No. 25-ICA-111

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
At Charleston

STATE OF WEST VIRGINIA *ex rel.*,
CENTRAL MUTUAL INSURANCE COMPANY,

Appellant,

v.

G&G BUILDERS, INC.,

Appellee.

From the Circuit Court of
Cabell County, West Virginia
Civil Action No. 14-C-250

APPELLANT'S BRIEF

Submitted by:

Mychal S. Schulz (WVSB #8174)
BABST, CALLAND CLEMENTS & ZOMNIR, P.C.
300 Summers Street, Suite 1000
Charleston, WV 25301
Telephone: 681-205-8888
Facsimile: 681-205-8814
mschulz@babstcalland.com

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III. ASSIGNMENTS OF ERROR

Appellant Central Mutual Insurance Company ("Central"), a Third-Party Defendant below, asserts that the Circuit Court of Cabell County ("Circuit Court") erred when it entered an 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 on May 28, 2024 (the "Order"). This Order excused the uncontroverted 5-year delay by Respondent G&G Builders, Inc. ("G&G Builders"), the Plaintiff and Third-Party Plaintiff below, in providing notice to Central of the claims against G&G Builders asserted by homeowners Randie Gail Lawson and Deanna Dawn Lawson (Defendants below) arising out of the work of Stone by Lynch, Inc. ("SBL"), a contractor that was Central's named insured under a Commercial General Liability Policy issued by Central to SBL ("the Policy"). Specifically, the Circuit Court erred as follows:

1. The Circuit Court erred when it concluded that "Central is estopped from denying coverage or a duty to defend G&G in this case based on coverage limitations which were not included or disclosed in the Certificate of Insurance which purported to provide the insurance coverage mandated under SBL's contract" when the "coverage limitation" was a notice requirement contained in the Policy.

2. The Circuit Court erred when it concluded that "Central cannot rely upon non-disclosed notice requirements to deny coverage when it otherwise applies under the CGL Policy" when the "non-disclosure" was in the Certificate of Insurance, not the Policy.

3. The Circuit Court erred when it concluded that an uncontested 5-year delay between when G&G Builders received notice of the Lawsons' claims against G&G Builders and SBL (June 12, 2014) and when G&G Builders first provided notice of the Lawsons' claims to Central (June 21, 2019) was reasonable.

4. The Circuit Court erred when it concluded that Central did not demonstrate prejudice from the 5-year delay, despite (1) the admission of G&G Builders' own supervisor that he could not remember details of work at the property performed by SBL, Central's named insured, at the Lawson property and (2) evidence of a fire in February 2015, which resulted in the loss of SBL's records concerning its work at the Lawson home.

Together, these clearly erroneous conclusions by the Circuit Court resulted in the ruling that Central must provide insurance coverage to G&G Builders for the allegations made by the Lawsons to the extent those allegations include work performed by SBL, Central's named insured.

In short, the entire premise upon which the Circuit Court concluded that Central owes insurance coverage to G&G Builders for the allegations made by the Lawsons related to the work of SBL represents clear error, and this Court should reverse the Order as it relates to Central's Company's Motion for Summary Judgment on Coverage Issues and reverse with instructions to grant that motion.

IV. STATEMENT OF THE CASE.

None of the facts relevant to Central's denial of G&G Builders' claim for insurance coverage were contested by G&G Builders. Moreover, G&G Builders did not contest any of the facts as they related to Central's coverage position. For purposes of this appeal, therefore, all the facts contained in both the Order and Central's Motion for Summary Judgment on Coverage Issues should be taken as true.

A. General Background.

The underlying matter centered 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 Builder's 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).

On April 4, 2011, SBL, one of many contractors that performed work on the Lawson home, entered into a written contract with the Lawsons to perform masonry/stonework on the Lawson home ("the Contract"). JA at 0742-0756. 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.

JA at 000751.[1]

Central insured SBL under a Commercial General Liability Policy in effect from July 8, 2010, to 12:01a, July 8, 2011, at which time the Policy terminated. JA at 0757-0841. Cincinnati Insurance Company then insured SBL under an insurance policy for the period July 8, 2011, to July 8, 2014. JA at 0308.

[1] G&G Builders styled itself as the "Owner's Representative" of the Lawsons instead of their General Contractor. Most, if not all, of the written contracts between the Lawsons and contractors who worked on their residence contained "G&G Builders Inc. Special Conditions."

G&G Builders received a Certificate of Insurance ("COI") issued to it by Central Carolina Insurance Agency no later than May 5, 2011.[2] The COI issued to G&G Builders itself explicitly notes that G&G Builders did not gain any rights or obligations under that document:

> THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. THIS CERTIFICATE OF INSURANCE DOES NOT CONSTITUTE A CONTRACT BETWEEN THE ISSUING INSURER(S), AUTHORIZED REPRESENTATIVE OR PRODUCER, AND THE CERTIFICATE HOLDER.
>
> IMPORTANT: If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. If SUBROGATION IS WAIVED, subject to the terms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

JA at 0554.

Central conceded[3] before the Circuit Court that (1) SBL obtained insurance coverage under the Policy that covered the work that it performed on the Lawson home and its indemnification obligation to G&G Builders under the Contract, and (2) the COI was issued that reflected G&G Builders to be an additional named insured under the Policy. JA at 0720 and 0554. The only issue presented by Central's Motion for Summary Judgment on Coverage Issues ("Central's Motion on

[2] While no evidence exists in the record as to when, exactly, G&G Builders actually received the COI, it necessarily had to be before May 5, 2011, when SBL began work on the Lawson residence. As discussed below, G&G Builders necessarily must concede that it possessed the COI by that date; otherwise, it cannot claim that it "reasonably relied" upon the COI as evidence of SBL's insurance coverage before it permitted SBL to begin working at the Lawson home as required by Marlin v. Wetzel County Bd. of Educ., 212 W. Va. 215, 222, 569 S.E.2d 462, 469 (2002), on which both the Order and G&G Builders' arguments rely.

[3] Central conceded these items in its Motion for Summary Judgment on Insurance Coverage Issues.

Coverage Issues"), therefore, concerned the application of the notice of claim provision in the Policy to the uncontroverted 5-year delay by G&G Builders in provide a notice of claim.

B. SBL's Work on the Lawsons' Home.

Daily Work records prepared by G&G Builders reveal that SBL began work at the Lawson home on or about May 5, 2011. JA at 0843. Thereafter, before the Policy terminated on July 8, 2011, SBL performed stone work on the Lawson home. JA at 0845-0868. Work continued at the Lawson home by a variety of 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.[4]

C. Notice to G&G Builders of the Lawsons' claims related to the work of SBL.

On March 20, 2014, G&G Builders filed its 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. 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 alleged 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." JA at 0046 (emphasis added).

Thereafter, G&G Builders attempted to force the Lawsons' claims into arbitration, which was ultimately unsuccessful following a decision by the West Virginia Supreme Court of Appeals

[4] The overwhelming amount of the work performed by SBL at the Lawson home took place after July 8, 2011, during which period Cincinnati Insurance provided insurance coverage to SBL. JA at 0870-0877.

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 their 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.

JA at 0880. 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." JA at 881.

D. Notice to Central of the Lawsons' claims by G&G Builders.

Central 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. JA at 0892-0922.[5]

[5] Central initially 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." JA at 0924.

Even before that, on March 7, 2018, G&G Builders filed a Third-Party Complaint against a number of subcontractors that worked on the Lawson home (but not against Central). JA at 0056-0087. G&G Builders filed an Amended Third-Party Complaint on September 3, 2019 (JA at 0088-0124), and a Second Amended Third Party Complaint on December 2, 2019 (JA at 0162-0176), neither of which included any claims against Central. On March 5, 2020, G&G Builders served its Third Amended Third Party Complaint, which was the first pleading that named Central as a party. JA at 0177-0236. Thereafter, Central, after a reasonable investigation, denied G&G Builders' claim for coverage by letter dated July 31, 2020. JA at 0926-0929.

E. Procedural History of the Claims against Central and the Circuit Court's Order.

1. G&G Builders' claims against Central in the Third Amended Third-Party Complaint.

G&G Builders' Third Amended Complaint contained claims against a number of additional parties, including both contractors and insurers. As to contractors, including SBL, G&G Builders alleged claims for implied and express indemnity and contribution. As to insurers, G&G Builders alleged claims for breach of contract, common law bad faith, statutory bad faith, and declaratory judgment.[6] JA at 0177-0236. Eventually, G&G Builders filed a total of six (6) third-party complaints (the initial Third-Party Complaint and five (5) amended Third-Party Complaints), each of which added contractors and/or insurers as parties and claims against those parties. JA at 0056-0087; 0088-0124; 0125-0161; 0162-0176; 0177-0236; 0237-0302.

