, Inc., filed a complaint against the defendant below and petitioner herein Soaring Eagle Development Company, LLC,2 asserting that petitioner caused certain structural and material defects in the Soaring Eagle Lodge at the Snowshoe Mountain Resort ("Snowshoe") in Pocahontas County, West Virginia. On February 9, 2016, petitioner tendered the claim for defense and indemnity to Branch & Associates ("Branch") and Branch's insurer, respondents herein, pursuant to the contract between petitioner and Branch. In a March 1, 2016, response letter respondents advised petitioner that they do "not address [petitioner's] tender as a putative additional insured under the above captioned policy" and directed petitioner to address those questions to the additional insured claims handler. In their March 10,

> 2016, letter, respondents informed petitioner that they were "unable to make a determination as to whether [petitioner] is entitled to any rights or coverage in connection with any claims, actions or proceedings relating to the captioned matter under policy(ies) of insurance issued to Branch by [respondents]." In both of the March of 2016 letters, respondents requested additional information from petitioner. However, according to respondents, it is undisputed that petitioner made no effort to respond to either of those requests until February 15, 2017. In respondents' later response to Cincinnati Insurance Companies, respondents wrote that "Travelers has determined that [petitioner] may qualify as an additional insured under the commercial liability policies issued to Branch by Travelers, but such coverage would apply on an excess basis only and there is no defense obligation at this time." Petitioner claims that while it made several other attempts to obtain indemnification and defense from respondents, respondents did not respond to those letters.
>
> Petitioner then filed an amended third-party complaint against respondents alleging breach of express contract, breach of implied contract, declaratory judgment, and unfair claims practices. All parties participated in mediation in June of 2018 and settled all claims other than petitioner's preservation of its right to pursue existing claims against "The Travelers Indemnity Company of America and possibly Zurich (a non-party)." On May 8, 2019, respondents filed a motion for summary judgment and supporting memorandum of law, arguing that they were entitled to summary judgment on all claims due to the fact that petitioner was provided a defense and indemnity. Petitioner filed a response in opposition, and respondents submitted a reply.

Soaring Eagle, at 1–2. Therefore, in *Soaring Eagle*, unlike this case, the insurance carriers of the various subcontractors involved in the construction project, who had primary coverage for the defense of the developer, provided the developer with a defense from the beginning and also paid the cost of the eventual settlement. The Court then explained that the developer had been indemnified for all payments made to resolve the claim, noting:

> In its order, the circuit court stated that "[t]he question the Supreme Court directs the trial court to is whether the insured party was defended without incurring costs and was indemnified for any payment made to resolve the underlying claim." It determined that there were no genuine issues of material fact remaining regarding coverage and that
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> > [i]f the other carriers, Cincinnati, Erie, or Liberty Mutual, believe their policies were excess to Travelers and wish to litigate that issue to recover their defense and indemnity payments, those issues would

> have be [sic] resolved in a separate civil action. In other words, if insurance carriers disagree among themselves, it has no bearing on the fact that [petitioner] was defended and fully indemnified throughout the case.
>
> According to the circuit court, petitioner received a full defense and indemnity by insurers for subcontractors "as envisioned by the parties as expressed in their contractual agreements." It also found that these are sophisticated parties which negotiated a large-scale construction project at Snowshoe, including contracting insurance obligations. The circuit court, therefore, granted respondents' motion for summary judgment.

Soaring Eagle, at 2. Put simply, the developer in *Soaring Eagle* had entered into a contract which required the general contractor on the project to defend and indemnify it but also mandated that the general contractor would require any subcontractors to defend the developer as well. Because the insurers for the subcontractors complied with that requirement and defended the developer on a primary basis throughout the litigation, the Supreme Court found that the developer had no valid claim for attorney's fees against the general contractor's insurer, which had excess coverage to that provided by the carriers for the subcontractors. In short, there was no breach by Travelers since it had no primary duty to defend the developer.

Here, Central Mutual seized upon the fact that some of the insurance carriers for the other subcontractors in this case eventually agreed to defend G&G under a reservation of rights and suggested that this similarity meant that Central Mutual was entitled to summary judgment in the same fashion as the insurer in *Soaring Eagle*. In fact, each of the insurers defending G&G were doing so under the separate contracts entered into by their insureds for the claims arising from their subcontracted work on the project. They were not defending G&G under the SBL contract for claims arising from SBL's stone work and Central was not providing excess coverage. Here, there clearly was a breach of the Central Policy because Central refused to defend G&G as the Circuit Court found it was required to do under its Policy (JA1418-1446). Unlike the general contractor's

carrier in *Soaring Eagle*, Central was obligated to provide primary coverage and defense under its contract and refused to do so. The defenses provided by carriers for other subcontractors who performed other work and allegedly caused other damages were not a substitute for the coverage which was supposed to be provided by Central in connection with the claims arising from SBL's work.

