NO. 25-ICA-111

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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

RESPONSE BRIEF OF APPELLEE, G&G BUILDERS, INC., TO THE BRIEF FILED BY CENTRAL MUTUAL INSURANCE COMPANY AND THE BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT CENTRAL MUTUAL INSURANCE COMPANY

Brent K. Kesner (WVSB 2022)
Ernest G. Hentschel (WVSB 6066)
Kesner & Kesner, PLLC
112 Capitol Street
P.O. Box 2587
Charleston, WV 25329
Phone: 304-345-5200
Fax: 304-345-5265
Email: bkesner@kesnerlaw.com
Counsel for Respondent G&G Builders, Inc.

TABLE OF CONTENTS

Contents

TABLE OF AUTHORITIES

Cases

Rules

Regulations

QUESTIONS PRESENTED

1. Whether the Circuit Court of Cabell County correctly found that Central Mutal Insurance Company ("Central") was estopped from denying coverage and a defense to G&G Builders, Inc. ("G&G") based on coverage limitations which were not disclosed to G&G.

2. Whether the Circuit Court of Cabell County correctly found that Central could not rely upon a notice requirement set forth in an insurance policy it issued to Stone By Lynch, LLC to deny insurance coverage to G&G for claims being asserted against G&G by Randie Gail Lawson and Deanna Dawn Lawson when the contract between Stone By Lynch and the Lawsons required Stone By Lynch to have G&G named as an additional insured on Central's insurance policy and Central's agent issued a Certificate of Insurance to G&G confirming that G&G had been added to the Central Policy as an additional insured, but G&G was never provided with a copy of the Central Policy or otherwise advised of the subject notice requirement.

3. Whether the Circuit Court of Cabell County correctly found that Central was given reasonable notice of the claims being asserted against G&G by the Lawsons.

4. Whether the Circuit Court of Cabell County correctly found that Central was not prejudiced by any delay in G&G's notice of the claims being asserted against G&G by the Lawsons.

5. Whether the Circuit Court of Cabell County correctly found that Central was obligated to defend and indemnify G&G in connection with the Lawsons' claims.

STATEMENT OF THE CASE

Introduction

This appeal addresses the Circuit Court of Cabell County's finding that an insurance policy issued to Stone By Lynch, LLC ("SBL") by Appellant, Central Mutual Insurance Company

("Central"), provides liability insurance coverage to Appellee G&G Builders, Inc. ("G&G") for claims asserted against G&G by Randie Gail Lawson and Deanna Dawn Lawson (collectively "the Lawsons"). The Appellant is asking the Court to reverse the Circuit Court's finding that Central had a duty to defend and indemnify G&G in connection with litigation arising from the construction of a residence belonging to the Lawsons. In that regard, SBL was involved in the project as a subcontractor and supplied and/or installed stone materials in connection with the construction of the Lawsons' home. G&G was the Owner's Representative for the project and was named as a counterclaim defendant by the Lawsons.

In discovery, the Lawsons filed an August 1, 2019 Expert Witness Disclosure identifying Gregory L. Boso, P.E. as a expert to testify that there was a failure of the exterior masonry and drainage system and a failure to properly lay the stone. (JA 0476-538 at JA0477-479) Therefore, it became apparent that the Lawsons were alleging that the installation of the stone by the SBL was defective and that the Lawsons were asserting claims against G&G in connection with those defects.

Prior to performing its work on the Lawson's home, SBL entered into a contract with the Lawsons which required SBL to have G&G, as the Owners Representative, named as an additional insured on its policy of insurance with Central and to defend and indemnify G&G in connection with any claim or dispute related to the Lawson Project. (See JA0539-553, the April 4, 2011 "Standard Form Agreement" entered into between the Lawsons and SBL.) Central's agent, Central Carolina Insurance, issued a Certificate of Insurance to G&G, dated May 4, 2011, confirming the existence of the required insurance coverage under SBL's Central Policy and representing that G&G had been added as an additional insured under the Policy. (See JA0554, the May 4, 2011 Certificate.) Because Central refused to defend and indemnify G&G in the Lawsons' action, G&G

filed a third-party claim against it for the purpose of obtaining a declaratory judgment as to its duties to G&G by virtue of the contract the Lawsons entered into with SBL. Following discovery, the Circuit Court below entered summary judgement in favor of G&G on the coverage issue and found that Central was contractually obligated to defend G&G. (JA0001-0029)