[6] Interestingly, G&G Builders first filed claims against Cincinnati Insurance Company, SBL's insurer after July 8, 2011, in its Third-Party Complaint filed on September 3, 2019. JA at 0088-0124. It then filed claims against SBL in its Amended Third-Party Complaint filed on December 2, 2019. JA at 0125-0161. Not until filing its Third Amended Third-Party Complaint on March 2, 2020, did G&G Builders bring claims against Central.

2. Motions for Summary Judgment on insurance coverage issues.

G&G Builders filed a Motion for Summary Judgment on Coverage Issues With Respect to Central Mutual Insurance Company Policy on November 19, 2021 ("G&G Builders' Insurance Coverage Motion"). JA at 0446-0706. Central filed a Response on December 20, 2021, to which G&G Builders filed a reply on January 14, 2022. JA at 1054-1070 and 1071-1083. This motion focused on the terms of the Policy, the Contract, and the COI.

Central also filed a Motion for Summary Judgment on Coverage Issues ("Central's Motion on Coverage Issues") on November 19, 2021. JA at 0707-0949. G&G Builders filed a Response on December 17, 2021 (JA at 0950-1053), to which Central filed a Reply on January 18, 2022. JA at 1084-1107. This motion focused solely on the failure of G&G Builders to provide timely and reasonable notice of claim under the Policy.

The Circuit Court held a hearing on various motions for summary judgment related to insurance coverage issues on February 8, 2022. JA at 1108-1116. At the hearing, the Circuit Court granted G&G Builders' Insurance Coverage Motion and inexplicably denied Central's Motion on Coverage Issues, simply finding that G&G Builders' 5-year delay in providing notice to Central of the Lawsons' claims was not "unreasonable." JA at 1115.

Thereafter, Central requested by letter dated February 25, 2022, that the Circuit Court enter an order "that contains findings of fact and conclusions of law 'sufficient to permit meaningful appellate review'" by this Court as Central intended to file a petition for writ of prohibition concerning the Court's denial of Central's Motion on Coverage Issues, all as required by State ex rel. Vanderra Res., LLC. v. Hummel, 829 S.E.2d 35 (W. Va. 2019). JA at 1117-1118. Central reiterated its request by letters dated July 20, 2022, and September 6, 2023. JA at 1119-1122 and 1226-1227.

Meanwhile, over the course of several months in late 2022, the Lawsons, all contractors, 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 non-insurer party, including all claims related to work performed by SBL. In the case of SBL, 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 . . . ." JA 1167. 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. JA 1168-1170.[7]

3. The Circuit Court's Order.

The Circuit Court granted G&G Builders' Insurance Coverage Motion and denied Central's Motion on Coverage Issues by Order dated May 28, 2024.

Critically, the Circuit Court's decision in the Order to grant G&G Builder's Insurance Coverage Motion is the subject of a separate appeal. Instead, Central filed this appeal solely to address the Circuit Court's denial of the Central Motion on Coverage Issues. For that reason, this appeal focuses solely on the parts of the Order that impact the Circuit Court's rulings concerning the validity and application of the notice provisions in the Policy. As a result, the salient portions

[7] After resolution of the claims between the Lawsons, SBL, and G&G Builders, Central filed a Motion for Summary Judgment on G&G Builders, Inc.'s, Claims for Breach of Contract, Common Law Bad Faith, and Unfair Trade Practices on October 11, 2022, because G&G Builders has been fully defended and fully indemnified for all claims asserted by the Lawsons related to work performed by SBL. JA at 1144-1145. The Circuit Court held a hearing on that motion on December 6, 2022, and entered an order granting that Motion on October 3, 2024, which is the subject of G&G Builders' appeal in No. 24-ICA-441 pending before this Court.

of the Order to this appeal are the following paragraphs (numbered to correspond to the paragraph numbers in the Order):

> 4. Central Carolina Insurance issued a Certificate of Insurance to G&G Builders, Inc. [], dated May 4, 2011, which confirmed the existence of the required insurance coverage under SBL's policy with Central Mutual and represented that the "Insurer Affording Coverage" was "Central Mutual Insurance Company." JA at 0004.
>
> 5. Daily Work records show that SBL began work at the Lawson home on or about May 5, 2011. JA at 0004.
>
> 6. Work continued at the Lawson home by a variety of contractors, including SBL, until sometime in 2013, at which time G&G no longer worked for the Lawsons and the work by SBL concluded. JA at 0004.
>
> 7. This civil action was initiated by G&G Builders on March 20, 2014, to recover for G&G's services as Owners Representative related to the construction of the Lawson residence. JA at 0004.
>
> 8. Along with their answer, the Lawson filed a counterclaim against G&G and cross claims in which they alleged the existence of various defects in the construction of their home – including damage to wood work, broken and cracked stone, leaking windows, chimney leaks, damages patio tiles, damaged tile, and defective grout – and sought damage from G&G and a number of contractors and suppliers who were involved in the construction of the Lawson residence. JA at 0004-0005.
>
> 71. In this case, the allegations of the Lawsons' Counterclaim filed on June 12, 2014, indicate that G&G is being sued in connection with alleged construction defects related to the work performed by SBL. JA at 0023-0024.
>
> 12. By letter dated June 21, 2019, Tanya Kesner, an attorney for G&G, advised Central Carolina Insurance of the claims asserted by the Lawsons against SBL and G&G and demanded a defense and indemnification from, among others, Central. See Mem. In Supp. Of Central Mut.'s Mot. for Summ. J. on Coverage Issues, Ex. 8. It is undisputed that Central first received notice of the Lawson's [sic] claims against SBL and G&G through this letter. JA at 0005.
>
> 19. With respect to the duty to provide notice of a claim, the Central Mutual Policy provides, in relevant part, as follows:

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

* * *

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, the notice should include:

1) How, when and where the "occurrence" or offense took place;

2) The names and addresses of any injured persons and witnesses; and

3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

1) Immediately record the specifics of the claim or "suit" and the date received; and

2) Notify us as soon as practicable.

You must see to it that we receive written notice of a claim or "suit" as soon as practicable,.

c. You and any other insured must:

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

2) Authorize us to obtain records and other information;

3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which the insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

* * *

JA at 0010-0011.

23. Central asserts that it is entitled to summary judgment because G&G failed to comply with the notice requirements set forth in its CGL Policy and, therefore, G&G is not entitled to coverage. JA at 0011.

55. Central Mutual's asserts that the 'Certificate of Insurance' issued by its agent confers no rights upon G&G. JA at 0018.

61. In this case, Central's agent issued the subject Certificate of Insurance, which did not set forth or disclose any of the limitations of coverage upon which Central now relies in its attempt to deny coverage to G&G. [Marlin v. Wetzel County Board of Education, 212 W.Va. 215, 569 S.E.2d 462 (2002)] addressed similar behavior, stating:

> In some instances, insurance companies attempt to avoid liability by asserting policy exclusions which are inconsistent with the coverage noted in the certificate of insurance. One commentator indicates that some courts do not give these exclusions effect:
>
> Certificates of insurance are often inconsistent with the related policy, and a prudent indemnitee

> should assume exclusions in the policy exist that do not appear on the certificate. In some jurisdictions, certificates do not govern coverage while in others, an exclusion of which a certificate holder is unaware will not be given effect.

Douglas R. Richmond, *et al.,* "Expanding Liability Coverage: Insured Contracts and Additional Insureds," 44 Drake L. Rev. 781, 796 (1996). *See also,* Brown Mach. Works & Supply Co. v. Ins. Co. of North America, 659 So.2d 51, 56 (Ala.1995) (holding that an insurance company that does not deliver a policy to a certificate holder is estopped from asserting exclusions contained in the policy but not revealed in the certificate); Moore v. Energy Mut. Ins. Co., 814 P.2d 1141, 1144 (Utah App.1991) (holding that exclusions are invalid unless they are communicated to the certificate holder in writing); J.M. Corbett Co. v. Ins. Co. of North America, 43 Ill.App.3d 624, 2 Ill. Dec. 148, 357 N.E.2d 125 (1976) (holding that because exclusion was not provided to certificate holder, terms of the certificate controlled).

Id., at 224 n. 11, 569 S.E.2d at 471, n.11.

JA at 0021.

62. In West Virginia, an insurer must bring all exclusions and limitations on which it seeks to rely to the attention of the insured. See Syl. Pt. 10, Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by* Parsons v. Haliburton Energy Servs., Inc., 237 W. Va. 138, 785 S.E.2d 844 (2016) ("An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured."). JA at 0021.