With respect to claims for indemnification such as those being asserted by G&G, the West Virginia State Supreme Court has held:

> In most cases, if an indemnitor does not assume control of the indemnitee's defense, he will be held liable for the attorney fees and costs incurred by the indemnitee in the defense of the original action.

State ex rel. Vapor Corp. v. Narick, 173 W. Va. 770, 774–75, 320 S.E.2d 345, 350 (1984). Here, the cost of G&G's defense was split among a number of different insurance carriers for subcontractors which originally denied G&G's tender for defense and indemnification. Each of those carriers was defending in connection with the damages allegedly caused by the work of their respective insured. Pursuant to the Circuit Court's earlier ruling, Central had a contractual duty to defend G&G in connection with damages allegedly caused by SBL's work. It refused to do so and instead asserts that, because other subcontractors' insurers did eventually agree to participate in G&G's defense in connection with claims arising from their insureds' work, Central could avoid its own independent contractual obligations altogether.

Finally, it should be noted that while the Circuit Court acknowledged that G&G was required to release its $250,000 mechanics' lien for services as part of the settlement of the Lawsons' claims related to SBL's work, it concluded that "[n]o insurance coverage existed under Central's policy for G&G's mechanic's lien asserted against the Lawsons" in Paragraph 39 of its "Conclusions of Law." (JA1458) This finding ignores the nature of the claims at issue. G&G never

asserted that the Central Policy provided coverage for its mechanic's lien against the Lawsons and the Lawsons were not contending that G&G was somehow obligated to pay them under the lien. Instead, the lien represented money owed to G&G by the Lawsons for G&G's work on the project as the Owners Representative and it was G&G which released the right to recover that payment as consideration in order to obtain a settlement of the SBL-related claim. The Circuit Court failed to recognize that, by releasing its mechanic's lien, G&G contributed that amount for the settlement of the Lawsons' claim. Therefore, *Soaring Eagle* is factually distinct from this case as a matter of law and provides no support for the Circuit Court's decision to award summary judgment to Central on all of G&G's claims against it.

V. The Circuit Court erred by failing to recognize that the collateral source rule applies to the payments made by other carriers for the defense of G&G.

In *Aetna Casualty & Surety v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), the West Virginia Supreme Court noted:

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

Pitrolo, 176 W. Va. at 193 (citations omitted). Here, the fact that G&G was eventually able to obtain coverage from the carriers for other subcontractors to pay for attorneys' fees and expenses, in the absence of coverage from Central, is irrelevant because such fees were incurred and Central is clearly liable for them under *Pitrolo* and the Circuit Court's own ruling in favor of G&G on the coverage issue. Even if the fees and expenses associated with G&G's defense were paid by other carriers that covered G&G as an additional insured, the existence of such other coverage represents a collateral source.

West Virginia law is abundantly clear that evidence of funds received or available from a collateral source are irrelevant. In that regard, the State Supreme Court has noted:

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

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

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

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

> **The purpose of the collateral source doctrine is to prevent reduction in the damage liability of defendants simply because the victim had the good fortune to be insured or have other means of compensation**.

Id. at 447 (emphasis supplied). In this case, Central could not rely upon the existence of other coverage available to G&G from a collateral source (the insurers of other subcontractors) to reduce the *Pitrolo* damages for which it was and is responsible. As noted above, the State Supreme Court has clearly held that, under the collateral source rule, it does not matter who paid the expenses. Instead, what matters is that someone lost the use of that money. Central cannot take advantage of G&G's good fortune that other subcontractors' carriers were eventually compelled to comply with their legal responsibilities to participate in G&G's defense. Such a situation clearly violates the principles behind the collateral source rule.

VI. The Circuit Court erred by failing to recognize that Central's *Motion* was premature because G&G had no possible opportunity for discovery with respect to its breach of contract, bad faith and unfair trade practices claims.

It is undisputed that, because of a stay of discovery, there was no possible opportunity for G&G to conduct discovery with respect to its claims for breach of contract, bad faith and violations of the West Virginia Unfair Trade Practices Act, which were the subject of Central's *Motion For Summary Judgment*. No depositions with respect to the defense and indemnification issues had been taken and no written discovery had been served. Likewise, no Scheduling Order with respect to those claims was in place. Therefore, Central's request for summary judgment was premature on its face.

