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 REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT OF THE CASE

In this appeal, G&G Builders Inc. (G&G) asserts that the Circuit Court of Cabell County erred when it granted summary judgment to Central Mutual Insurance Company ("Central") on G&G's claims against Central for breach of contract, bad faith and violations of West Virginia's Unfair Trade Practices Act. Said claims arose from Central's denial of defense and indemnification of G&G in connection with claims asserted by Randie and Deanna Lawson ("the Lawsons") related to the construction of the Lawsons' home. G&G was the owners' representative for the project and had initially filed suit against the Lawsons to recover under a mechanics lien for work G&G had performed for the Lawsons on the project. (See JA79-163.) In response, the Lawsons filed a counterclaim against G&G alleging that the home had various defects and also asserted claims against a number of the subcontractors and suppliers involved in the project. (See JA164-183.)

One of the subcontractors involved in the Lawson project was Stone By Lynch, LLC. ("SBL") which was insured by Central.[1] Before beginning work, SBL entered into a contract which required it to hold G&G harmless in the event of claims and losses related to SBL's work and/or product and to obtain insurance coverage to protect G&G in the event of such a claim or loss. (See JA671-672.) In that regard, the Central Policy expressly provided that anyone SBL agreed to defend and indemnify in a written contract would also qualify as an "additional insured" under the Central Policy. (See JA924-925, JA935-938 and JA954-963.) In addition, a Certificate of Insurance was issued by Central's agent to G&G to confirm that the required insurance had

1 While the Lawsons did not initially name SBL as a defendant, their retained expert engineer, Gregory L. Boso, P.E., provided opinions in 2019 suggesting that SBL's work on the exterior masonry and drainage system was defective. (JA600-603)

been obtained. (See JA678.) That Certificate expressly provided that "Certificate Holder [G&G] is listed as an additional insured with respect to the general liability under form 81869 1207 as required per written contract." (See JA678.)

As the litigation developed, G&G sought defense and indemnification from the various subcontractors and suppliers in connection with the Lawsons' claims against it and requested that their respective insurance carriers defend and indemnify G&G. While a number of the carriers for the various subcontractors and suppliers eventually agreed to defend G&G in connection with the claims arising from their insureds' work or products, Central and certain others refused to do so even though SBL had agreed to indemnify and hold harmless G&G for any claims arising from its work on the project. Therefore, G&G filed suit against Central seeking defense and indemnification and also asserting claims for Central's breach of contract, bad faith, and violations of West Virginia's Unfair Trade Practices Act. (See JA359-417.)

Following discovery, the Circuit Court below granted summary judgment to G&G on the coverage issue and found that Central was, in fact, contractually obligated to defend G&G. (See JA570-830.) Despite this finding, Central continued to refuse to participate in G&G's defense and instead 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* (JA1264-1303) in which it argued that because G&G was always defended by one or more of the insurance carriers for the other subcontractors, it could have no valid claims against Central for breach of contract, bad faith or unfair trade practices. In effect, Central took the position that, so long as someone defended G&G in the litigation, it could ignore its own primary contractual obligation to do so. In support of its position, Central directed the Circuit Court to 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 suggested that, like the claimant in *Soaring Eagle,* G&G had received a full defense and full indemnification from one or more insurance carriers for other subcontractors and, therefore, could not recover against Central. (See JA1279-1283.)

On October 3, 2024, 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) and found in favor of Central. In particular, the Circuit Court found that G&G had no right to recover from Central for its breach of contract, bad faith, or violations of the Unfair Trade Practices Act because it had been defended by other subcontractors' insurance carriers and was ultimately related without payment even though G&G was required to release $250,000 of its mechanics lien against the Lawsons as consideration to obtain the settlement of the Lawsons' claims arising from SBL's work. (See JA1457-1460.)

Because the Circuit Court failed to recognize that there were critical differences between this case and *Soaring Eagle* and further failed to recognize that the settlement of the Lawsons' SBL-related claims was not made "at no cost to G&G" since G&G had to release $250,000 of its mechanics lien, G&G filed this appeal (JA1461-1477) and asked the Court to reverse the Circuit Court's decision. Central has now filed its *Response Brief* in which it again relies upon *Soaring Eagle* and continues to argue that G&G provided no valuable consideration to obtain the settlement with the Lawsons. G&G now submits its *Reply Brief* and asks that the Circuit Court's October 3, 2024 *Order* be reversed.