63. Accordingly, Central is estopped from denying coverage or a duty to defend G&G in this case based on coverage limitations which were not included or disclosed in the Certificate of Insurance which purported to provide the insurance coverage mandated under SBL's contract. JA at 0022.

64. Like the insurer in Marlin, Central also argues that its Certificate of Insurance expressly indicated that it conferred no rights upon the certificate holder and was subject to the limitations of the policy. Nevertheless, the Court in Marlin found that the insurer could not rely upon undisclosed policy limitations that would contradict or limit the coverage evidence by its Certificate of Insurance. [citation omitted]. JA at 0022.

75. The Court observes that the SBL contract contains no limitations that require notice of a claim at some specific time or which arbitrarily cut off SBL's duty to defend and indemnify at a certain point in time. JA at 0024.

76. Further, the Certificate of Insurance issued by Central's agent to G&G does not set forth or disclose any such notice requirements. Rather, it states that the Certificate Holder was listed as an additional insured "as required per written contract." JA at 0024.

77. As discussed above, the Marlin court found that an insurer cannot rely upon undisclosed policy limitations that would contradict or limit the coverage evidenced by its Certificate of Insurance. Therefore, the Court finds in this case that Central cannot rely upon non-disclosed notice requirements to deny coverage when it otherwise applies under the CGL Policy. JA at 0024.

78. Because at least some of the claims being asserted by the Lawsons clearly arose from SBL's allegedly defective work and were, therefore, covered, Central was and remains obligated to defend G&G with respect to all of the Lawsons' claims against G&G. JA at 0024-0025.

79. Because the CGL Policy provides primary liability coverage for an "insured" and G&G is an "additional insured" under the principles set forth in Marlin, there is no genuine question of fact with respect to Central's duty to provide a defense to G&G. JA at 0025.

80. However, even if the notice provision upon which Central relies to deny coverage was properly disclosed, Central cannot prevail. JA at 0025.

81. Under West Virginia law, "[t]he satisfaction of the notice provision in an insurance policy is a condition precedent to coverage for the policyholder." Colonial Ins. Co. v. Barrett, 208 W. Va. 706, 711, 542 S.E.2d 869, 874 (2000) (citing Maynard v. Nat'l Fire Ins. Co. of Hartford, 147 W. Va. 539, 128 S.E.2d 443 (1963); Adkins v. Globe Fire Ins. Co., 45 W. Va. 384, 32 S.E. 194 (1898)). The Colonial Ins. Co. court explained the reasons for this rule:

> The provision gives the insurance company "an opportunity to investigate and marshall [sic] defenses at a time when events are fresh in the witnesses' recollections." Berryhill v. State Farm Fire & Cas. Co., 174 Ga. App. 97, 99, 329 S.E.2d 189, 191 (1985). The provision also allows the insurance company "to acquire information upon which it can form an intelligent estimate of its liabilities[.]" Willey v. Travelers Indemnity Co., 156 W.Va. 398, 402, 193 S.E.2d 555, 558 (1972).

Id. JA at 0025.

81. However,

> the notice provision—also called a proof of loss provision—"is to be liberally construed in favor of the insured." Petrice v. Federal Kemper Ins. Co., 163 W.Va. 737, 740, 260 S.E.2d 276, 278 (1979). The provision is not to be read as a series of technical hurdles. Rather, a "substantial compliance" with the notice provision of a policy, "resulting in the insurer being able to adequately investigate the claim and estimate its liabilities, is all that is required." Id.

JA at 0025.

83. The Colonial Ins. Co. court held:

> "In cases which involve liability claims against an insurer, several factors must be considered before the Court can determine if the delay in notifying the insurance company will bar the claim against the insurer. The length of the delay in notifying the insurer must be considered along with the reasonableness of the delay. If the delay appears reasonable in light of the insured's explanation, the burden shifts to the insurance company to show that the delay in notification prejudiced their investigation and defense of the claim. If the insurer can produce evidence of prejudice, then the insured will be held to the letter of the policy and the insured barred from making a claim against the insurance company. If, however, the insurer cannot point to any prejudice caused by the delay in notification, then the claim is not barred by the insured's failure to notify." Syllabus Point 2, Dairyland Ins. Co. v. Voshel, 189 W.Va. 121, 428 S.E.2d 542 (1993).

Syl. Pt. 2, id. JA at 0025-0026.

84. In Travelers Indemnity Co. v. U.S. Silica Co., 237 W. Va. 540, 788 S.E.2d 286 (2015), the Supreme Court explained that this holding sets forth "a two-step inquiry" for "determin[ing] whether late notice precludes coverage." 237 W. Va. at 546, 788 S.E.2d at 292. The Travelers Indemnity Co. court continued:

> > First, we must consider the length of the delay and whether the delay was reasonable. If the delay was not reasonable, the inquiry ends, and coverage will be foreclosed. However, if the delay was reasonable, then the burden shifts to the insurer under the second part of the analysis. If the insurer can demonstrate prejudice from the late notice, coverage is precluded. If the insurer cannot show that it was prejudiced by the late notice of its insured's claim, though, coverage is not barred by the insured's failure to provide timely notice.

Id. JA at 0026.

85. Under the facts of the present matter, the time between the date on which G&G received notice of the Lawsons' claims against G&G based upon work performed on the Lawsons' home by SBL—June 12, 2014, when the Lawsons filed their Counterclaim to G&G Builders' initial Complaint—and the date on which G&G first provided notice of the Lawsons' claims to Central Mutual—June 21, 2019, when Central Mutual received a letter from Tanya Kesner, counsel for G&G Builders, dated June 21, 2019—was reasonable. Discovery did not begin in the case until 2017 due to the appeal to the Supreme Court. Further, this case has involved complex claims against a large number of subcontractors, and discovery was integral to determining the contracts in place during specific time periods and what insurance contracts applied. This process produced a justifiable delay in notice to Central. JA at 0026-0027.

86. The Court concludes that G&G's notice to Central of the Lawsons' claims against G&G caused by or related to the work performed by SBL was reasonable. JA at 0027.

87. Further, Central has failed to demonstrate prejudice that would necessitate barring G&G's claim for coverage against Central. JA at 0027.

88. Central argues that it has sustained prejudice as a result of G&G's delay in providing it with notice of the Lawsons' claims, emphasizing the importance of Daily Logs to reflect work performed by SBL on the Lawson resident; the admission by G&G's representative, David Taylor, that he could not remember details about SBL's work as reflected in the Daily Logs; and the loss of SBL's records related to work at the Lawson residence due to a fire in February 2015. JA at 0027.

89. The fact that memories may have faded with respect to work performed by SBL and the fact that records were lost in a fire are not particularly indicative of prejudice to Central's defense, particularly in light of the reasonable delay discussed above. Any such prejudice would affect both Central and G&G. JA at 0027.

90. Moreover, Central did not present any evidence that any of the subject claims were not being actively defended in the period between June 12, 2014, and June 21, 2019, or that its ability to defend G&G has been impaired through a default or any failure to adequately defend against the Lawsons' claims. In fact, it is apparent that a number of other insurers have been actively defending G&G such that this matter has been fully developed for trial. JA at 0027.

91. Therefore, the Court finds that Central has failed to demonstrate that it

suffered prejudice as a result of G&G's delay in providing notification of the Lawson's claims to Central such that the Court should find that G&G violated the notice provision in the CGL Policy. JA at 0027.

92. The Court concludes that G&G's notice to Central of the Lawsons' claims against G&G does not preclude coverage for G&G for such claims under the CGL Policy. JA at 0027.

Central Mutual does not contend that the Circuit Court abused its discretion in reaching its findings of fact, as all the facts relevant to Central's Motion on Coverage Issues are undisputed. Rather, the Circuit Court committed clear error in reaching its legal conclusions by ignoring the actual language of applicable West Virginia law.