The Contract Between The Lawsons And Stone By Lynch

Even before SBL's work began on the project, the Lawsons and SBL decided how they wanted to allocate the risk of potential liability arising from SBL's work on the Lawson's home and the cost of purchasing insurance to cover that risk. To that end, the contract between the Lawsons and SBL required SBL to indemnify and hold harmless the Lawsons and their representative, G&G, from any liability arising out of the work and to obtain insurance coverage for claims arising out of SBL's work, naming both the Lawsons (as "Owner") and G&G (as the "Owner's Representative ") as additional insureds. (See JA0539-0553) "Attachment A" to the April 4, 2011 "Standard Form Agreement" provides as follows:

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

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

***

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

***

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

***

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

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

***

(See JA0547-0548) Thus, the contract between the Lawsons and SBL clearly required SBL to obtain and maintain an insurance policy to provide liability coverage for G&G for claims arising from SBL's work and to have G&G named as an additional insured under the Policy. (See JA0547) In order to confirm the existence of the required coverage, a "Certificate of Insurance" was required.

The Certificate of Insurance

Through Central's agent, SBL obtained and provided to G&G a Certificate of Liability Insurance, dated May 4, 2011, which represented that SBL had obtained the required insurance coverage from "Central Mutual Insurance" and that G&G had been added as an additional insured under the Central Mutual Policy. (See JA0554) Based on the representations of the Certificate of Insurance, the contractual provisions set forth in "Attachment A" to the April 4, 2011 "Standard Form Agreement" (JA JA0547-0548), and the provisions of the Central Policy (JA0758-0841), G&G, as the "Owners Representative," qualified as an additional insured and an "indemnitee" under the Central Policy for claims arising out of the work performed by SBL on the Lawson project.

The Central Mutual Policy

The Central Policy issued to SBL (Policy No. CLP8886235) (Effective July 8, 2010 to July 8, 2011) provides, in relevant part, that Central will pay those sums that an insured is legally obligated to pay as damages because of bodily injury or property damage caused by an "occurrence" that takes place in the "coverage territory," and that Central will provide a defense to a suit seeking to recover such damages from an insured, at Central's expense. (See JA0800-0839) Specifically, the Policy provides, in relevant part:

> **COMMERCIAL GENERAL LIABILITY COVERAGE FORM**
>
> Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.
>
> Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations or Change Endorsement, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the Company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** - Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** - Definitions.

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result. But:

* * *

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

* * *

b. This insurance applies to "bodily injury" and "property damage" only if:

1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

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

3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of any such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

* * *

2. Exclusions

This insurance does not apply to:

* * *

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

1) That the insured would have in the absence of a contract or agreement; or

2) Assumed in a contract or agreement that is an "insured contract," provided the "bodily injury or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract," reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage," provided:

a) Liability to such party for, or the cost of, that party's defense has also been assumed in the same "insured contract; and

b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

* * *

SECTION V - DEFINITIONS

---

* * *

4. "Coverage territory" means:

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

* * *

9. "Insured contract" means:

* * *

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

* * *

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

* * *

17. "Property damage" means:

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

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

* * *

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

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

This endorsement amends the policy by adding the following; please read each section carefully.

* * *

ADDITIONAL INSURED - AUTOMATIC STATUS

* * *

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

* * *

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

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

A written contract, permit or agreement; and

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

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

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

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

1) Your premises;

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

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

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

b. The Limits of Insurance applicable to the additional insured are those specified in the written contract or agreement or in the Declarations of this

policy, whichever is less. These Limits of Insurance are inclusive and not in addition to the Limits of Insurance are inclusive and not in addition to the Limits of Insurance shown in the Declarations.

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

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

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

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

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

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

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

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

* * *

(See JA0800-0814 and 0829-0834) Thus, the contract between the Lawsons and SBL qualifies as "a contract or agreement that is an 'insured contract'" under the Central Policy for purposes of providing coverage for the Lawsons' claims against G&G, as an indemnitee. Because the contract between SBL and the Lawsons contains an indemnification provision (See JA0547-0548) and because G&G is an "Additional Insured" with respect to the Central Policy, coverage was triggered for G&G as an "indemnitee" of SBL, such that Central had a contractual duty to defend and indemnify G&G in the Lawson litigation.

