No. 24-ICA-441

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
At Charleston

G&G BUILDERS, INC.,

Petitioner,

v.

CENTRAL MUTUAL INSURANCE COMPANY,

Respondent.

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

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Respondent Central Mutual Insurance Company ("Central") submits this brief in support of the Order Granting Motion for Summary Judgement of Central Mutual Insurance Company on G&G Builders, Inc.'s Claims for Breach of Contract, Common Law Bad Faith and Unfair Trade Practices ("Order") entered by the Circuit Court of Cabell County, West Virginia, by the Hon. Gregory Howard ("the Circuit Court") on October 3, 2024. The Order granted the Motion for Summary Judgement of Central Mutual Insurance Company on G&G Builders, Inc.'s Claims for Breach of Contract, Common Law Bad Faith and Unfair Trade Practices ("Motion") and resulted in summary judgment being entered for Central on those claims.

Because no issues of material fact existed, the Circuit Court properly issued the Order. Further, the Order comports with both the Supreme Court of Appeals of West Virginia's decision in Soaring Eagle Dev. Co. LLC v., Travelers Indem. Co. of Am & Travelers Prop., 2020 W. Va. LEXIS 699 (No. 19-0841, Oct. 19, 2020), and common sense. In addition, as the Circuit Court correctly recognized, G&G Builders received a full defense from insurance carriers in the underlying litigation, and the underlying claims against G&G Builders were fully settled without G&G Builders paying any monies towards that settlement. Given these facts, which are uncontested, the Circuit Court correctly determined that G&G Builders received exactly what it bargained for in the various agreements with contractors, pursuant to which it became an additional insured under various insurance policies – a full defense and indemnification at no cost to it. The Circuit Court, therefore, properly entered the Order, and Central asks that this Court affirm the Circuit Court's Order in all respects.

II. STATEMENT OF THE CASE.

A. General Background.

The underlying civil action in this appeal centers on the design and construction of a home owned by Randie and Deanna Lawson near Milton, West Virginia, the construction of which began in 2010. G&G Builders began its work on the Lawson residence in November 2010. See G&G Builders, Inc. v. Lawson, 238 W. Va. 280, 281, 794 S.E.2d 1, 2 (2016). Out of the claims asserted by G&G Builders and the Lawsons in that civil action, G&G Builders filed a series of third-party complaints against contractors who performed work on the Lawson home and against insurance companies that G&G Builders alleged owed G&G Builders coverage for the claims asserted by the Lawsons.

1. Stone By Lynch, Inc.'s, Work on the Lawson Home.

On April 4, 2011, Stone by Lynch, Inc. ("SBL"), one of the contractors who performed work on the Lawson home, entered into a written contract with the Lawsons to perform masonry/stonework on the Lawson home ("the Contract"). App. at JA000867-000880. That Contract contained the following language in "Exhibit A" that was titled "G&G Builders Inc. Special Conditions":

> **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 not 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.
>
> In the case of claims against the Owner's Representative, the Owner, or their agents and employees by any employee of the Contractor/Material Supplier, anyone directly or indirectly employed by the Contractor/Material Supplier, or anyone for whose acts it may be liable, the indemnification obligation under this Attachment A shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor/Material Supplier under workers' compensation acts, disability benefit acts.

. . . . .

INSURANCE: Before Contractor/Material Suppliers does any work at or prepares 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 full 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 Suppliers' 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.

App. at JA000875.

Central insured SBL under a Commercial General Liability Policy in effect from July 8, 2010, to 12:01 a.m., July 8, 2011 ("the Policy"), at which time the Policy terminated. App. at JA000882-000965. SBL obtained insurance coverage under the Policy that covered both the work that it performed on the Lawson home and its indemnification obligation to G&G Builders under the Contract, and a Certificate of Liability Insurance was issued that reflected G&G Builders to be an additional named insured under the Policy.[1]

Daily Work records reveal that SBL began work at the Lawson home on or about May 5, 2011. App. at 000967. Thereafter, before the Policy terminated on July 8, 2011, SBL performed stone work on the Lawson home. App. at 000967-000992. The overwhelming amount of the work performed by SBL at the Lawson home, however, took place after July 8, 2011, which work accounted for approximately 81% of the amounts charged by SBL for the work performed at the Lawson home. App. at 000994-001001. Work continued at the Lawson home by a variety of

[1] G&G Builders spends a considerable portion of its Brief on the Contract between the Lawsons and SBL, Central's Policy, and the Certificate of Insurance, apparently trying to prove that insurance coverage existed here. Petitioner's Brief at pp. 4-10; 12-14, 23-31. That the Policy provided coverage to G&G Builders as an additional insurance for claims made against G&G Builders by the Lawsons for work performed by SBL, however, is not contested for purposes of this appeal, and this Court may assume that such coverage existed.

contractors, including SBL, until sometime in 2013, at which time G&G Builders no longer worked for the Lawsons and the work by SBL concluded.

2. Relevant History of Claims Against G&G Builders and SBL.

On March 20, 2014, G&G Builders filed the underlying civil action against the Lawsons asserting breach of contract claims and seeking enforcement of a mechanic's lien that G&G Builders filed on the Lawsons' property ("Civil Action"). On June 13, 2014, the Lawsons filed both an answer and a counterclaim against G&G Builders. G & G Builders, 238 W. Va. at 282, 794 S.E.2d at 3. The Counterclaim against G&G Builders alleges that G&G Builders (1) failed to properly supervise the contractors, subcontractors and its own employees, and (2) failed to supervise the construction of "various and significant areas of work," which included "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." See App. at JA000170. Notably, the Circuit Court concluded, as a matter of law, that G&G Builders was on notice of the Lawsons' claims against G&G Builders based upon work performed by SBL no later than June 12, 2014, when the Lawsons filed their answer and counterclaim. App. at 001442.