ARGUMENT

I. G&G's appeal is not premature.

Central begins its arguments by asserting that G&G's appeal is premature because the Circuit Court's October 3, 2024 *Order* is interlocutory and does not dispose of all of G&G's claims against the other insurance carriers. In particular, Central argues that, because the Circuit Court's *Order* does not include the specific language set forth in *Rule 54* of the *West Virginia Rules Of Civil Procedure* that "no just reason for delay exists," the Order is not a "final order" subject to an appeal at this time.

Central's arguments ignore the fact that the Circuit Court's October 3, 2024 *Order* completely disposes of G&G's claims against Central and, therefore, approximates a final order in its nature and effect. In the recent case of *Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Westlake Chem. Corp.*, 249 W. Va. 575, 900 S.E.2d 1 (2024), the West Virginia State Supreme Court of Appeals explained;

> "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."

Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Westlake Chem. Corp., at 576, 3. In this case, the Circuit Court's *Order* effectively dismissed all of G&G's remaining claims against Central and left nothing else to be decided between these parties. Therefore, the existence of other claims against other insurance carriers is simply irrelevant to G&G's dispute with Central and this matter is ripe for appeal.

II. Central's reliance upon the *Soaring Eagle* decision is misplaced.

Central next directs the Court to the *Soaring Eagle* decision and argues that it is controlling in this case. However, Central fails to recognize that there are important distinctions between the facts of this case and those at issue in *Soaring Eagle*. Specifically, the Circuit Court in this case determined that under the terms of Central's Policy and the indemnification provisions of the SBL contract, Central was obligated to provide "primary liability coverage" to G&G as an "additional insured" under its Policy to defend G&G in connection with the Lawsons' SBL-related claims. (See JA1441.) In that regard, the SBL contract for the Lawson project expressly provided that "[t]he additional named insured endorsement shall be endorsed as **primary coverage** on Contractor/Material Supplier's commercial general liability and excess insurance policy." (See the SBL Contract at JA671-672.) (Emphasis added.) In contrast, the insurer for the general contractor in *Soaring Eagle* had excess coverage for the claimant developer above the coverage provided by the insurers for the subcontractors involved in the project. For example, the Court in *Soaring Eagle* noted that the insurer for the general contractor (Travelers) had advised the claimant developer by letter at the outset of the litigation that its policy only provided excess coverage. The letter stated:

> "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."

Soaring Eagle, No. 19-0841, 2020 W. Va. LEXIS 699, at 3. (Emphasis added.) The Court then explained:

> **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, No. 19-0841, 2020 W. Va. LEXIS 699, at 5 (Emphasis added.) In effect, the contract in *Soaring Eagle* required the general contractor on the project to defend and indemnify the claimant developer, but also expressly mandated that the subcontractors would be required to defend the claimant developer as well. Because the insurers for the subcontractors complied with that requirement and defended and indemnified the claimant developer against **all** of the claims on a primary basis throughout the litigation, the Supreme Court found that the claimant developer had no valid claim for attorney's fees against the general contractor's insurer, which provided excess coverage to that provided by the carriers for the subcontractors. The Court noted:

> As in *State Auto* and *Fisher*, petitioner herein was provided a defense at no cost to it and the claims against it were settled at no cost to petitioner. For these reasons, under the facts of this case, we find that the circuit court did not err in applying our findings in *State Auto* and *Fisher* and awarding judgment in favor of respondents.

Soaring Eagle, No. 19-0841, 2020 W. Va. LEXIS 699, at 12. Unlike Travelers in *Soaring Eagle*, Central was not providing excess coverage for the claims arising from SBL's work over and above other coverage. Instead, Central is in the position of the insurers for the subcontractors in *Soaring Eagle,* who stepped up and provided the defense and indemnification of the claimant developer on a primary basis. Like the subcontractors' insurers in *Soaring Eagle*, Central had a primary duty to defend and indemnify G&G in connection with the claims arising from SBL's work. However, the similarities end there. Rather than comply with its contractual obligations, Central breached its contract by denying coverage to its additional insured, G&G, and refused to participate in G&G's defense. While other insurance carriers for other subcontractors ultimately agreed to defend G&G, they were defending G&G under the separate contracts entered into by their insureds for the claims arising from their subcontractor work on the project. In its *Reply Brief*, Central asserts it was allowed to ignore its contractual obligations to G&G merely because other subcontractors'

insurance carriers did not. Central does not, however, explain how or why it deserves such a unique "free pass" while other, responsible, insurance carriers must honor their contractual obligations. Moreover, Central appears to be suggesting that insurance carriers in such situations should wait to see if anyone else will defend their additional insureds so that they can avoid their own contractual obligations. Such a situation would deny West Virginia businesses the benefit of the insurance coverage they purchase at great expense and reward the carriers who refuse or delay their contractual duties.