The Civil Action

This civil action was initially instituted by G&G on March 20, 2014, to recover for G&G's services as "Owners Representative" related to the construction of the Lawsons' home. (See JA 0030-0037) On June 13, 2014, the Lawsons responded by filing their *Answer, Counterclaim and Cross-Claims of Randie Gail Lawson and Deanna Dawn Lawson* (JA0038-0055), in which they alleged the existence of various defects in the construction of their home and sought damages from G&G and a number of contractors and suppliers who were involved in the Lawsons' project. The Lawsons' *Counterclaim and Cross-Claims* did not provide a detailed description or analysis of each claimed defect or indicate when any allegedly defective work was performed and the parties were required to conduct discovery in order to determine the nature of the issues with the home. For example, the *Counterclaim* against G&G alleged that G&G had:

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

(JA00046) As the discovery process was ongoing and different defects were identified, G&G began seeking indemnification from the sub-contractors and suppliers which performed the work and requested that their respective insurance carriers defend and indemnify G&G based on the indemnification agreements set forth in each of their contracts. For obvious reasons, this process took time as different sub-contractors were identified and the applicable policy periods when the allegedly defective work was performed were determined so that the different insurance carriers could be put on notice to participate in the defense of G&G. Over time, this led to several different

insurance carriers participating in G&G's defense with respect to specific issues related to the construction of the Lawsons' home, splitting the cost of the defense between them on a pro-rata basis. When any subcontractor's insurance carrier refused to participate in its defense, G&G filed a third-party complaint joining the carrier as a third-party defendant, seeking a declaratory ruling with respect to whether the carrier was obligated to defend and indemnify G&G in the Lawson litigation. (See the original March 7, 2018 *Third-Party Complaint Of G&G Builders, Inc.* (JA0056-0087), the September 3, 2019 *Third-Party Complaint* (JA0088-0124), the December 2, 2019 *Second Amended Third Party Complaint* (JA0162-0176), the March 5, 2020 *Third Amended Third Party Complaint* (JA0177-0236), which joined Central as a party to the Lawson litigation and the April 26, 2021 *Fourth Amended Third-Party Complaint* (JA0237-0302.) For this reason, the litigation developed on two separate tracks, with G&G being defended against the Lawsons' underlying claims by some carriers while others engaged in litigation over the existence of coverage.

The Request For Summary Judgment

Because there was no genuine question of fact to be decided with respect to coverage under the Central Policy, G&G served its *Motion For Summary Judgment* on November 18, 2021, and asserted that Central had a contractual duty and obligation to defend G&G against the Lawsons' claims. (JA0446-0706) Central responded and also filed its own *Motion For Summary Judgment* addressing the coverage issues. (JA0707-0949) In its briefing, Central conceded that SBL "obtained insurance coverage under the Central Mutual Policy that covered the work it performed on the Lawsons' home" (JA0720); that its Policy covered SBL's "indemnification obligation to G&G Builders under the Contract" (JA0720); and that a Certificate of Liability Insurance was issued by Central's agent that represented that G&G Builders had been added as an additional

insured under the Central Policy (JA0720). In addition, Central conceded that "the Lawsons claim "property damage" as that term is used in the Policy" (JA0723); that "the Lawson residence is within the "coverage territory" of the Policy" (JA0723); and that "the Contract represents an "insured contract" under the Policy for which coverage is provided for SBL's indemnification obligations to G&G Builders under the Contract" (JA0723).

While not advanced at the February 8, 2022 hearing on the coverage issues, Central had asserted in its filings that the law of North Carolina, where the Central Policy was issued, should apply and that its Policy did not provide coverage for the claims against G&G under North Carolina Law. At the hearing, however, Central did not contest G&G's position that West Virginia law applies (JA1110). Central acknowledged that G&G qualified as an additional insured under its Policy and asserted that the only reason why G&G was not entitled to coverage under the Central Policy was G&G's failure to comply with Policy's notice requirements. (JA1110) Specifically, Central's counsel stated:

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

(JA1110) Therefore, because Central had effectively conceded that West Virginia law applies to the claims in this case, the only issue before the Circuit Court with respect to Central was whether it had been given adequate notice of the claims against G&G under West Virginia law. (See JA1111) After hearing the arguments of counsel on the coverage issues, the Circuit Court noted:

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

(JA1115) The matter then proceeded toward trial of the Lawsons' claims until a settlement of the claims was reached in September of 2022.