Thereafter, G&G Builders attempted to force the Lawsons' claims into arbitration, which was ultimately unsuccessful following a decision in the Supreme Court of Appeals of West Virginia dated November 1, 2016. See G & G Builders, Inc. v. Lawson, 238 W. Va. 280, 794 S.E.2d 1 (2016).

Following remand to the Circuit Court, the parties to the litigation at that time began discovery. On April 14, 2017, the Lawsons answered discovery from G&G Builders, and in their

written responses, the Lawsons identified the following "defects and deficiencies" at the residence that are relevant to G&G Builders' claims against Central:

(1) cracked, broken, and crumbling stone throughout the back terrace, second and third floor balconies, archways, wall caps, port-cochere, and front entrance;

(2) leaking windows, doors, and chimneys;

(3) water damaged ceiling, pavers, piers, archways, and wiring throughout the back terrace;

(4) defective and damaged pool and driveway pavers.

App. at JA001004. In addition, the Lawsons' discovery responses claimed that the stone was "cracked, broken and crumbling, and in some places, appear to be laid with mix too high in sand" and that the "ceiling, pavers, archways, and wiring throughout the back patio has been damaged by water intrusion due to improper construction resulting in improper drainage and run-off from the second and third floor balconies." App. at JA001005-001006.

On March 7, 2018, G&G Builders filed a Third-Party Complaint against a number of contractors that worked on the Lawson home and the contractors' insurers in which G&G Builders made claims for implied and express indemnity and for contribution against the contractors, and claims for breach of contract, common law bad faith, statutory bad faith, and declaratory judgment against the insurers of the contractors allegedly arising out of (1) the contractual provisions of the written agreements between the Lawsons and the respective contractor, and (2) the terms of each insurer's insurance policy, under which G&G Builders claimed to be an additional insured. G&G Builders eventually filed a total of six (6) third-party complaints against contractors and their insurers making the same claims, including the Third Amended Third Party Complaint filed on March 2, 2020, which was the first pleading that named Central as a party. App. at JA000359-000500.

3. Notice of Lawsons' claims and G&G Builders' notice to Central.

Central first received notice of the claims asserted by the Lawsons against SBL and G&G Builders on June 21, 2019, upon receipt of a letter from Tanya Kesner, counsel for G&G Builders, who demanded a defense and indemnification from, among others, Central. App. at JA001017. Central denied the demand "at this time" by letter dated August 21, 2019, which noted that "[w]e have not received documentation to date indicating when Stone by Lynch & Design, LLC performed any work at this jobsite nor have any indication that any work performed by Stone by Lynch & Design LLC was faulty." App. at JA001048.

Thereafter, Central, after a reasonable investigation, denied G&G Builders' claim for coverage by letter dated July 31, 2020. App. at JA001050-001053.

4. The Circuit Court's decision on insurance coverage issues under Central's Policy, including both the existence of coverage for G&G Builders and Central's claim of late notice under the Policy.

G&G Builders filed a Motion for Summary Judgment that sought summary judgment on the issue of whether Central's Policy provided insurance coverage to G&G Builders for the claims asserted by the Lawsons for work performed by SBL. App. at JA000570-000830. Central filed a Motion for Summary Judgment on Insurance Issues in which it claimed that G&G Builders provided late notice to Central of the Lawsons' claims. App. at JA000831-001073. As timely notice represented a condition precedent to coverage under the Policy, Central asked the Circuit Court to find that no coverage existed for G&G Builders under the Policy because of the failure to provide adequate notice.

The Circuit Court orally granted G&G Builders' motion and denied Central's motion at a hearing held on February 11, 2022. Thereafter, because the Circuit Court's decision involved less than all claims and all parties in the Civil Action, Central asked the Circuit Court (on three separate

occasions) to enter a detailed order on the insurance coverage motions so that Central could file a petition for writ of prohibition. JA001635-001636; JA001637-001640; JA001641-001642. The Circuit Court finally entered such an order on May 28, 2024, after which Central filed its Petition for Writ of Prohibition in the Supreme Court of Appeals of West Virginia on July 15, 2024. On January 21, 2025, the day before Central filed this brief, the Supreme Court summarily denied the writ of prohibition, which means that the insurance coverage order will now be directly appealed to this Court.

Critically, however, disposition of the insurance coverage issues that will be appealed to this Court does not necessarily impact the issues on appeal before this Court in the current appeal. The reason is simple. As detailed below, the decision in Soaring Eagle, upon which the Circuit Court based its Order, assumed that insurance coverage existed for the party asserting the breach of contract and common law and statutory bad faith claims. Whether coverage actually exists, therefore, is less important than the question of whether G&G Builders received a fully-paid-for defense and full indemnification for the underlying claims asserted by the Lawsons. Those questions, answered in the affirmative, were fully addressed by the Circuit Court in its Order.

5. Settlement of G&G Builders' claims against contractors' insurers and settlement of the Lawsons' claims against G&G Builders, including for work performed by SBL.

As the discovery on the underlying claims progressed towards trial in 2022 following the addition of contractors and insurers to this litigation by G&G Builders, numerous important events relevant to Central's Motion occurred:

- First, G&G Builders obtained summary judgment against many contractors on each contractor's respective duty to provide a defense and indemnification to G&G Builders under the terms of the written agreement between the contractor and the

Lawsons, with the result that each contractor, including SBL, was found to owe a defense and indemnification to G&G Builders.[2] See App. at JA001451.

- Second, G&G Builders obtained summary judgment against some insurers on the duty of the insurer to defend G&G Builders per the terms of the written agreement between the insurer's named insured (i.e., contractor) and the Lawsons, and the terms of the insurance policy issued by the respective insurer. See App. at JA001451.