In the case of *Elliot v. Schoolcraft*, 213 W.Va. 69, 576 S.E.2d 796 (W.Va. 2002), the West Virginia State Supreme Court of Appeals noted, "[a]s a general rule, summary judgment is appropriate only after the parties have had an adequate time to conduct discovery." *Elliot* at 73, 800. The Court went on to state:

> A party opposing a motion for summary judgment must have a reasonable opportunity to discover information that is essential to [its] opposition to the motion.

Id. The Court then reversed an award of summary judgment which was entered before a Scheduling Order had even been entered, indicating:

> And lastly, "good cause" for the appellant's "failure to have conducted discovery earlier" was shown by the fact the appellees began filing motions for summary judgment only four months after a complex lawsuit with multiple parties was filed, even before depositions of the parties could be taken.

Id. at 74, 801. As in *Elliot*, this case and G&G's various claims against Central presented complex issues which warranted an appropriate opportunity for discovery. For example, discovery was needed concerning Central's decision to refuse to provide a defense to G&G and its decision to

continue that refusal even after the Court announced its ruling in G&G's favor on the coverage issue. Because the parties had not yet completed necessary depositions or necessary discovery with respect to those issues, Central's request for summary judgment was not ripe for consideration by the Circuit Court.

Pursuant to the requirements of *Rule 56(f)* of the *West Virginia Rules of Civil Procedure*, G&G's counsel provided an Affidavit Of Counsel setting forth the areas of discovery which needed to be addressed before G&G could fully respond to Central's *Motion.*(JA1340-1341) The Circuit Court improperly ignored this need for discovery and erred when it granted Central's premature request for summary judgment.

VII. The Circuit Court erred when it granted summary judgment on G&G's bad faith and Unfair Trade Practices Act claims.

In this case, G&G asserted a private cause of action against Central for violations of West Virginia's Unfair Trade Practices Act, found at *W. Va. Code §33-11-4(9),* and a cause of action for "bad faith" pursuant to cases such as *Hayseeds v. State Farm Fire and Casualty Company*, 352 S.E.2d 73 (W.Va. 1986) and *Pitrolo*, supra.. Specifically, G&G asserted that Central compelled it to file suit in order to obtain the coverage to which it was entitled and failed to defend and indemnify G&G for claims arising from SBL's work. While Central asserted that it did not have a duty to defend G&G, the Circuit Court rejected that argument and ruled that coverage for defense existed for G&G under the Central Policy. (JA1418-1446) Nevertheless, Central continued to refuse to participate in G&G's defense to address the SBL-related claims. At a minimum, this situation raises genuine questions of fact regarding whether Central violated multiple provisions of the Unfair Trade Practices Act as a business practice by failing to meet its obligation to defend

G&G and compelling G&G to pursue litigation to pursue defense under the Policy which precluded summary judgment in Central's favor.

With respect to G&G's common law "bad faith" claims, the Court in *Pitrolo*, supra. held:

> Where a declaratory judgment action is filed to determine whether an insurer has a duty to defend its insured under its policy, if the insurer is found to have such a duty, its insured is entitled to recover reasonable attorney's fees arising from the declaratory judgment litigation.

Pitrolo, at 192, 158. Here, Central never conceded the coverage issue and forced G&G to fully litigate the dispute through a ruling on summary judgment and beyond. Therefore, G&G clearly has a "bad faith" claim for *Pitrolo* damages since it has prevailed on the coverage issue. Unlike G&G, the developer in *Soaring Eagle* received defense and indemnification from the subcontractors' insurers consistent with the development company's contract and, therefore, was never forced to sue to obtain defense and indemnification for the claims asserted against it. Therefore, the Circuit Court erred when it found that *Soaring Eagle* disposed of G&G's bad faith claims.

CONCLUSION

For all of the foregoing reasons, G&G asks the Court to reverse the Circuit Court's ruling in favor of Central and remand this action for proceedings on the merits.

Respectfully submitted,

G&G Builders, Inc.,

By counsel,

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VERIFICATION

BRENT K. KESNER, being first duly sworn, on his oath, deposes and says that he is counsel for the Petitioner, G&G Builders, Inc., in the foregoing verified **PETITIONER'S BRIEF**; that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief; and that insofar as they are therein stated to be upon information and belief, he believes them to be true.

_/s/ Brent K. Kesner
Brent K. Kesner (WVSB 2022)

CERTIFICATE OF SERVICE

I, Brent K. Kesner, counsel for Petitioner, do hereby certify that I have served the foregoing "**PETITIONER'S BRIEF"** upon all parties and known counsel of record, via File & ServeXpress, as indicated below, this 23rd day of December, 2024, addressed as follows:

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