Proceedings After The Settlement Of The Underlying Claims

On May 28, 2024, the Circuit Court entered its written *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* (JA0001-0029) In its *Order*, the Circuit Court found, in Paragraph 85 of its "Conclusions of Law":

> 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.

(JA0026) In that regard, the Circuit Court explained:

> 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.

> 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.

(JA0027) Moreover, the Circuit Court concluded that Central had not suffered any prejudice insamuch as the claims had always been defended. It explained:

> 87. Further, Central has failed to demonstrate prejudice that would necessitate barring G&G's claim for coverage against Central.
>
> 88. Central argues that it has sustained prejudice as a result of G&G's delay in providing it with notice of the Lawsons' claims, emphasizing the importance of Daily Logs to reflect work performed by SBL on the Lawson resident; the admission by G&G's representative, David Taylor, that he could not remember details about SBL's work as reflected in the Daily Logs; and the loss of SBL's records related to work at the Lawson residence due to a fire in February 2015.
>
> 89. The fact that memories may have faded with respect to work performed by SBL and the fact that records were lost in a fire are not particularly indicative of prejudice to Central's defense, particularly in light of the reasonable delay discussed above. Any such prejudice would affect both Central and G&G.
> 90. Moreover, Central did not present any evidence that any of the subject claims were not being actively defended in the period between June 12, 2014, and June 21, 2019, or that its ability to defend G&G has been impaired through a default or any failure to adequately defend against the Lawsons' claims. In fact, it is apparent that a number of other insurers have been actively defending G&G such that this matter has been fully developed for trial.
>
> 91. Therefore, the Court finds that Central has failed to demonstrate that it suffered prejudice as a result of G&G's delay in providing notification of the Lawson's claims to Central such that the Court should find that G&G violated the notice provision in the CGL Policy.
>
> 92. The Court concludes that G&G's notice to Central of the Lawsons' claims against G&G does not preclude coverage for G&G for such claims under the CGL Policy.

(JA0027) In light of these findings, the Circuit Court granted G&G's request for summary judgment and denied the *Motion* filed by Central. (JA0028)

Despite the fact that the Court's *Order* on the coverage issue was interlocutory and did not resolve all of the matters in dispute, Central indicated its intention to seek extraordinary relief

through a petition to the West Virginia State Supreme Court and filed such a *Petition* on July 15, 2024, seeking to have the Circuit Court's findings with respect to its coverage reversed.(JA1228-1272) That Petition was denied by the West Virginia State Supreme Court on January 21, 2025.(JA1314)

While awaiting the entry of an order reflecting the Circuit Court's verbal ruling at the February 8, 2022 hearing, Central had also filed its *Motion For Summary Judgment On G&G Builders Inc.'s Claims For Breach Of Contract, Common Law Bad Faith, And Unfair Trade Practices* on October 11, 2022. (JA1144-1183) In that *Motion*, Central argued that, despite its ruling on coverage, the Circuit Court should grant it summary judgment with respect to G&G's claims for breach of contract, bad faith, and unfair trade practices arising from Central's failure to defend and indemnify G&G based upon the West Virginia State Supreme Court's unpublished memorandum decision in *Soaring Eagle Dev. Co., LLC v. Travelers Indem. Co. of Am.*, No. 19-0841, 2020 WL 6131741 (W. Va. Oct. 19, 2020). Central argued that because G&G received a full defense and full indemnification from insurance carriers for other subcontractors, G&G had no right to seek further recovery from Central Mutual. (JA1158) While G&G responded by pointing out that it had not been fully indemnified and had been forced to release its $250,000 mechanics lien as additional consideration to obtain the settlement of the Lawsons' claims (JA1185-1203), the Circuit Court 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* on October 3, 2024. (See JA1394) In its *Order,* 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, effectively dismissing all of G&G's remaining claims against Central. G&G filed a timely *Notice of Appeal* of that decision on November 4, 2024 (JA

1394), and it is presently the subject of Case No. 24-ICA-441 before this Court. In contrast, Central filed no appeal of the earlier May 28, 2024 *Order* on the coverage issue and allowed its deadline for filing such a notice of appeal to pass.