Next, Central ignores the fact that, in *Soaring Eagle*, the claimant developer did not contribute anything as consideration for the settlement of the claims against it. In fact, it is undisputed in this case that G&G had to release $250,000 of its mechanics lien as consideration for the settlement of the Lawsons' SBL-related claims and the Circuit Court even acknowledged that fact in its *Order*. (See JA1458.) Nevertheless, the Circuit Court mistakenly concluded that G&G's mechanics lien would only be relevant if it represented a potential claim against G&G and found, 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) In the same fashion, Central argues at pg. 18 of its *Response Brief*:

> 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.

Both statements ignore the fact that G&G has never argued that the mechanics lien represented a claim which was "covered" under the Central Policy. Instead, G&G has correctly pointed out that, unlike the claimant developer in *Soaring Eagle*, G&G did not obtain a settlement of the Lawsons' SBL-related claims at "no cost" to it. (See *Soaring Eagle* at 12.) Rather, G&G had to release $250,000 of its mechanics lien as consideration to get the Lawsons to release their claims related to the work of SBL, which claims were "covered" under the Central policy. This clearly represents a "cost" of the settlement incurred by G&G which no one reimbursed or otherwise paid on its behalf. In that regard, West Virginia Courts have long recognized that "[a] compromise of a controversy is a valuable consideration to sustain a contract." *Sanders v. Roselawn Mem'l Gardens*, 152 W. Va. 91, 93, 159 S.E.2d 784, 786 (1968). In this case, G&G gave up valuable consideration in the form of its entitlement to collect $250,000 of its mechanics lien from the Lawsons in order to obtain a settlement of their SBL-related claims. For that reason, Central's suggestion that the mechanics lien is "irrelevant" is flat out wrong. Clearly, G&G gave up something of value as consideration for which it was not compensated in order to obtain the settlement and, therefore, did incur a "cost" which was not paid by anybody else. Under these circumstances, the principles discussed in *Soaring Eagle* do not apply.

III. Central's suggestion that G&G was defended by Cincinnati Insurance Company for all of the claims arising from the work performed by SBL ignores the facts of this case.

Central next suggests that G&G's arguments with respect to Central's contractual duty to defend it on a primary basis ignore the fact that G&G was being defended on the claims against SBL by Cincinnati Insurance Company ("Cincinnati") which had insured SBL after SBL's coverage with Central had ended. This suggestion ignores the facts of this case as outlined by Central itself.

At pg. 3 of its *Response Brief*, Central acknowledges the history of SBL's work on the Lawson project as follows:

> Daily Work records reveal that SBL began work at the Lawson home on or about May 5, 2011. App. at 000967. Thereafter, before the [Central] Policy terminated on July 8, 2011, SBL performed stone work on the Lawson home. App. at 000967-000992.

(See the *Response Brief,* at pg. 3.) Likewise, it is undisputed that the Policy issued to SBL by Cincinnati did not go into effect until July 8, 2011. (See JA1497) These facts are important because the Lawsons' expert engineer, Gregory Boso, opined that it was the "failure of the exterior masonry and drainage systems of the home" which was "allowing water into the stone façade and framing system at numerous locations." (JA000601) Put simply, it was the preliminary work performed by SBL, while the Central Policy was still in effect, that purportedly caused a number of the problems. While Cincinnati did eventually agree to participate in G&G's defense after being joined in the litigation, it certainly could not be held liable for damages purportedly caused before its Policy went into effect.[2] Therefore, it was Central, not Cincinnati which had the contractual duty to provide primary coverage for G&G's defense in connection with claims arising from SBL's early work on the project. The fact that Cincinnati provided coverage for work done by SBL later provided no protection to G&G for damages arising from SBL's initial defective work.

IV. Central's arguments regarding the collateral source rule ignore the Circuit Court's decision with respect to coverage under the Central Policy.

At pg. 20 of its *Response Brief*, Central takes issue with the fact that G&G explained the underlying insurance coverage issues in its *Brief* and suggests that G&G was "needlessly

2 In this case, the Lawsons alleged that SBL failed to properly install the bitithane underlayment (JA 543), which necessarily is the first step in the installation of the stonewall. Accordingly, this work by SBL would necessarily have occurred at the initial stage of SBL's work, while SBL was insured by Central.

reviewing its insurance coverage arguments that are not before this Court and are not necessarily relevant to this Court's inquiry." However, at pg. 22 of its *Response Brief*, Central appears to reconsider how relevant those coverage issues are and raises them on its own behalf in support of its suggestion that the collateral source rule should not apply to the payment of G&G's defense costs by the insurance carriers of other subcontractors. Specifically, Central states:

> 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."