- Third, both before and after G&G Builders obtained these summary judgments, G&G Builders entered into settlement agreements with various insurers whereby the insurer (1) agreed to pay a pro-rata share of G&G Builders' past defense costs, including attorneys' fees, which pro-rata share depended upon how many insurers had reached a settlement with G&G Builders; (2) agreed to pay a pro-rata share of G&G Builders' defense costs going forward, including attorneys' fees, which pro-rata share again depended upon how many insurers had reached a settlement with G&G Builders; and (3) agreed to defer G&G Builders' claims for indemnification pending resolution of the Lawsons' claims against G&G Builders. See App. at JA001451.[3]

- Fourth, three (3) insurers (including Central) denied coverage to G&G Builders, had their respective motions for summary judgment on coverage issues denied, and informed the Court that they each intended to file a petition for writ of prohibition to challenge the Court's decision concerning insurance coverage under the terms of the insurer's respective insurance policy.[4] App. JA001451. When Central filed its Motion, written orders reflecting the Court's decisions on coverage issues related to those three (3) insurers had not been entered by the Court.

- Fifth, in late 2022, the Lawsons, the contractors (including SBL), and G&G Builders settled all claims between and among themselves related to the construction of the Lawson residence, and the Lawsons, the contractors, and G&G Builders released any and all claims that each had against any other party, but for G&G Builders' breach of contract and bad faith claims. App. at JA001452.[5]

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[2] Those contractors include Alltech Electric; Archetype Builders, Inc.; Envision Millwork, Inc.; ITC Millwork, Inc.; Noble and Family Painting, Inc.; Roof Depot, Inc.; Stone By Lynch, LLC; Stone By Lynch, GP; Peacock Pavers; and Frank Snodgrass and Building Graphics.

[3] Notably, these settlements included Cincinnati Insurance Company, which had agreed to provide a defense to SBL in the Civil Action. At all times, therefore, SBL was fully defended in the Civil Action.

[4] The other remaining insurers were Ohio Casualty Insurance Company and Builders Mutual Insurance Company. G&G Builders reached a settlement with Ohio Casualty Insurance Company in early 2023. Both Central and Builders Mutual remain in this litigation, and the Circuit Court granted summary judgment by order entered December 30, 2024, to Builders Mutual on G&G Builders' breach of contract, common law bad faith, and statutory bad faith claims for the same exact reasons asserted in the Order on appeal here. Central anticipates that, literally within days of filing this brief, G&G Builders will file a notice of appeal of that order.

[5] As discussed below, the monies paid to the Lawsons to resolve the Lawsons' claims against SBL and G&G Builders for work performed by SBL was paid by Cincinnati Insurance, which defended SBL, and Central.

- Finally, and most critically to this appeal, the Lawsons "agreed to resolve their claims against Stone By Lynch and G&G for all injuries and damages caused by, arising out of, resulting from, occurring in connection with, derivative of, and/or related to the work and/or product of Stone By Lynch in connection with the construction or repair of the Lawson home . . . ." App. at JA001452. As a result, and upon the payment of settlement monies to the Lawsons on behalf of SBL and G&G Builders -- including monies contributed by Central -- the Lawsons dismissed, with prejudice, all claims against SBL and G&G Builders related to the work performed by SBL. App. at JA001288; JA001290-001291.

The net result of these developments was that (1) G&G Builders was provided a complete defense in the Civil Action for the claims asserted by the Lawsons related to the work performed by SBL, including the payment of all attorneys' fees and expenses related to that defense; and (2) G&G Builders had all claims asserted against it by the Lawsons related to the work performed by SBL settled and released without the payment of any monies by G&G Builders.

As a result, on October 7, 2022, Central filed its Motion, which sought summary judgment on the remaining claims of G&G Builders asserted against Central in G&G Builders' Third Amended Third Party Complaint. Specifically, Central sought summary judgment on G&G Builders' claims for breach of contract (Count XV); so-called "common law bad faith" (Count XVI); and violation of the West Virginia Unfair Trade Practices Act (Count XVI), which represented the only remaining claims asserted by G&G Builders against Central in the Civil Action. The Circuit Court heard oral argument on the Motion on December 6, 2022, though it did not enter the Order until October 3, 2024.

III. SUMMARY OF THE ARGUMENT.

Initially, this appeal is premature because the Order fails to resolve all claims against all parties in the underlying litigation. In addition, the Order fails to include the language necessary under W. Va. R. Civ. P. 54(b) for it to be considered a final judgment order. Finally, to the extent that G&G Builders argues that the resolution of this appeal rests upon the Circuit Court's finding

that coverage exists under the Policy for G&G Builders for the claims asserted by the Lawsons related to work performed by SBL, that coverage determination will be the subject of an appeal to this Court given that the Supreme Court of Appeals of West Virginia declined to address Central's Petition for Writ of Prohibition on January 20, 2025.

Even if this Court reaches the merits of G&G Builders' appeal, the Circuit Court properly entered summary judgment in favor of Central on G&G Builders' claims for breach of contract, common law bad faith, and statutory violations of the Unfair Trade Practices Act because the Circuit Court properly applied Soaring Eagle Dev. Co. LLC v., Travelers Indem. Co. of Am & Travelers Prop., 2020 W. Va. LEXIS 699 (No. 19-0841, Oct. 19, 2020), to the uncontested facts of this case. Specifically, the Circuit Court correctly found that (1) G&G Builders received a full defense against the Lawsons' claims against G&G Builders based upon the work performed by SBL, at no cost to G&G Builders; and (2) G&G Builders was fully indemnified for all claims asserted by the Lawsons against G&G Builders related to the work performed by SBL, again with no payment of monies by G&G Builders. Given those uncontested facts, the Circuit Court correctly determined that G&G Builders could not continue to maintain its claims against Central for breach of contract, common law bad faith, and violations of the Unfair Trade Practices Act.