Despite the fact that its time for appeal had expired, Central attempted to file an appeal of the Circuit Court's May 28, 2024 *Order* on the coverage issues with this Court on February 5, 2025 (JA1395). When that appeal was rejected as being untimely, Central filed a *Motion To File Notice Of Appeal Out Of Time* with this Court and a corresponding *Motion To Certify Order As Final And Appealable* with the Circuit Court below (JA1395). In that regard, Central apparently failed to recognize that the Court's May 28, 2024 *Order* on the coverage issue remained interlocutory up until the Court entered its October 3, 2024 *Order,* which disposed of all of the remaining claims and issues between G&G and Central. Because Central filed no appeal of the May 28, 2024 Order within thirty (30) days of the Court's entry of its October 3, 2024 *Order,* and because the coverage issues were moot (pending the outcome of G&G's appeal), G&G argued that there was no basis for permitting Central to file an appeal inasmuch as it would be futile since all of G&G's claims have subsequently been dismissed by the Circuit Court. On March 13, 2025, this Court denied Central's *Motion To File Notice Of Appeal Out Of Time.* However, the Circuit Court granted Central's *Motion To Certify Order As Final And Appealable,* (JA1315-1317) whereupon Central filed this appeal asserting that the Circuit Court erred in granting G&G's request for summary judgment on the coverage issue. In conjunction with the filing of Central's *Brief*, the West Virginia Insurance Federation has also filed a *Brief* as *Amicus Curiae* in which it supports Central's arguments with respect to notice. Because the arguments advanced by Central and the *Amicus Curiae* are without merit, G&G now submits this *Response Brief* and asks that Central's appeal be denied.

SUMMARY OF THE ARGUMENT

In this case, the Circuit Court properly found that G&G was entitled to summary judgment and rejected Central's assertion that G&G was not entitled to coverage and a defense due to its purported failure to comply with the notice requirements set forth in the Central Policy. In particular, the Circuit Court properly found that Central had a duty to defend G&G in this case inasmuch as claims for construction defects arising from the work of subcontractors can be considered to be an occurrence under a commercial general liability policy such as the Policy issued by Central and G&G stands in the shoes of Central's named insured (SBL) for coverage purposes due to the existence of an insured contract. Likewise, it is undisputed that SBL agreed to defend and indemnify G&G in its contract with the Lawsons and it is also undisputed that Central's Policy provides coverage for such additional insureds. Moreover, Central's agent issued a Certificate of Insurance to G&G which expressly represented that G&G was named as an additional insured under the Central Policy.

With respect to Central's reliance upon the notice provisions in its Policy, it is undisputed that such requirements were not mentioned on the Certificate of Insurance issued to G&G. It is also undisputed that Central did not provide a copy of the Policy to G&G when it issued the Certificate and did not otherwise bring the notice requirements which purportedly restrict coverage to G&G's attention. Under applicable West Virginia law, an insurer cannot rely upon restrictive policy language if it does not bring the language to the attention of insureds, such as G&G.

Finally, the Circuit Court properly concluded that Central had failed to prove that it did not receive adequate notice of the claim or that it was prejudiced by G&G's notice of the Lawson claim. Specifically, the Circuit Court below properly concluded that the notice provided by G&G was reasonable since this case involved complex claims against a large number of subcontractors

who could not be identified until after extensive discovery was completed. In addition, Central did not even mention a failure to give adequate notice in its initial denial of the claim to G&G and West Virginia law mandates that notice requirements be liberally construed. Finally, the Circuit Court below properly found that Central could not demonstrate prejudice due to the lack of earlier notice since G&G was defended the entire time and no judgment had been entered against G&G prior to Central being notified of the claim.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Central requests oral argument under *Rule 20* of the *West Virginia Rules of Appellate Procedure* because it asserts that this case "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" and because "it presents a critical issue." In response, G&G would note that, because the issues raised in this appeal address only the application of settled law to the subject claims, oral argument is not necessary.

ARGUMENT

I. Standard Of Review.

Central appeals the Circuit Court's 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* (JA0001-0029). Under settled West Virginia law, the *Order* is subject to *de novo* review. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994) ("A circuit court's entry of summary judgment is reviewed *de novo*."); *see also*, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002) ("This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court.").

While the standard of review is de novo, when this Court reviews a decision of the Circuit Court to grant summary judgment, it does so under the same standards that the Circuit Court applied to determine whether summary judgment was appropriate. *Williams v. Precision Coil, Inc.*, 194 W.Va. 52, 59, 459 S.E.2d 329, 335 (1995). In that regard, *Rule 56* of the *West Virginia Rules of Civil Procedure* governs requests for partial summary judgement and provides: "The 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."