(See pg. 22 of the *Response Brief*.) In effect, Central is arguing that because its Policy provides that its coverage was "excess" over any other available coverage, payments by other insurance carriers that also provided "primary' coverage does not represent a collateral source.

As noted above, the Circuit Court found in its May 28, 2024 *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) that Central was obligated to provide "primary liability coverage" for the defense of G&G as an "additional insured" under its Policy. (See JA1441.) While Central would clearly like to re-hash this aspect of the coverage dispute, that finding is not before the Court in this appeal. Moreover, Central ignores the plain language of the SBL contract which expressly requires SBL to obtain "primary coverage" to protect G&G with respect to the SBL-related claims. (See the SBL Contract at JA671-672.) In effect, Central is asking this Court to reverse the Circuit Court's ruling in the May 28, 2024 *Order*

(which is not the subject of this appeal) and find that the "fine print" of a policy that was never provided to G&G overrules the contractual agreement between G&G and SBL.[3]

While Central is correct when it notes that G&G never mentioned the "Other Insurance" provisions in the Central Policy in its *Brief*, it ignores the fact that no mention of those provisions was necessary when Central's own Counsel acknowledged at the hearing on Central's *Motion For Summary Judgment* with respect to the coverage issues that the only issue in dispute was G&G's alleged failure to comply with the Policy's notice requirements. 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**.
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> * * *
>
> 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.

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3 It is undisputed that Central never provided a copy of the Policy to G&G. In *Marlin v. Wetzel Cty. Bd. of Educ.*, 212 W. Va. 215, 222, 569 S.E.2d 462, 469 (2002), the West Virginia State Supreme Court noted 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**." *Marlin*, at 224, 471. (Emphasis added.) Moreover, the Certificate of Insurance which Central provided to G&G expressly indicated that the insurance provided was "as required per written contract." (See JA678.) Because the "written contract" expressly required that SBL's insurance coverage be "primary" (See JA 1441, 671-672) G&G would have had no reason to suspect that it contained the "Other Insurance" provision upon which Central now relies to suggest that its coverage was excess. For all of these reasons, Central's failure to provide a copy of the Policy to G&G estops it from relying upon the subject "Other Insurance" provisions as a matter of law.

(JA1235) Only after losing on that "simple issue" has Central seen fit to raise the "Other Insurance" provisions of its Policy and argue that its coverage was actually excess[4].

In addition to raising the "Other Insurance" provisions of its Policy, Central also argues that the collateral source rule should not apply under the principles discussed in the *Soaring Eagle* decision. While *Soaring Eagle* does not apply for the reasons set forth above, it should be noted that the claimant in *Soaring Eagle* never raised the collateral source rule to suggest that evidence of payments by other insurance carriers was not admissible. In fact, the Supreme Court in *Soaring Eagle* noted:

> Petitioner has failed to point to any decision from this Court, or any court, that supports its argument that it is entitled to reimbursement for attorney's fees and costs under the facts of this matter.

Soaring Eagle, No. 19-0841, 2020 W. Va. LEXIS 699, at 14. In contrast, it is undisputed in this case that G&G did raise the collateral source rule from the beginning and has repeatedly pointed out in its briefing that evidence of funds received or available from a collateral source is inadmissible. 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) For obvious reasons, G&G's rights under the collateral source rule should not be restricted merely because *Soaring Eagle* did not

4 G&G clearly disagrees with Central's position, but the issue is not the subject of this Appeal.

address the issue that payments by other insurance carriers are a classic example of a collateral source[5].

V. Central's arguments with respect to the need for additional discovery ignore applicable law.

Finally, Central suggests in its *Response Brief* that the Circuit Court properly found that no additional discovery was needed with respect to G&G's claims and could therefore grant summary judgment to Central even though G&G's breach of contract, bad faith and unfair trade practices act claims had been stayed and were never subject to discovery. In *Soaring Eagle*, the Court noted:

> Rule 56(c) of the West Virginia Rules of Civil Procedure declares "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that *there is no genuine issue as to any material fact* and that the moving party is entitled to a judgment as a matter of law." (Emphasis added). **Parties opposing the motion may utilize Rule 56(f), which provides "a procedural 'escape hatch' . .. for a party who genuinely requires additional time to marshal material facts to contest a summary judgment motion."** *Powderidge Unit Owners Assoc. v. Highland Properties, Ltd.*, 196 W. Va. 692, 701, 474 S.E.2d 872, 881 (1996). Petitioner's argument fails when considering that "the party making an informal Rule 56(f) motion must . . . demonstrate that the material facts will, if obtained, suffice to engender an issue both genuine and material[.]" *See* syllabus, in part, *Elliott v. Schoolcraft*, 213 W. Va. 69, 576 S.E.2d 796 (2002) (applying the four-requirement test provided in *Powderidge* to a party's informal Rule 56(f) motion). **As respondents point out, petitioner fails to articulate why further discovery was necessary in order to rule on respondents' motion for summary judgment. Petitioner did not submit an affidavit, in accordance with Rule 56(f), and failed to meet the minimum requirements set forth in *Powderidge*.**