IV. STATEMENT REGARDING ORAL ARGUMENT.

Central believes that G&G Builders' appeal should be summarily dismissed, without prejudice, as it is premature, and oral argument is not necessary to reach that conclusion. In the event, however, that the Court addresses the substantive issues in this appeal, Central believes that the unique factual and procedural issues merit oral argument under W. Va. R. App. P. 20.

V. ARGUMENT.

G&G Builders was defended in this litigation for all claims related to work performed by SBL (and others) *without G&G Builders incurring any costs related to that defense*, including attorneys' fees and costs. See App. at JA001243. Likewise, G&G Builders has been indemnified for all claims asserted by the Lawsons for damages related to the work performed by SBL (and all other contractors) in that such claims have been settled and released *without the payment of any monies by G&G Builders*. Given these uncontroverted facts, the Circuit Court correctly entered summary judgment in Central's favor on G&G Builders' breach of contract common law bad faith, and statutory bad faith claims.

A. Standard of Review.

This Court's review of the Order entered by the Circuit Court is *de novo*. See Painter v. Peavy, 192 W.Va. 189, 451 S.E.2d 755, Syl. Pt. 1 (1994) ("A circuit court's entry of summary judgment is reviewed de novo."). As this Court articulated in Painter," [t]he circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." Painter, 192 W.Va. at 190, 451 S.E.2d at 756, Syl. Pt. 3.

B. G&G Builders' appeal of the Circuit Court's Order is premature.

Central agrees that "other parties and claims remain" in the case before the Circuit Court. For that simple reason, the Order on appeal here is not a "final order" subject to appeal at this time. Petitioner's Brief at 22.

W. Va. R. Civ P. 54(b) explicitly states that a circuit court "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of

judgment." The Order on appeal here does not contain that language, and *G&G Builders never asked the Circuit Court to include this language.* As such, per the explicit language of Rule 54(b), "[i]n the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties . . . ." No only, as G&G Builders admits, do "other parties and claim remain" in this case before the Circuit Court, but the insurance coverage issues involving Central and G&G Builders likewise remain pending as they will be appealed to this Court after the Supreme Court of Appeals of West Virginia declined to address those issues pursuant to Central's Petition for Writ of Prohibition.

For these simple reasons, the Order is not a "final judgment" order, and this Court should dismiss this appeal as premature.

C. The Circuit Court correctly entered summary judgment for Central on G&G Builders' claims for breach of contract (Count XV); so-called "common law bad faith" (Count XVI); and violation of the West Virginia Unfair Trade Practices Act (Count XVI), pursuant to the Soaring Eagle decision.

Even if this Court decides to address the substance of G&G Builders' appeal here, the Supreme Court of Appeals of West Virginia recently issued a decision that virtually mirrors the situation involving Central and G&G Builders before the Circuit Court, which resulted in the Supreme Court affirming summary judgment for an insurance carrier in the exact same position as Central on the exact same claims asserted by G&G Builders in this case.

In Soaring Eagle Dev. Co. LLC v., Travelers Indem. Co. of Am & Travelers Prop., 2020 W. Va. LEXIS 699 (No. 19-0841, Oct. 19, 2020), property owners Soaring Eagle Lodge Master Association, Inc., and Soaring Eagle Lodge Association, Inc. ("Property Owners"), filed a complaint against Soaring Eagle Development Company, LLC ("Developer"), the developer of the Soaring Mountain Lodge, alleging that the Developer "caused certain structural and material

defects" in the Lodge. Soaring Eagle, 2020 W. Va. LEXIS 699 at *2. Eventually, the Property Owners brought claims against Branch & Associates, Inc., the general contractor ("Branch"), and GBBN Architects, Inc., and, as the court noted, the litigation eventually included "multiple cross-, third-, and fourth-party claims against subcontractors, suppliers, and manufacturers, some of whom filed cross-claims and counterclaims against each other." Soaring Eagle, 2020 W. Va. LEXIS 699, at *2 n.3.

Like G&G Builders here, the Developer demanded that Branch and Travelers Indemnity Company of America (Travelers"), Branch's insurer, defend and indemnify the Developer per the contract between the Developer and Branch. Soaring Eagle, 2020 W. Va. LEXIS 699 at *2. Like Central here, neither Branch nor Travelers agreed to defend or indemnify Developer, which (like G&G Builders here) led the Developer to file a third-party complaint that included claims of breach of express contract, breach of implied contract, declaratory judgment, and unfair claims practices against Branch and Travelers. Soaring Eagle, 2020 W. Va. LEXIS 699 at *3.

Thereafter, as happened in the Circuit Court here, all parties in the underlying litigation settled all claims other than the Developer's claims against Branch and Travelers, which were excepted from the release of claims. Branch and Travelers (like Central here) then moved for summary judgment on the Developer's claims for breach of contract and bad faith. Soaring Eagle, 2020 W. Va. LEXIS 699 at *3-4.

The court in Soaring Eagle initially referenced State ex rel. State Auto Prop. Ins. Co. v. Stucky, 239 W. Va. 729, 736 806 S.E.2d 160, 167 (2017), in which the court held that:

> [t]he insured, CMD, was defended and indemnified by its insurer, State Auto, with respect to the lawsuit filed by the plaintiffs as required by the commercial general liability policy. A settlement was obtained at no cost to CMD, and no adverse judgment was entered in the circuit court. Consequently, this Court is of the opinion that, as a matter of law, CMD cannot maintain a first-party

> action against State Auto for common law and statutory bad-faith and breach of contract.

In State Auto, therefore, the court determined that an insured (such as G&G Builders) may not maintain common law or statutory bad faith claims or a breach of contract claim against the insured's insurer (such as Central) if the insurer provided a defense at no cost to the insured and a settlement was reached at no cost to the insured -- as occurred with G&G Builders here.