V. SUMMARY OF THE ARGUMENT

The Circuit Court first erred by concluding that, as a matter of law, "Central is estopped from denying coverage or a duty to defend G&G in this case based on coverage limitations which were not included or disclosed in the Certificate of Insurance which purported to provide the insurance coverage mandated under SBL's contract." JA at 0022. In reaching this erroneous conclusion, the Circuit Court relied upon Marlin v. Wetzel County Board of Education, 212 W. Va. 215, 569 S.E.2d 462 (2002), and National Mutual Ins. Co. v. McMahon & Sons, Inc., 177 W. Va. 734, 356 S.E.2d 488 (1987) (*overruled on other grounds by* Parsons v. Haliburton Energy Servs., Inc., 237 W. Va. 138, 785 S.E.2d 844 (2016)). Marlin, however, explicitly limited its decision to situations in which an insurer or its agent "misrepresented" – either intentionally or accidentally – that coverage was available to an additional insured. Here, the Circuit Court ignored this critical requirement because, in fact, the record is completely devoid of any misrepresentation by Central whatsoever. Further, the Circuit Court relied upon McMahon & Sons when it concluded that, "[i]n West Virginia, an insurer must bring all exclusions *and limitations* on which it seeks to rely to the attention of the insured." JA at 0021 (emphasis added). This conclusion ignores,

however, that the court explicitly limited its holding in McMahon & Sons to *exclusionary clauses* -- not any and all "limitations" in an insurance policy. The Circuit Court's erroneous reading and application of Marlin and McMahon & Sons led to the clearly erroneous conclusion that "Central is estopped from denying coverage or a duty to defend G&G in this case based on coverage limitations which were not included or disclosed in the Certificate of Insurance which purported to provide the insurance coverage mandated under SBL's contract." JA at 0022. See also JA at 0024 ("As discussed above, the Marlin court found that an insurer cannot rely upon undisclosed policy limitations that would contradict or limit the coverage evidenced by its Certificate of Insurance. Therefore, the Court finds in this case that Central cannot rely upon non-disclosed notice requirements to deny coverage when it otherwise applies under the CGL Policy.").

The Circuit Court also erred in finding that an undisputed 5-year delay by G&G Builders in giving notice to Central was, as a matter of law, reasonable despite the Policy requirement that a notice of claim be provided "as soon as practicable." JA at 0026. The Court compounded this error by justifying G&G Builders' failure to provide a notice of claim before June 2019 because "[d]iscovery did not begin in the case until 2017 due to the appeal to the Supreme Court . . . [and] this case has involved complex claims against a large number of subcontractors, and discovery was integral to determining the contracts in place during specific time periods and what insurance contracts applied." JA at 0026. Moreover, the Circuit Court further exacerbated this error by ignoring the prejudice to Central due to the uncontroverted fact that (1) G&G Builders' own supervisor testified that he could not, because of the passage of time, remember details of SBL's work at the residence, and (2) SBL's records concerning its work at the Lawson home were destroyed by fire in February 2015. JA at 0027.

VI. STATEMENT REGARDING ORAL ARGUMENT.

Oral argument is necessary under Rule 18(a) West Virginia Rules of Appellate Procedure. This case is appropriate for a Rule 20 argument because it involves issues of fundamental importance concerning the proper legal analysis by which an insurer may be estopped from relying on the clear and unambiguous terms of an insurance policy. Likewise, this case presents a critical issue concerning whether an uncontroverted 5-year delay in providing notice of a claim to an insurer by an insured is reasonable when the insured (1) possessed a valid certificate of insurance for at least 3 years before a claim arose that contained both the name of the insurer and the policy number; (2) knew that a claim had been made against it, and (3) was represented by counsel for the entire 5-year period.

VII. ARGUMENT.

A. Standard of Review.

It is well settled that "[a] circuit court's entry of summary judgment is reviewed de novo." Painter v. Peavy, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 1 (1994). Moreover, in undertaking a de novo review, this Court should apply the same standard for granting summary judgment that is applied by the circuit court:

> 'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' Syllabus Point 3, Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York, 148 W. Va. 160, 133 S.E.2d 770 (1963)." Syllabus Point 1, Andrick v. Town of Buckhannon, 187 W. Va. 706, 421 S.E.2d 247 (1992).

Painter, 192 W. Va. 189, 451 S.E.2d 755, Syl. Pt. 2.

In addition, “it is well recognized that ‘[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a

lower court's grant of summary judgment, shall be reviewed de novo on appeal.'" First Ins. Co. v. Russell, 239 W. Va. 773, 777, 806 S.E.2d 429, 433 (2017) (citing Riffe v. Home Finders Assocs. Inc., 205 W. Va. 216, 517 S.E.2d 313, Syl. Pt. 2 (1999).

B. The Circuit Court erred when it concluded that "Central is estopped from denying coverage or a duty to defend G&G in this case based on coverage limitations which were not included or disclosed in the Certificate of Insurance which purported to provide the insurance coverage mandated under SBL's contract[]" when the "coverage limitation" was a notice requirement contained in the Policy.

The Circuit Court's Order clearly erred when it concluded as a matter of law that Central was estopped from relying upon the notice provision in the Policy because the notice provision was not contained in the COI issued to G&G Builders. In addition, the Circuit Court erred when it concluded that Central was "estopped" from relying upon the notice provision in the Policy despite the fact that neither the Policy nor the COI contained any misrepresentation, and in fact, the evidence fails to reveal any misrepresentation by Central Mutual anywhere, period.

1. Under the Policy, G&G Builders was required to provide notice "as soon as practicable" of the Lawsons's claims, and notice is a condition precedent to coverage.

The Policy states that the insured "must see to it that [Central is] notified as soon as practicable of an 'occurrence' or an offense which may result in a claim." JA at 0809. Further, Section IV.2 of the Policy details an insured's duties in the event of an "occurrence, offense, claim or suit[,]" all of which must be done "as soon as practicable." JA at 0809-0810.

The coverage provided under the Policy to G&G Builders, therefore, only exists if G&G Builders provided notice to Central of the Lawsons' claims "as soon as practicable." Moreover, under West Virginia law, a notice provision in an insurance policy serves as a condition precedent for the insured to receive coverage. Colonial Ins. Co. v. Barrett, 542 S.E.2d 869, 874 (W. Va. 2000) (citing Maynard v. National Fire Ins. Co. of Hartford, 129 S.E.2d 443 (W. Va. 1963)).

Notice provisions are conditions precedent because the provisions allow insurance companies the ability to investigate while the events are "fresh in the witnesses' recollections." Id.

Here, G&G Builders waited over 5 years, however, to provide notice of the Lawsons' claims to Central; hence, no coverage exists under the Policy because of G&G Builders' failure to provide notice "as soon as practicable."

2. The Circuit Court's Order misconstrues and misapplies the proper scope and application of estoppel analyzed in Marlin as it eliminates anything in an insurance policy that "limits" coverage unless such "limitation" is contained in a certificate of insurance.

Faced with language in the notice provision within the Policy itself that contained a "limitation" on coverage in the form of a condition precedent, the Circuit Court completely bypassed the Policy language and instead took the remarkable and clearly erroneous position that *any* "limitation" on insurance coverage contained in the Policy that was not contained in the COI could not be enforced against G&G Builders. In doing so, the Circuit Court fundamentally misapplied, and substantially expanded the scope of, the court's decision and rationale in Marlin v. Wetzel County Bd. of Educ., 212 W. Va. 215, 222, 569 S.E.2d 462, 469 (2002), such that the Order represents a drastic upheaval in basic insurance law and elevates a certificate of insurance to the operative insurance agreement in place of the actual insurance policy.

In Marlin, the court meticulously examined the purpose of certificates of insurance and stated that "[a] certificate of insurance is a form that is completed by an insurance broker at the request of an insurance policyholder, and is a document evidencing the fact that an insurance policy has been written and includes a statement of the coverage of the policy in general terms. (Citing Black's Law Dictionary (5th Ed. 1979)." Marlin, 212 W. Va. at 223, 569 S.E.2d at 470. In addition, and critically, the court noted that "[a] certificate of insurance 'serves merely as evidence of the insurance and is not a part of the insurance contract.'" Marlin, 212 W. Va. at 223, 569

S.E.2d at 470 (quoting Richard H. Glucksman, et al., "Additional Insured Endorsements: Their Vital Importance in Construction Defect Litigation," 21 Construction Lawyer 30, 33 (Winter 2001)). See also Marlin, 212 W. Va. at 223, 569 S.E.2d at 470 ("Certificates provide evidence that certain general types of policies are in place on the date the certificate is issued and that these policies have the limits and policy periods shown.").

In Marlin, unlike here, the court addressed "the most common" problem with certificates of insurance: "A problem with certificates of insurance, which appears to be common in indemnification contracts such as that in the instant case, is that insurance agents often issue certificates of insurance detailing a particular form of coverage, but then fail to notify the insurance company of the need to alter or amend the coverage to match the certificate. The result is that the insurance company - like in the instant case - refuses to provide coverage." Marlin, 212 W. Va. at 223, 569 S.E.2d at 470.

It was against this backdrop that the court in Marlin examined the interplay between a certificate of insurance and an insurance policy and whether a certificate of insurance extended coverage to a party listed as an "additional insured" on the certificate of insurance. In Marlin, the Court examined a certificate of insurance which expressly stated that the Board of Education of Wetzel County was an "additional insured" under the liability and umbrella policies issued to Bill Rich Construction, the named insured under the policies. The insurance broker who issued the certificate of insurance, however, failed to inform the insurer that the Board had been added as an additional insured to the policies, and so the insurer argued that it owed no coverage to the Board as no endorsement had been issued to add the Board as an additional insured; i.e., the "most common" problem with certificates of insurance. The Board argued that the insurer was estopped from denying coverage because the certificate of insurance identified the Board as an additional

insured, and the Board relied upon that representation in the certificate of insurance in allowing Bill Rich Construction to begin work.