Soaring Eagle, No. 19-0841, 2020 W. Va. LEXIS 699, at 7-8. (Emphasis added.) In contrast, G&G expressly pointed out in its briefing that, because of a stay of discovery, there was no possible

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5 As noted, however, *Soaring Eagle*, is distinguishable because the claimant developer was defended by the subcontractors' insurers who had the primary coverage for the defense of the claimant developer, as opposed to the excess coverage provided by Travelers.

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*. (JA1318) It also pointed out that, because of the stay, no depositions with respect to the defense and indemnification issues had been taken, no written discovery had been served and no Scheduling Order with respect to those claims was in place. (JA1318-1319) Likewise, G&G provided a *Rule 56(f)* Affidavit to the Court in which G&G's counsel specifically identified the areas where discovery was needed. (JA1339-1341) Therefore, unlike the claimant developer in *Soaring Eagle*, G&G did present specific information to support its claim that discovery was needed. Central simply does not agree with G&G's position and is now attempting to argue that none of the issues raised by G&G are relevant.

First, Central takes issue with G&G's assertion that discovery was needed regarding Central's decision to refuse to begin providing a defense after the Circuit Court ruled that it had a primary contractual obligation to do so with respect to the SBL-related claims. While Central points out that its counsel asked the Circuit Court to enter an order on the coverage issues so that it could pursue a writ of prohibition, that fact does not explain why Central felt it could continue to ignore the ruling on its duty to defend and then suddenly deciding at the end of the mediation to participate in settlement discussions. Clearly, Central wanted to settle the case while preventing G&G from conducting discovery regarding the factual basis of its continuing refusal to participate in G&G's defense. Now that it has obtained the desired ruling without allowing the requested discovery, it conveniently argues that no such discovery was necessary in the first place because the case was settled. This is precisely the situation the Court sought to avoid in *Elliot v. Schoolcraft*, 213 W.Va. 69, 576 S.E.2d 796 (W.Va. 2002), where it held that "[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.

Next, Central argues that G&G had an adequate opportunity to conduct discovery regarding the factual basis for Central's assertion that it did not receive adequate notice before Central's *Motion* was filed. Once again, this argument ignores the fact that all discovery regarding G&G's bad faith and breach of contract claims was stayed and G&G could not request copies of Central's claim file or depose its claims adjusters. Instead, the underlying tort claims of the Lawsons were still being litigated and unfettered discovery of the insurers' claim files would have provided the Lawsons access to otherwise undiscoverable information concerning the defense of their claims. The Circuit Court simply accepted Central's assertion that no further discovery was needed at face value without considering the status of the underlying tort litigation.

Finally, Central asserts at pg. 25 of its *Response Brief,* "[w]hy Central contributed monies to the settlement of the Lawsons' claims against G&G Builders is neither relevant nor important." In fact, the basis for that decision is crucial to G&G's claims. If Central felt it never had any duty to defend or indemnify G&G, it would have had no need or motivation to contribute to a settlement of the Lawsons' SBL-related claims and could have simply waited for its appeal. If, on the other hand, Central recognized that it did have such a duty, but wished to avoid paying its participation in G&G's defense, Central would have a strong motive to contribute to a settlement while refusing to pay G&G's defense costs. In the end, that is precisely what happened and Central is now seeking a "no harm no foul" ruling from this Court so that it can continue to avoid the consequences of its breach of its contractual obligation to provide the primary defense of G&G in connection with the SBL-related claims.

CONCLUSION

Central's assertion that G&G was always defended in this case and never incurred any cost to resolve the Lawson's claims ignores the fact that G&G released $250,000 of its mechanics lien, as well as Central's primary duty to defend G&G from the Lawsons' SBL-related claims which the Circuit Court found Central clearly had. Likewise, Central's reliance upon *Soaring Eagle* is misplaced because Central had a duty to defend G&G on a primary basis which it simply ignored. Therefore, the Circuit Court's award of summary judgment to Central should be reversed and this action should be remanded for further proceedings on the merits.

Respectfully submitted,

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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 REPLY 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 REPLY BRIEF"** upon all parties and known counsel of record, via File & ServeXpress, as indicated below, this 5th day of February, 2025, addressed as follows:

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