The court in Soaring Eagle, however, went further when it referenced Admiral Ins. Co. v. Fisher, No. 17-0671, 2018 W. Va. LEXIS 467, 2018 WL 2688182 (W. Va. Jun. 5, 2018) which an insurer informed Dr. Fisher, its named insured, that it would not provide coverage under a medical professional liability policy, but it would provide a defense for Dr. Fisher in underlying medical malpractice cases. Dr. Fisher filed a declaratory judgment action seeking to confirm coverage, while the insurer filed a counterclaim to rescind the insurance policy based upon alleged misrepresentations made on the insurance application. Before resolution of the declaratory judgment action, however, the insurer settled the underlying medical malpractice cases, and Dr. Fisher was released from all liability in those cases without having to contribute financially to any of the settlements. While the circuit court in Fisher permitted Dr. Fisher to pursue his claims against the insurer, and a jury awarded him consequential damages for aggravation and inconvenience, the insurer appealed. Under these facts, the court in Fisher held:

> To give guidance to the circuit court following remand, we briefly address Respondents' request for Pitrolo [i.e., attorneys' fees and expenses] and Hayseeds [i.e., common law bad faith] damages. In syllabus point two of [Aetna Casualty & Surety Co. v. Pitrolo, 176 W. Va. 190, 342 S.E.2d 156 (1986)], this Court 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, 176 W.Va. at 191, 342 S.E.2d at 157. Pitrolo was

initiated only after the insurer breached the insurance contract by refusing to defend. We stated:

> The general reason stated for allowing recovery of attorney's fees in this situation is that where an insurer has violated its contractual obligation to defend its insured, the insured should be fully compensated for all expenses incurred as a result of the insurer's breach of contract, including those expenses incurred in a declaratory judgment action. To hold otherwise would be unfair to the insured, who originally purchased the insurance policy to be protected from incurring attorney's fees and expenses arising from litigation.

[Pitrolo], at 176 W. Va. at 194, 342 S.E.2d at 160.

. . .

> Turning to Hayseeds, in syllabus point one this Court held: "Whenever a policyholder substantially prevails in a property damage suit against its insurer, the insurer is liable for: (1) the insured's reasonable attorneys' fees in vindicating its claim; (2) the insured's damages for net economic loss caused by the delay in settlement, and damages for aggravation and inconvenience." [Hayseeds, Inc., v. State Farm Fire & Cas., 177 W. Va. 323, 324, 352 S.E.2d 73, 74 (1986)].

Soaring Eagle, 2020 W. Va. LEXIS 699, at *11-12 (citing to Fisher, 2018 W. Va. LEXIS 467, 2018 WL 2688182 at *7-8).

Critically, the court in Soaring Eagle noted that the Developer, much like the insured in both State Auto and Fisher -- and like G&G Builders here -- "was provided a defense at no cost to it and the claims against it were settled at no cost to [Developer]." Soaring Eagle, 2020 W. Va. LEXIS 699 at *12. As a result, the court found that the circuit court "did not err in applying our findings in State Auto and Fisher and awarding judgment in favor of [Branch and Travelers]." Soaring Eagle, 2020 W. Va. LEXIS 699 at *12.

Notably, the Developer in Soaring Eagle contended that Branch and Travelers should not have been permitted to take advantage of the defense and indemnification provided to the

Developer that were paid for by *other* parties and insurers -- much like G&G Builders argues that Central should not be permitted to take advantage of the uncontested fact that *other* insurers fully defended G&G Builders, and another insurer (Cincinnati Insurance Company) paid for part of the indemnification (i.e., settlement) for the Lawsons' claims, with Central also paying a portion of the settlement, all at no cost to G&G Builders. The court in Soaring Eagle properly determined this, however, to be a distinction without a difference, and it focused, instead, 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. As a result, the court upheld the circuit court's entry of summary judgment on the Developer's claims for breach of contract, declaratory judgment, and common law and statutory bad faith against Travelers. Soaring Eagle, 2020 W. Va. LEXIS 699 at **3-4, *12.

D. The Circuit Court correctly applied the principles in Soaring Eagle as G&G Builders was always defended in the underlying Civil Action and G&G Builders was fully indemnified for all claims asserted by the Lawsons against G&G Builders as a result of the work performed by SBL.

The facts in Soaring Eagle, and the conclusion reached by the court in that case, virtually mirror the situation involving G&G Builders and Central before the Circuit Court and this Court.

The Developer in Soaring Eagle was sued by the Property Owner for various design and construction deficiencies, exactly like the Lawsons sued G&G Builders for poor design and construction of their residence in the Civil Action. The Developer demanded that Branch, the general contractor, and its insurer, Travelers, defend and indemnify the Developer for all claims made by the Property Owner, much like G&G Builders demanded that SBL and its insurers, Cincinnati Insurance Company and Central, defend and indemnify G&G Builders for the claims made by the Lawsons. The Developer was "defended by the insurers for the subcontractors as contemplated by the subcontracts[,]" just as G&G Builders was defended and indemnified by a

variety of insurers for contractors that performed work on the Lawson residence, including for the work performed by SBL. Soaring Eagle, 2020 W. Va. LEXIS 699 at *13. Finally, the Developer was defended and indemnified fully for all claims asserted by the Property Owners at no cost to the Developer, even though Travelers did not pay any part of that defense or indemnification. Here, G&G Builders has been defended fully for all claims asserted by the Lawsons related to work performed by SBL, even though Central did not pay any part of that defense. Central did, however, contribute monies to the settlement of the Lawsons' claims against SBL and G&G Builders related to the work performed by SBL, thereby contributing to the indemnification of G&G Builders.