After noting that a "certificate of insurance" serves merely "as evidence of the insurance and is not a part of the insurance contract[,]" the court reiterated the general rule that, "[g]enerally, the principles of waiver and estoppel are inoperable to extend insurance coverage beyond the terms of an insurance contract." Marlin, 212 W. Va. at 225, 569 S.E.2d at 472. The court recognized, however, that "[e]xceptions to the general rule that the doctrine of estoppel may not be used to extend insurance coverage beyond the terms of an insurance contract, include, but are not necessarily limited to, instances where an insured has been prejudiced because: (1) an insurer's, or its agent's, misrepresentation made at the policy's inception resulted in the insured being prohibited from procuring the coverage s/he desired; (2) an insurer has represented the insured without a reservation of rights; and (3) the insurer has acted in bad faith." Marlin, 212 W. Va. at 225, 569 S.E.2d at 472. The court in Marlin focused its "analysis on the first exception, whether the insurer or its agent made a misrepresentation by issuing a certificate of insurance at the inception of coverage which resulted in the Board not having the coverage it desired[,]" and it concluded that (1) the certificate of insurance, issued by the insurer's agent, misrepresented that the Board was an additional insured under the policies, and (2) the Board relied to its detriment on that misrepresentation because it allowed Bill Rich Construction to begin work on the project. Marlin, 212 W. Va. at 225, 569 S.E.2d at 472. Specifically, under those circumstances, the court concluded as follows:

> We therefore hold that a certificate of insurance is evidence of insurance coverage, and is not a separate and distinct contract for insurance. However, because a certificate of insurance is an insurance company's written representation that a policyholder has certain insurance coverage *in effect at the time the certificate is issued*, the insurance company may be estopped from later denying

> *the existence of that coverage* when the policyholder or the recipient of a certificate *has reasonably relied to their detriment upon a misrepresentation in the certificate.*

Marlin, 212 W. Va. at 225-26, 569 S.E.2d at 472-73 (emphasis added).

Here, Central concedes that G&G Builders was an "additional insured" under the Policy and that coverage existed for G&G Builders' "acts and omissions" in supervising SBL's work at the Lawson residence before July 8, 2011. JA at 0723-0724. In addition, Central concedes that the Policy provided coverage for SBL's indemnification obligation to G&G Builders under the Contract. JA at 0724-0725. In other words, Central Mutual does not deny the "existence of coverage" because G&G Builders was never added to the actual policy as an additional insured, which was the "common" problem addressed by the court in Marlin. Rather, the sole issues should be (1) whether Central may rely upon the notice provision in the Policy to deny coverage to G&G Builders, and (2) whether G&G Builders failed to provide notice of the Lawsons' claims "as soon as practicable[.]"

The Circuit Court, however, misapplied Marlin as reflected in its Order. For example, the Order (1) fails to identify any "misrepresentation" in the COI whatsoever; and (2) fails to find that G&G Builders "reasonably relied to their detriment" on any "misrepresentation" in the COI present at the time the COI was issued, i.e., May 5, 2011. Estoppel, however, represents an equitable remedy that cannot be applied absent evidence that Central engaged in some wrongdoing, and the Order fails to identify any such alleged wrongdoing by Central. See Nat'l Mut. Ins. Co. v. McMahon & Sons, 177 W. Va. 734, 739, 356 S.E.2d 488, 493 (1987) ("Detrimental reliance is essential to the assertion of waiver or estoppel. . . . While the party asserting waiver or estoppel has the burden of proving it, we will presume prejudice resulted where an insured has shown that his insurer assumed the defense of an action[.]" (citations omitted));

LaRocco v. Old Republic Ins. Co., No. 5:08-cv-00205, 2009 U.S. Dist. LEXIS 89237, at *38 (S.D. W. Va. Sep. 28, 2009) ("The doctrines of waiver and estoppel are creatures of equity; in the absence of wrongdoing by Old Republic, they cannot justify the extension of insurance coverage to situations not contemplated in the insurance contract. Plaintiff has not asserted, nor is there evidence in the record, that Old Republic misrepresented the scope of coverage to Plaintiff when it issued the Policy, represented Plaintiff without a reservation of rights, or acted in bad faith.").

Moreover, as conceded by Central and reflected in the Order, G&G Builders *was* added as an additional insured to the Policy, and the Contract *was* an insured contract under the Policy. Order at ¶ 4, 30. Coverage for G&G Builders was in place, therefore, during the time period contained in the COI, which ended on July 8, 2011. In short, the COI does not contain any misrepresentation upon which G&G Builders relied, and the Order's failure to identify any such misrepresentation renders it erroneous. Likewise, the Order fails to identify any "misrepresentation" in the COI upon which G&G Builders relied in May 2011, when the COI was issued, and this failure likewise makes the Order erroneous.

In short, the Circuit Court's Order clearly misconstrued and misapplied the decision in Marlin, which should be inapplicable to the facts in this case. The Circuit Court, therefore, committed clear legal error when it concluded as a matter of law that "Central is estopped from denying coverage or a duty to defend G&G in this case based on coverage limitations which were not included or disclosed in the Certificate of Insurance which purported to provide the insurance coverage mandated under SBL's contract." JA at 0022. As discussed in the next section, the Circuit Court used this erroneous conclusion to compound its erroneous extension of Marlin in a dangerous and illogical manner.

C. The Circuit Court erred when it concluded that "Central cannot rely upon non-disclosed notice requirements to deny coverage when it otherwise applies under the CGL Policy" when the "non-disclosure" was in the Certificate of Insurance, not the Policy.

The Circuit Court erred when it concluded that, "[i]n West Virginia, an insurer must bring all exclusions *and limitations* on which it seeks to rely to the attention of the insured." JA at 0021 (emphasis added). This overbroad and inaccurate statement does not accurately reflect West Virginia law, yet the Circuit Court used it to conclude that "Central is estopped from denying coverage or a duty to defend G&G in this case based on *coverage limitations* which were not included or disclosed in the Certificate of Insurance which purported to provide the insurance coverage mandated under SBL's contract." JA at 0022 (emphasis added). These conclusions represent a fundamental and radical change to insurance law in West Virginia based upon a puzzling (mis)interpretation of decisions from the West Virginia Supreme Court of Appeals.

In reaching its erroneous conclusions, the Circuit Court relied upon Nat'l Mut. Ins. Co. v. McMahon & Sons, 177 W. Va. 734, 737, 356 S.E.2d 488, 491 (1987), in which the court addressed the issue of "whether an *exclusionary clause* in the general liability policy should operate to relieve the [insurer] of any obligation to defend or pay any liability of" an additional insured. Nat'l Mut. Ins. Co., 177 W. Va. at 739-40, 356 S.E.2d at 493-94 (emphasis added). Importantly, the court in Nat'l Mut. Ins. Co. recognized that the insuring agreement before it contained sixteen different exclusions, each of which "provides that the insurance does not apply" under certain circumstances. Nat'l Mut. Ins. Co., 177 W. Va. at 740, 356 S.E.2d at 494. See also Vienna Family Med. Assocs. v. Allstate Ins. Co., No. 95-1225, 1996 U.S. App. LEXIS 3857, at *12-13 (4th Cir. Mar. 5, 1996) (Exclusion "precludes coverage" for a bodily injury otherwise covered under the insuring agreement).

The Circuit Court's conclusions expanded the principals in Nat'l Mut. Ins. Co. to "limitations" – a phrase that has no meaning under insurance law – even though the court in Nat'l Mut. Ins. Co. expressly used the term "exclusions," which represents a specialized term of art in the context of an insurance policy:

> Exclusions eliminate coverage that otherwise would be provided under the policy's insuring agreement by describing property, perils, hazards, losses that arise from specific causes, persons, or locations outside the policy's coverage. Insurers use language of exclusion where the risk of loss is too high (e.g., named driver exclusions to avoid covering high-risk drivers), the risk is too uncertain to accurately estimate the risk of loss (e.g., a property policy may exclude losses for terrorism or nuclear accidents), the activity giving rise to the loss is correlated with moral hazard (e.g. a liability policy will exclude liability for intended or expected bodily injury or property damage), the insured is likely to have other coverage of the exposure (e.g., a homeowners policy will exclude coverage for losses arising out of the use, ownership, or maintenance of an automobile), or the coverage is of a specialized nature that the insurer does not provide (e.g., damage to electronic data). When seeking to rely upon an exclusion, an insurer must establish that a claim falls entirely within the scope of the exclusionary language.