In short, G&G Builders is in the same position as the Developer in Soaring Eagle, and Central is in the same position as Travelers. And the Circuit Court, faced with the same facts and law that the Supreme Court of Appeals of West Virginia expressly found to support entry of summary judgment on the insured's claims for breach of contract and common law and statutory bad faith, followed that law and likewise entered summary judgment for Central on all of G&G Builders' remaining claims. In doing so, the Circuit Court properly concluded that G&G Builders had been fully defended and indemnified for all claims asserted by the Lawsons and others against G&G Builders related to work performed at the Lawsons' residence, including work performed by SBL, all at no cost to G&G Builders.

1. G&G Builders' mechanic's lien against the Lawsons is not part of the "indemnification" owed an insured under the Central Policy; hence, G&G Builders' mechanic's lien is irrelevant to the issues presented.

Notably, G&G Builders does not dispute that all of its attorneys' fees and costs to defend against the Lawsons' claims related to the work by SBL have been fully paid at no cost to itself, i.e., G&G Builders has been fully defended. Likewise, G&G Builders does not argue that it was

required to pay monies to the Lawsons to settle any of the Lawsons' claims against G&G Builders related to the work performed by SBL – because it was not. Instead, G&G Builders argues that it was not "fully indemnified" for the claims asserted by the Lawsons related to work performed by SBL because G&G Builders agreed to the release of $250,000 of its mechanic's lien that it filed against the Lawsons in the Complaint that initiated the Civil Action. Critically, however, the mechanic's lien filed by G&G Builders against the Lawsons is not a "claim" asserted by anyone *against* G&G Builders – which is required for coverage under Central's Policy. App. at JA001458. Instead, the mechanic's lien represents a "claim" made by G&G Builders against the Lawsons, which is completely irrelevant to coverage available under Central's Policy and any indemnification available to G&G Builders as an insured under the Policy.

Specifically, Central's Policy states that Central "will pay sums that the insured *becomes legally obligated to pay as damages* because of 'bodily injury' or 'property damage' to which this insurance applies." App. at JA000924. Conversely, the Policy states that Central "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." App. at JA000924.

G&G Builders' mechanic's lien represented a claim that G&G Builders asserted *against* the Lawsons, pursuant to which G&G Builders sought money damages from the Lawsons. Under no circumstance would G&G Builders have been "legally obligated to pay damages" to the Lawsons pursuant to G&G Builders' mechanic's lien claim. For that simple reason, the Circuit Court properly concluded that no insurance coverage existed under Central's Policy for G&G Builders' mechanic's lien asserted against the Lawsons. App. at JA001458. In turn, the Circuit Court also properly concluded that G&G Builders' release of all or part of that mechanic's lien could not, as a matter of law, be part of the duty to indemnify owed by Central to G&G Builders,

and therefore could not be used in the evaluation of whether G&G Builders has been fully indemnified for the claims asserted against it by the Lawsons. App. at JA001458.

In short, the Circuit Court correctly concluded that G&G Builders received full indemnification from the various insurance companies -- including monies paid by Central -- in exchange for a releases of all claims asserted against G&G Builders by the Lawsons for claims related to the work performed by SBL.

2. The circumstances by which G&G Builders received a full defense in the Civil Action are not relevant.

G&G Builders claims that it was "forced to engage in years of litigation in order to compel the various insurers of subcontractors to participate in its defense." Petitioner's Brief at 16. That argument, however, is of no consequence to the claims against Central because (1) the settlements reached in the Civil Action between G&G Builders and various insurers provided for the payment of G&G Builders' defense costs, including attorneys' fees, back to when G&G Builders first provided notice of the Lawsons's claims to its own insurance carrier in 2017; and (2) G&G Builders did not provide notice of its claim against Central until June 2019 -- a full 5 years after G&G Builders was first put on notice of those claims.

Likewise, G&G Builders also claims that "it is undisputed that each of the participating carriers was only willing to pay a pro-rata share of the total defense costs in this case and expected to be paid back for any amounts they paid in excess of their disproportionate share of the total." App. at JA001315. This argument, however, is completely irrelevant here because that statement apparently reflects terms of the settlements that G&G Builders reached with various insurance carriers, which does not, and cannot, bind or otherwise have any impact on Central.[6]

[6] If one of the other insurance carriers made a claim against Central that its portion of the pro-rata defense costs should be less and that Central should be made to pay a pro-rata share, that would be a claim brought by another insurance carrier against Central, and not G&G Builders. This Court should not allow G&G Builders, however, to bring such a claim on behalf of those other insurance carriers.

Finally, G&G Builders argues that "[h]ere, the total cost of G&G's defense was eventually split among a number of different insurance carriers who had originally denied G&G's tender for defense and indemnification." App. at JA001315. This statement, however, merely reinforces that all of G&G Builders' defense costs, including attorneys' fees and expenses, were completely paid for at no cost to G&G Builders. Moreover, all "damages" incurred by G&G Builders going forward simply represent the attorneys' fees and expenses that G&G Builders continues to incur in pursuing its remaining claims – because it incurred no defense costs for the underlying claims and paid no monies to settle those claims.

3. G&G Builders' arguments about the "independent primary contractual duty" of Central to defend G&G Builders are neither accurate nor relevant.

G&G Builders attempts to distract the Court's attention from the operative issues in this appeal, including the application of Soaring Eagle, by needlessly reviewing its insurance coverage arguments that are not before this Court and are not necessarily relevant to this Court's inquiry. See Petitioners' Brief at 23-31.

For example, G&G Builders invokes Central's allegedly "independent primary contractual duty" to defend G&G Builders to argue that Central cannot claim any benefit from other insurance carriers that decided to defend and indemnify G&G in this litigation. Brief at 23 (". . . 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."). This statement, however, is both misleading and irrelevant.

First, SBL was defended in the Civil Action by Cincinnati Insurance Company for its work on the Lawson home, and G&G Builders was likewise defended in the Civil Action for claims

arising from SBL's work. Hence, G&G Builders was fully defended against all claims asserted in the Civil Action by the Lawsons for work performed by SBL.

Second, the word "independent" does not even appear anywhere in the Order; hence, it is not relevant to the analysis of the issues before this Court.

Third, the "primary duty" of Central under the Policy is subject to the "Other Insurance" provision in the Policy, which, as detailed below, makes all other insurance available to an insured (i.e., G&G Builders) "primary." App. at JA000934. Curiously, G&G Builders conveniently fails to acknowledge the "Other insurance" provision in the Policy in its Brief.

Finally, G&G Builders' arguments about the "independent primary contractual duty" to defend under the Policy actually address an insurance coverage issue not part of this appeal and not before this Court; i.e., whether G&G Builders failed to provide adequate and timely notice to Central of the Lawsons' claims against G&G Builders for work performed by SBL by failing to provide notice of those claims for almost 5 years. As noted above, that issue will be the subject of an appeal to this Court now that the Supreme Court of Appeals of West Virginia declined to address this issue on a petition for writ of prohibition.

In short, the Circuit Court correctly applied the principles in Soaring Eagle to the uncontested facts before it and determined that G&G Builders was fully defended and fully indemnified for all claims asserted by the Lawsons against G&G Builders related to work performed by SBL.

E. The Circuit Court correctly determined that the collateral source rule did not apply to payments for defense costs and indemnity made by other insurers to and on behalf of G&G Builders when examining G&G Builders' breach of contract, common-law bad faith, and statutory bad faith claims against Central in this case.

The Circuit Court correctly concluded that the collateral source rule did not apply to G&G Builders' claims against Central for breach of contract, common-law bad faith, and statutory bad faith claims. Specifically, G&G Builders argues that the collateral source rule applies here such that Central cannot be credited with the defense costs paid to G&G Builders for its defense, or for indemnity (i.e., settlement) monies paid by other insurance carriers to the Lawsons to resolve their claims against G&G Builders, including claims related to work performed by SBL. Brief at 35-36. The Circuit Court correctly concluded, however, that based upon the decision in Soaring Eagle, principles of collateral estoppel did not operate under the uncontested facts presented, i.e., where the insured (G&G Builders) received a fully-paid-for defense and indemnity at no cost to it. App. at JA001459.

In addition, as correctly explained by the Circuit Court in the Order, the collateral source rule does not apply here because the express terms of the "Other Insurance" provision in Central's Policy makes all other insurance available to an insured (i.e., G&G Builders) "primary." App. at JA000934. Under this provision, the Central Policy "is excess over . . . b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations . . . for which you have been added as an additional insured by attachment of an endorsement." App. at JA000934. This provision also states that, "[w]hen this insurance is excess, we will have no duty . . . to defend the insured [i.e., G&G Builders] against any 'suit' if any other insurer has a duty to defend the insured against that 'suit.' If no other insurer defends, we [i.e. Central] will undertake to do so . . . ." App. at JA000934.

This clear and unambiguous language must be applied as written, and as written, Central's coverage under its Policy is "excess over [] [a]ny other primary insurance available to [G&G Builders] covering liabilities arising out of the premises or operations [i.e., the work of G&G Builders and SBL at the Lawson home] for which [G&G Builders has] been added as an additional insured . . . ." App. at JA000934. As noted above, numerous other insurance carriers provided insurance coverage to G&G Builders for its work on the Lawson home, and Cincinnati Insurance Company specifically agreed that it provided coverage to G&G Builders for work done on the Lawson home by SBL. Per the clear and unambiguous terms of the Policy, therefore, Central's coverage was "excess over" all those other policies.

The uncontested fact remains that G&G Builders received a full defense and indemnification for all "liabilities arising out of the premises or operations" through other insurance coverage available to it, including the Cincinnati Insurance Company policy issued to SBL for its work on the Lawson home. The brief filed by G&G Builders, however, completely ignores both these uncontested facts and the "Other Insurance" provision of the Central Policy and instead simply repeats that Central's coverage is "primary" and "independent"[7] as though repeatedly stating these words makes the "Other Insurance" provision disappear. It does not, and this Court should, like the Circuit Court, recognize that the "Other Insurance" provision in the Central Policy negates application of the collateral source rule to the payments made by other insurance carriers to G&G Builders for defense costs and all monies paid by other insurance carriers on behalf of G&G Builders to the Lawsons to settle claims against G&G Builders related to work performed by SBL.

[7] Notably, the word "independent" does not appear anywhere in the Final Order. G&G Builders' repeated use of the word "independent" to describe Central's coverage means nothing and is designed to simply mislead this Court.

F. The Circuit Court correctly entered summary judgment for Central on G&G Builders' claims for breach of contract, common-law bad faith, and statutory bad faith claims against Central in this case as no additional discovery was needed.

G&G Builders half-heartedly argues that it demonstrated a "need" for further discovery to properly respond to Central's Motion that resulted in the Order. A cursory examination of G&G Builders' purported "need" for discovery, however, reveals the nonsensical nature of this argument.

G&G Builders' counsel submitted an Affidavit to the Circuit Court that contended "discovery is needed" on three issues. First, the Affidavit requested discovery on "Central Mutual's decision to refuse to provide a defense to G&G, including after this Court's ruling on the duty to defend issue[.]." App. at JA001340. The uncontested record reflects, however, that Central sent three (3) letters to the Circuit Court asking that it enter an order on its decision concerning the insurance coverage and notice issues with sufficient findings of fact and conclusions of law to allow full examination of those issues by a reviewing appellate court because Central intended to file a writ of prohibition to the Supreme Court of Appeals of West Virginia. App. at JA001635-001636; JA001637-001640; JA001641-001642. Shortly after the Circuit Court entered its order on the insurance coverage issues involving Central on May 28, 2024 (App. at JA001417-001445), Central filed its Petition for Writ of Prohibition on the insurance coverage issues, which the Supreme Court of Appeals only declined to review by order entered January 20, 2025, as a result of which Central will appeal those insurance coverage and notice issues to this Court. Together, these uncontested facts reflect that Central's "decision to not provide a defense" centers on its belief that the Circuit Court committed clear legal error when it refused to find that G&G Builders failed to provide timely notice of the Lawsons' claims to Central. More importantly, however,

Central's decision to challenge the Circuit Court's coverage decision has nothing to do with the issues raised in either Central's Motion or the Circuit Court's Order.