1 New Appleman on Insurance Law Library Edition § 1.07 (citations omitted). In West Virginia, "[a]n insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage *must make exclusionary clauses conspicuous, plain, and clear*, placing them in such a fashion as to make obvious their relationship *to other policy terms*, and must bring such provisions to the attention of the insured." First Mercury Ins. Co. v. Russell, 239 W. Va. 773, 779, 806 S.E.2d 429, 435 (2017). Here, the Policy contains both an insuring agreement (JA at 0800) and a section entitled, in bold print, "Exclusions." JA at 0801-0804.

Critically, *Central has never denied coverage to G&G Builders under any of the "exclusions" in the Policy.* In fact, none of the "exclusions" in the Policy are even relevant to the coverage issues in this case, and none were even referenced by the Circuit Court in its Order.

Instead, Central denied coverage under the Policy because G&G Builders failed to satisfy a condition precedent to coverage; i.e., G&G Builders failed to provide notice of the Lawsons' claims "as soon as practicable" because it waited over 5 years to provide that notice.

Notably, the notice provisions in the Policy are contained in Section IV, entitled "Commercial General Liability Conditions," and in Paragraph B, entitled "Duties in the Event of Occurrence, Offense, Claim or Suit." JA at 0809. The "exclusions" in the Policy, by contrast, are contained in Section I.2 of the Policy, entitled "Exclusions." JA at 0801-0804. Because Central did not rely upon an "exclusion" to coverage, the Circuit Court, at G&G Builders' urging, expanded the principles in Nat'l Mut. Ins. Co. by broadly concluding that, "[i]n West Virginia, an insurer must bring all exclusions *and limitations* on which it seeks to rely to the attention of the insured." JA at 0021 (emphasis added). In doing so, the Circuit Court erred because it treated "exclusions" and the notice provision, which does not exclude coverage but provides a condition precedent to coverage, the same.

Not only does the insertion of the phrase "and limitations" run contrary to West Virginia law as expressed in Nat'l Mut. Ins. Co., which confined itself only to "exclusions" in an insurance policy, but adding "limitations" completely turns insurance law upside down and inside out. Again, the Circuit Court concluded that "Central is estopped from denying coverage or a duty to defend G&G in this case based on *coverage limitations* which were not included or disclosed in the Certificate of Insurance which purported to provide the insurance coverage mandated under SBL's contract. JA at 0022. [8] In doing so, the Circuit Court turned the certificate of insurance - which even the Circuit Court acknowledged "is evidence of insurance and is not a separate and

[8] The haphazard nature of the Circuit Court's analysis is revealed by its statement that the "Certificate of Insurance . . purported to provide the insurance coverage mandated under SBL's contract." JA at 0022. Yet, the Circuit Court also acknowledged the language in Marlin that a "certificate of insurance is evidence of insurance coverage and is not a separate and distinct contract for insurance." JA at 0019-0020 (Order at ¶58 (citation omitted).

distinct contract for insurance" - into the insurance policy itself. JA at 0019-0020 (Order at Conclusion of Law ¶ 58 (citing Marlin, 212 W. Va. at 217, 569 S.E.2d at 464, Syl. Pt. 9). Every insurance policy, however, necessarily contains "limits" to the coverage available under the policy, including "exclusions," notice requirements, other insurance provisions, monetary limits, and duties placed upon an insured to cooperate with the insurer, the failure of which could result in coverage being denied. Even the "insuring agreement" in an insurance policy represents a "limitation" on insurance coverage because a claim must fall within the insuring agreement; otherwise, no coverage exists. Yet, under the Circuit Court's analysis, every single "limitation" on coverage must be contained in the certificate of insurance; otherwise, the insurer may not rely upon that limitation even if it is clearly and ambiguously contained in the policy itself. This represents an absurd and ridiculous proposition. More importantly, it ignores the West Virginia Supreme Court's express recognition that a certificate of insurance does not represent the insurance contract and is simply evidence of coverage.

In short, the West Virginia Supreme Court has made it clear that an insurer's duty to bring a limitation of coverage to the insured's attention extends *only* to "exclusions" under the Policy. The notice provision relied upon by Central here, however, is not an exclusion, and Central Mutual does not rely upon anything in the "Exclusions" section of the Policy to deny coverage. Rather, it contends that G&G Builders' failure to provide timely notice of the Lawsons' claims fails to satisfy a condition precedent to coverage. The Circuit Court committed clearly error, therefore, when it determined that "all . . . limitations on which [an insurer] seeks to rely" must be "brought to the attention of the insured" in the COI and that "Central is estopped from denying coverage or a duty to defend G&G in this case based on *coverage limitations* which were not included or disclosed in

the Certificate of Insurance which purported to provide the insurance coverage mandated under SBL's contract."

D. The Circuit Court erred when it concluded that an uncontested 5-year delay between when G&G Builders received notice of the Lawsons' claims against G&G Builders and SBL (June 12, 2014) and when G&G Builders first provided notice of the Lawsons' claims to Central (June 21, 2019) was reasonable.

Beyond the Circuit Court's erroneous conclusions with respect to disclosure of limitations to coverage in the COI, the Order also erred by concluding that G&G Builders' uncontested 5-year delay in providing notice of the Lawsons' claims to Central represented notice given "as soon as practicable" per the Policy, and therefore reasonable. This conclusion is both illogical and contrary to West Virginia law.

1. G&G Builders' 5-year delay in providing Central with notice of the Lawsons' claims bars its claim for coverage.

The Circuit Court correctly determined that a little more than five (5) years passed between the date on which G&G Builders received actual notice of the Lawsons' claims against G&G Builders based upon work performed by SBL (June 12, 2014) and the date on which Central Mutual first received notice of those claims (June 21, 2019). JA at 0026.[9]

Notably, at the time that G&G Builders first received actual notice of the Lawsons' claims on June 12, 2014, the following facts are uncontested:

- G&G Builders was represented by counsel, and it continued to be represented by counsel throughout this litigation. See, gen., JA at 1318-1396.

- G&G Builders possessed the COI issued to it on May 4, 2011, which contained Central's identity as the insurer of SBL, its named insured, G&G

[9] G&G Builders was actually aware as early as May 2012 that SBL allegedly improperly installed bituthene behind a section of a wall at the Lawson residence. JA at 0748.

Builders' designation as an additional insured, the Policy number, and the dates on which the Policy was effective. JA at 0554.[10]

- G&G Builders knew by May 5, 2012, that SBL was performing stone mason work at the Lawson home. JA at 0843.

- G&G Builders was aware in May 2012 that SBL had allegedly performed faulty work as David Taylor, G&G Builders' superintendent who was onsite at the Lawson residence, testified that he was aware in May 2012 that SBL allegedly improperly installed bituthene behind a section of the wall at Suite 4 of the Lawson home. JA at 0934. Mr. Taylor was also aware in August 2012 that SBL allegedly improperly installed bituthene on a chimney. JA at 0936 (Exhibit 12 to Memorandum (Exhibit 215 to Taylor Depo. (Daily Log entry dated May 17, 2012, which states that "stone masons took the stone off of the wall at Suite 4 and we found that the bituthene was not installed in a shingle fashion. It was lapped over the top and allowed water to run down behind it.")) and JA at 0936 (Exhibit 13 (Exhibit 216 to Taylor Depo. (Daily Log entry dated August 21, 2012, which states that "Eddie began taking the stone off the chimney and found that the water was coming in where the bituthene was not adhering to itself.")). JA at 0938.

In short, it is uncontroverted that G&G Builders possessed the following information no later than June 12, 2014: the identity of Central, all identifying information concerning the Policy, the effective dates of the Policy, SBL's work on the Lawsons' residence, and the (allegedly) defective nature of SBL's work for which the Lawsons made a claim against G&G Builders -- and it had to know all the details about the Policy no later than May 4, 2011, when it legally had to rely upon the COI to allow SBL to begin its work at the Lawson residence.

Yet, while the Circuit Court correctly cited to the applicable law governing the validity of notice provisions in insurance contracts, it clearly erred in the application of that law to the uncontested facts in the record.

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[10] To conclude otherwise would mean that G&G Builders could not have relied to its detriment upon the COI before May 5, 2011, the day that SBL began work at the Lawsons' home. G&G Builders' reasonable reliance upon the contents of the COI is necessary for G&G Builders' dependence upon Marlin v. Wetzel County Bd. of Educ., 212 W. Va. 215 225, 569 S.E.2d 462, 472 (2002) (Court concluded that the certificate of insurance, issued by the insurer's agent, misrepresented that the Board was an additional insured under the policies, and that the Board relied to its detriment on that misrepresentation because it allowed the contractor to begin work on the project.).

2. G&G Builders' 5-year delay in providing notice to Central of the Lawsons' claims was unreasonable as a matter of law.

Notwithstanding the uncontested passage of at least 5 years before G&G Builders provided notice of the claims to Central, the Circuit Court made the astonishing conclusion that, "[u]nder the facts of the present matter," the more than 5-year delay "was reasonable." JA at 0026. This conclusion is, as a matter of law, clearly erroneous.

Central initially acknowledges that the "question of whether an insurance company was notified within a reasonable period of time is, generally, a question for the finder of fact." Colonial Ins. Co. v. Barrett, 208 W. Va. 706 , 713, 542 S.E.2d 869, 876 (W. Va. 2000). The court in Travelers Indem. Co. v. U.S. Silica Co., 237 W.Va. 540 547, 788 S.E. 2d 286, 293 (2015), however, noted that "where . . . the length of the delay is substantial or the proffered reason for the delayed notice is simply untenable, reasonableness 'may be determined as a matter of law where the evidence, construing all inferences in favor of the insured, establishes that the [delay] was unreasonable or in bad faith.'" Here, G&G Builders knew that SBL - and only SBL - did the stone work at the Lawson residence. David Taylor, G&G Builders' own superintendent, was aware by at least May 2012 of alleged issues with SBL's work that allegedly allowed water to infiltrate behind the stone work. When the Lawsons' Counterclaim (served on June 12, 2014) stated that "stone is cracked and broken," therefore, G&G Builders knew such allegations could only relate to work performed by SBL. Likewise, G&G Builders knew from this same Counterclaim that the Lawsons alleged that their property damages were caused, at least in part, by G&G Builders' failure to properly supervise contractors, subcontractors, and "various and significant areas of work," which obviously included all work performed by SBL before July 8, 2011. These uncontested facts demonstrate that, as a matter of law, G&G Builders' delay in providing notice of the Lawsons' claims to Central was unreasonable.

Moreover, G&G Builders possessed all the information necessary to put Central on notice of the Lawsons' claims when made in June 2014. Specifically, G&G Builders possessed the COI no later than May 5, 2011, which contained the Policy number, the name of Central as the insurer, the dates on which the Policy was in effect, and the name of the entity that issued the COI.[11] It possessed the Lawsons' claims asserted in their Counterclaim. It possessed the contract between SBL and the Lawsons, which contained "G&G Builders Inc. Special Conditions." In short, G&G Builders already possessed all the information necessary to provide a notice of claim to Central by June 2014. It simply chose not to do so.[12]

In short, the undisputed material facts reveal that G&G Builders waited over 5 years to put Central on notice of the Lawsons' claims, and this delay is simply unreasonable as a matter of law. See Travelers Indem. Co. v. U.S. Silica Co., 237 W.Va. 540, 788 S.E. 2d 286 (2015) (court found that 3-year delay was unreasonable); Ragland v. Nationwide Mut. Ins. Co., 146 W.Va. 403, 120 S.E.2d 482, 490-91 (W.Va. 1961) (the court found that the "phrase 'as soon as practicable' means a reasonable time" and "more than five months is not, under normal circumstances, a reasonable time for an insured to report a fatal accident to his insurer."); Medical Assurance of W.Va., Inc. v. United States, No. 06-1156, 2007 U.S. JA LEXIS 9331 (4th Cir. April 24, 2007) (court found that "[a]n unexplained, four-year delay in notice is unreasonable as a matter of law.").

Critically, "[a]bsent a demonstration of reasonableness, the burden does not shift to the insurer to prove that it was prejudiced by the delayed notice, and the inquiry necessarily ends with a finding that coverage is precluded by the insured's failure to comply with the policy's notice provision." Travelers Indem. Co., 237 W.Va. at 549, 788 S.E. 2d at 295. Because G&G Builders'

[11] Interestingly, G&G Builders' counsel sent the initial notice of claim on June 21, 2019, to Carolina Insurance Agency, the entity listed on the COI as the entity that issued that document -- over 8 years earlier.
[12] Moreover, G&G Builders was represented by counsel by at least March 20, 2014, when it filed its complaint that initiated the civil action before the Circuit Court. JA at 0030-0037.

5-year delay in providing notice was unreasonable, therefore, the Circuit Court should not have considered whether the unreasonable delay prejudiced Central. See Travelers Indem. Co., 237 W. Va. at 547, 788 S.E. 2d at 293 ("If the delay was not reasonable, the inquiry ends, and coverage will be foreclosed."). The Circuit Court committed clear legal error, therefore, when it concluded that, [u]nder the facts of the present matter," G&G Builders' more than 5-year delay "was reasonable." JA at 0026.

Moreover, the "facts of the present matter" identified by the Circuit Court to support its conclusion that G&G Builders' delay was "reasonable" do not support that conclusion. Specifically, the Circuit Court found that "[d]iscovery did not begin in the case until 2017 due to the appeal to the Supreme Court" of G&G Builders' efforts to force the Lawsons' claims into arbitration. JA at 0026. This "fact" fails, however, to recognize that G&G Builders had all the information necessary to send a notice of claim (1) before it demanded arbitration of the Lawsons' claims; (2) before it appealed the denial of arbitration to this Court; and (3) before discovery began in early 2017. In fact, the Order completely fails to acknowledge that G&G Builders had all the information necessary to submit a notice of claim as of June 2014 – about 3 years before discovery "began" in this case, and that discovery did not include anything necessary or needed to submit a notice of claim to Central.

In addition, the Circuit Court excused G&G Builders' delay because "this case has involved complex claims against a large number of subcontractors, and discovery was integral to determining the contracts in place during specific times and insurance contracts applied." JA at 0026. While the liability issues may have been "complex," the uncontested facts reveal, again, that G&G Builders was in possession of all the necessary information no later than June 2014 to serve a notice of claim on Central. The Lawsons' claims against G&G Builders, whether in

arbitration or before a court of law, were still capable of being covered by the Policy. In addition, the statement that "discovery was integral to determining the contracts in place during specific times and what insurance contracts applied" is simply nonsensical. The uncontested facts are that G&G Builders *already possessed* (1) the SBL – Lawson Contract, (2) the Central COI, (3) and the dates of both SBL's work and the effective dates of the Policy *by May 4, 2011*. Discovery was not "integral" to G&G Builders learning these things as it already had the necessary documents and information seven years before discovery began in this matter in early 2017.[13]

In short, the "facts of the present matter" identified by the Circuit Court do not actually represent a finding of fact in its own Order. Even if they did, the Circuit Court clearly abused its discretion in finding those "facts" and committed clear error by concluding that those alleged facts made G&G Builders' 5-year delay in providing a notice of claim to Central "reasonable."

Moreover, "[a]n insured's lack of knowledge of its own policies of insurance does not . . . provide reasonable grounds to justify its late provision of notice to its insurer." Travelers Indem. Co., 237 W.Va. at 548, 788 S.E. 2d at 294. Here, G&G Builders knew that SBL had obtained insurance to cover its work as the Contract included "G&G Builders Inc. Special Conditions" as Exhibit A to the Contract, and it possessed the COI that contained all the information about the Policy no later than May 4, 2011; hence, G&G Builders' delay in providing notice to Central cannot be blamed on its "lack of knowledge" concerning the Policy.

In short, the Circuit Court committed clear legal error in concluding that, [u]nder the facts

[13] In fact, every demand made by G&G Builders for a defense and indemnification in this litigation against both a contractor and an insurer arose from (1) "G&G Builders Inc. Special Conditions" attached to a contract between the Lawsons and the insurer's insured, and (2) a certificate of insurance that listed G&G Builders as an additional insured. It was on that basis that G&G Builders eventually filed claims against 12 insurers, including Central. G&G Builders necessarily had the information for each of the contracts, and the insurance information for each named insured, *at the time that named insured worked on the Lawson home*. As it is undisputed that work on the Lawson home stopped in late 2013, G&G Builders necessarily possessed all this information by that time, and discovery beginning in 2017 was certainly not "necessary" for G&G Builders to acquire either those documents or that information.

of the present matter," G&G Builders' more than 5-year delay "was reasonable." JA at 0026.

E. The Circuit Court erred when it concluded that Central did not demonstrate prejudice from the 5-year delay, despite (1) the admission of G&G Builders' own supervisor that he could not remember details of work at the property performed by SBL, Central's named insured, at the Lawson property and (2) evidence of a fire in February 2015, which resulted in the loss of SBL's records concerning its work at the Lawson home?