G&G Builders' next contended that it "needed" discovery on "the factual basis for Central Mutual's assertion that it did not receive adequate notice of the claims[.]" App. at JA001341. This contention makes no sense, however, as the notice issue (i.e., whether Central timely received notice of the Lawson's claims against G&G Builders resulting from SBL's work at the Lawson home) represents the entire basis for Central's position on insurance coverage issues, which the Circuit Court addressed after the conclusion of the discovery period, which included discovery on all claims related to insurance coverage.[8] In other words, G&G Builders had the opportunity to conduct all the discovery it wanted on "the factual basis for Central Mutual's assertion that it did not receive adequate notice of the claims[.]" Moreover, the Circuit Court concluded that "G&G Builders first provided notice of the Lawsons' claims to Central Mutual [on] June 21, 2019, when Central Mutual received a letter from Tanya Kesner, counsel for G&G Builders, dated June 21, 2019[.]" App. at JA001442. Contending that it has a "need" for this discovery now is both fundamentally misleading and not relevant.

Finally, G&G Builders asserted that it needed discovery on "Central Mutual's belated decision to participate in the underlying settlement of the Lawsons' claims while still refusing to pay its share of G&G's defense costs." App. at JA001341. Why Central contributed monies to the settlement of the Lawsons' claims against G&G Builders is neither relevant nor important. The uncontested fact is that it did, and that is all that is important. Moreover, that Central contributed monies to the settlement of the Lawsons' claims against G&G Builders is not contested, and in conjunction with Central's continued pursuit of appellate review of the Circuit

[8] The Circuit Court bifurcated the underlying construction and insurance coverage claims, and allowed discovery on those claims, from the breach of contract and common law and statutory bad faith claims.

Court's coverage decisions, it reflects that no further discovery was necessary for G&G Builders to respond to the Motion filed by Central.

In short, the additional discovery that G&G Builders posits it "needed" to properly respond to the Motion is simply a nonsensical smoke screen to distract from the Circuit Court's correct determination that no issues of *material* fact on the issues raised in Central's Motion were disputed. For that reason, the Circuit Court properly rejected G&G Builders' request for additional discovery before the Circuit Court entered its Order.

G. The Circuit Court correctly entered summary judgment on G&G Builders' claims for common law bad faith and violations of the Unfair Trade Practices Act.

Finally, G&G Builders argues that the Circuit Court erred when it granted summary judgment on G&G Builders' claims for common law and statutory bad faith. Petitioner's Brief at 38-39. To support this statement, G&G Builders states that "[u]nlike G&G, the developer in Soaring Eagle received defense and indemnification from the subcontractors' insurers consistent with the development company's contract[.]" Petitioner's Brief at 39.

This statement, however, represents another iteration of G&G Builders' emphasis of a distinction that makes no difference. For example, exactly like the developer in Soaring Eagle, G&G Builders received a defense and indemnification from the contractors' insurers consistent with "G&G Builders Inc. Special Conditions" that were a part of each of the contracts between the Lawsons and the contractors. That G&G Builders describes itself as an "owners' representative" instead of a general contractor or developer is completely irrelevant. That it received a complete defense and indemnification from the contractors' insurance carriers represents the only important fact.

Moreover, G&G Builders has been defended on the Lawsons' claims from the time that it first reported those claims to its own insurance carrier, Westfield National Insurance Company, on November 12, 2017. See S. APP. 0000007 and JA001247-001248. Thereafter, as G&G Builders concedes, other insurance carriers began to "participate in G&G's defense" through the payment of G&G Builders' attorneys' fees and expenses. See App. at JA001306; JA001243; JA001248.

In short, G&G Builders has been defended from the time that it first notified its own insurance carrier, Westfield, about the Lawsons' claims against it, and thereafter, additional insurance companies paid all of G&G Builders' defense costs related to the Lawsons' claims. Moreover, all of the monies paid to settle the Lawsons' claims against G&G Builders were paid by insurance carriers – including Central. No monies to settle the Lawsons' claims were paid by G&G Builders – and G&G Builders does not even pretend to argue otherwise. Together, these uncontested facts reveal that the *only* alleged damages that G&G Builders could possibly recover at this point on its breach of contract and common law and statutory bad faith claims are the attorneys' fees and expenses that its counsel continues to accumulate by pursuing those claims and this appeal. Put another way, G&G Builders was made whole when claims asserted by the Lawsons settled. At this point, this case is solely about G&G Builders' counsel seeking to run up legal bills, and then making other insurance companies, including Central, pay those bills.

The Court in Soaring Eagle understood that, as did the Circuit Court here when it entered this Order. This Court should, as well, which is why Central asks that it affirm the Order in its entirety.

VI. CONCLUSION.

For the reasons detailed above, Central asks that this Court dismiss this appeal, without prejudice, as the Order appealed by G&G Builders was not a final order under W. Va. R. Civ. P. 54(b), and this appeal is therefore premature.

In the event this Court considers the substantive issues raised in this appeal, Central asks that the Court affirm the Order entered by the Circuit Court in all respects.

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No. 24-ICA-441

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
At Charleston

G&G BUILDERS, INC.,

Petitioner,

v.

CENTRAL MUTUAL INSURANCE COMPANY,

Respondent.

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

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2025, I electronically filed the foregoing **Respondent's Brief** via File & ServeXpress which will provide electronic notification to the following counsel of record:

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