Finally, the Circuit Court committed clear legal error when it concluded that, even if G&G Builders' 5-year delay was reasonable, "Central has failed to demonstrate prejudice that would necessitate barring G&G's claim for coverage against Central." JA at 0027.

Under West Virginia law, if the delay was reasonable, then the burden shifts to the insurer to demonstrate prejudice from the late notice before coverage is precluded. If the insurer cannot show that it was prejudiced by the late notice of its insured's claim, coverage is not barred by the insured's failure to provide timely notice. U.S. Silica Co., 237 W.Va. at 547, 788 S.E. 2d at 293. Here, Central was prejudiced in a number of ways because G&G Builders waited over 5 years to put Central on notice of the Lawsons' claims.

First, the long delay between the work performed by SBL during the time period that Central provided coverage (May 2011 - July 8, 2011) and the first notice of claim to Central in June 2019 impacted the memory of key witnesses, including G&G Builders' superintendent on the Lawson project. See Colonial Ins. Co. v. Barrett, 542 S.E.2d 869, 874 (W. Va. 2000) (notice provision gives insurance company "an opportunity to investigate and marshal defenses at a time when events are fresh in the witnesses' recollections"). Daily Log entries prepared by David Taylor, G&G Builders' superintendent, relevant to SBL's work lack specifics about the work performed by SBL. JA at 0845-0868. As such, witness testimony was critical to determining what work, exactly, SBL did on the Lawson residence and during what period of time, and given the passage of time, recollection of those details have faded.

Not surprisingly, Mr. Taylor testified during his deposition in 2019 that he simply could not remember details concerning entries in his Daily Logs. For example, on August 21, 2012, Mr. Taylor wrote in his Daily Log: "Eddie began taking the stone off of the chimney and found that the water was coming in where the biathane [sic] was not adhering to itself." JA at 0938. When asked during his deposition on June 17, 2019, however, which chimney this Daily Log referred to, Mr. Taylor testified, "I don't recall." JA at 0934. Further, when asked during that same deposition "[w]hat was done with the chimney[,]" Mr. Taylor responded, "I don't recall exactly what we did in that spot." JA at 0934. When asked whether a subsequent Daily Log, which stated, "We also noticed a water leak at the 'something' roof chimney again[,]" referred to the same chimney that was the subject of his note on August 21, 2012, Mr. Taylor stated, "I don't remember." JA at 0934. These examples demonstrate that the long passage of time during which G&G Builders failed to provide notice of the Lawsons' claims to Central has resulted in exactly what the court in Barrett identified as prejudicial, i.e., foreclosing "an opportunity to investigate and marshal defenses at a time when events are fresh in the witnesses' recollections." Barrett, 542 S.E.2d at 874.

Yet, the Circuit Court blithely concluded that "[t]he fact that memories may have faded with respect to work performed by SBL . . . are not particularly indicative of prejudice to Central's defense, particularly in light of the reasonable delay discussed above. Any such prejudice would affect both Central and G&G." JA at 0027. Yet, the fading of memories from the passage of time is exactly the type of prejudice that notice provisions are designed to protect against. See Barrett, 542 S.E.2d at 874. Moreover, the prejudice does not "affect both Central and G&G." SBL, and by extension G&G, had insurance coverage in place the entire time that SBL performed work at the Lawson residence; hence, G&G had the benefit of coverage regardless of the details of when

SBL did what. On the other hand, Central only insured SBL until July 8, 2011, after which Cincinnati Insurance Company provided insurance coverage to SBL. When SBL did what work at the Lawson home, therefore, was critical to Central's defense and evaluation obligations in this case. The more than 5-year delay in giving notice, however, absolutely prejudiced Central's ability to defend and evaluate the claims of the Lawsons against SBL as readily demonstrated from Mr. Taylor's deposition testimony, taken before Central was even in this litigation, yet 8 years after Central no longer insured SBL.

Second, the passage of time also resulted in the loss of most of SBL's records that related to its work on the Lawson residence. As noted by SBL in its discovery responses, "Most of the records related to this project which had been retained by Stone by Lynch were destroyed in a fire on or about February 23, 2015." JA at 942. Had G&G Builders promptly notified Central of the Lawsons' claims in June 2014, Central could have requested the records retained by SBL related to SBL's work on the Lawson residence, which may have provided more (or different) information than that contained in Mr. Taylor's Daily Logs, which in turn may have impacted coverage issues, especially given that Central's policy terminated shortly after SBL began work at the Lawson residence. The inability of Central to obtain SBL's records pertaining to the Lawson residence, caused by G&G Builders' unreasonable delay in providing notice of the Lawsons' claims, clearly prejudiced Central's effort to "investigate and marshal defenses at a time when events are fresh in the witnesses' recollections." Barrett, 542 S.E.2d at 874.

Again, the Circuit Court dismissively concluded that "[t]he fact that . . . records were lost in a fire are not particularly indicative of prejudice to Central's defense, particularly in light of the reasonable delay discussed above. Any such prejudice would affect both Central and G&G." JA at 0027. For the same reasons noted above, however, this conclusion is both illogical and simply

not true. In fact, when Central first received notice of G&G Builders' claims, it attempted to contact SBL and obtain information about the claims and SBL's work at the Lawson residence. SBL, however, did not cooperate.[14]

This non-exhaustive list of prejudice to Central demonstrates that an approximately 8-year delay between the "occurrences" at the Lawson residence (starting in May 2011, when SBL first started work, until the Policy terminated in July 2011) and notice of the claim to Central (in June 2019) worked to the prejudice of an insurer like Central. G&G Builders was aware of the Lawsons' claims, both as they related to SBL's work and to the Lawsons' claim of negligent supervision, for at least a little over five of those years, yet it failed to provide notice of the claims to Central. Even in the unlikely event this delay may be termed reasonable, coverage for G&G Builders is still precluded under the Policy because the delay unfairly and significantly prejudiced Central, and the Circuit Court's conclusion to the contrary was clearly erroneous.

VIII. CONCLUSION

As detailed above, the Order made numerous erroneous legal conclusions. Central, therefore, asks that this Court (1) reverse the Order; (2) find that Central is not estopped from relying upon G&G Builders' unreasonable delay in denying coverage to G&G Builders; (3) find that a 5-year delay by G&G Builders to notify Central of the claim made by the Lawsons represents an unreasonable delay, as a matter of law; and (4) direct the Circuit Court to enter judgment for Central on insurance coverage issues on the ground that G&G Builders failed to provide timely notice to Central of the Lawsons' claims, which was a valid precedent to coverage for G&G Builders under the terms of the Policy.

[14] In fact, SBL never submitted a notice of claim to Central concerning any of the claims against SBL in this matter. Cincinnati Insurance Company defended SBL, and Cincinnati Insurance Company paid the overwhelming bulk of the settlement monies that resulted in the settlement of all claims related to the work performed by SBL. JA at 1167.

CENTRAL MUTUAL INSURANCE COMPANY
By Counsel

/s/ Mychal S. Schulz

Mychal S. Schulz, Esquire (WVSB #6092)
Babst, Calland, Clements & Zomnir, P.C.
300 Summers Street, Suite 1000
Charleston, WV 25301
Telephone: 681-205-8888
Facsimile: 681-205-8814
mschulz@babstcalland.com

CERTIFICATE OF SERVICE

I, Mychal Sommer Schulz, counsel for the Petitioner, hereby certify that on June 4, 2025, I electronically filed the foregoing **Appellant's Brief** via File & Serve*Xpress* which will provide electronic notification to the following counsel of record:

Brent K. Kesner, Esquire
Ernest G. Hentschel, Esquire
Kesner & Kesner, PLLC
112 Capitol Street
Charleston, WV 25301
Counsel for G&G Builders, Inc.

Jeffrey D. Van Volkenburg, Esquire
Varner & Van Volkenburg, PLLC
360 Washington Avenue
Clarksburg, WV 26301
Counsel for Archetype Builders, Inc.

W. Gus Saines, Esquire
McDermott & Bonenberger, PLLC
1144 Market Street, Suite 101
Wheeling, WV 26003
Counsel for Builders Mutual Insurance Company

Jill Cranston Rice, Esquire
Melanie Morgan Norris, Esquire
Dinsmore & Shohl, LLP
215 Don Knotts Boulevard, Suite 310
Morgantown, WV 26501
Counsel for Amicus Curiae West Virginia Insurance Federation

/s/ Mychal S. Schulz
Mychal S. Schulz, Esquire (WVSB #6092)
Babst, Calland, Clements & Zomnir, P.C.
300 Summers Street, Suite 1000
Charleston, WV 25301
Telephone: 681-205-8888
Facsimile: 681-205-8814
mschulz@babstcalland.com