The purpose of summary judgment is to dispose promptly of controversies on their merits if no facts are disputed or only a question of law is at issue. *W. Va. R. Civ. P. 56(c)*; *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994)*; Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995). If a party moves for summary judgment and presents "affirmative evidence that there is no genuine issue of material fact, the burden of production shifts to the nonmoving party who must either (1) rehabilitate the evidence attacked by the moving party, (2) produce additional evidence showing the existence of a genuine issue for trial, or (3) submit an affidavit explaining why further discovery is necessary as provided in *W. Va. R. Civ. P. 56(f)"*. Syl. Pt. 3, *Williams*, 194 W. Va. 52, 459 S.E.2d 329. Immaterial facts are irrelevant, and summary judgment is required if the non-movant cannot establish an essential element of her case. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995); Syl. Pt. 5, *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

A "genuine issue" for summary judgment purposes is simply one half of a trialworthy issue, and a genuine issue does not arise unless there is sufficient evidence favoring the non-moving party for a reasonable jury to return a verdict for that party; the opposing half of a trialworthy issue

is present where the non-moving party can point to one or more disputed "material" facts. *Jividen v. Law*, 194 W. Va. 705, 461 S.E.2d 451 (1995).

A "material fact" is one that has the capacity to sway the outcome of litigation under the applicable law. *Jividen*, 194 W. Va. 705. For purposes of determining whether there is a genuine issue of material fact sufficient to preclude summary judgment, factual disputes that are irrelevant or unnecessary will not be counted. *Id*. The nonmoving party must, at a minimum, offer more than a "scintilla of evidence" to support his claim. *Id*. The mere contention that issues are disputable is not sufficient to deter the trial from the award of summary judgment. *DeRocchis v. Matlack, Inc.*, 194 W. Va. 417, 460 S.E.2d 663 (1995). Summary judgment "*shall* be entered against" an adverse party, *W. Va. R. Civ. P. 56(e)* (emphasis supplied), who cannot point to "specific facts demonstrating that, indeed, there is a 'trialworthy' issue." *Williams*, 194 W. Va. at 60.

Although the non-movant for summary judgment is entitled to the most favorable inferences that may reasonably be drawn from the evidence, it cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another. *Marcus v. Holley*, 217 W.Va. 508, 516, 618 S.E.2d 517, 525 (2005). Unsupported speculation is not sufficient to defeat summary judgment. *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 58, 59, 459 S.E.2d 329 (1995).

II. The Circuit Court properly found that G&G was entitled to summary judgment with respect to Central's duty to defend it in the Lawson litigation.

Under West Virginia law, liability insurance creates two (2) duties for the insurer: the duty to defend and the duty to provide coverage. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 194, 342 S.E.2d 156 (1986). The insurer must defend its insured if the allegations and the facts

behind them "are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." *Id.*; Syl. Pt. 6, *Farmers & Mechs. Mut. Ins. Co. v. Cook*, 210 W. Va. 394, 557 S.E.2d 801 (2001); *Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 378, 376 S.E.2d 581 (1988) (citing *Pitrolo*). The insurer must defend all the claims if its policy could apply to any of them, but it "need not defend ... if the alleged conduct is entirely foreign to the risk insured against." *Leeber*, 180 W. Va. at 378. Likewise, clear insurance policy provisions are to be applied. *Cook*, 210 W. Va. at Syl. Pt. 5 (citing Syl. Pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33 (1986)); *Green v. Farm Bureau Mut. Auto Ins. Co.*, 139 W. Va. 475, 80 S.E.2d 424, 426 (1954). The only facts material to insurance coverage in this case were the terms of the Central Policy and the claims and allegations made against G&G and SBL by the Lawsons. *Leeber*, 376 S.E.2d at 584.

In the case of *State ex rel. Nationwide Mut. Ins. Co. v. Wilson*, 236 W. Va. 228, 778 S.E.2d 677 (2015), this Court recognized that, after being notified of a claim, an insurer such as Central has a duty to determine whether any of the claims could fall within the coverage provided under its policy, and indicated:

> We recognize that "[w]hen a complaint is filed against an insured, an insurer must look beyond the bare allegations contained in the third party's pleadings and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of the coverage that the insurer is obligated to provide." Syl., *Farmers & Mech. Mut. Fire Ins. Co. of W.Va. v. Hutzler,* 191 W.Va. 559, 447 S.E.2d 22 (1994)

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

> By contrast, an insurer's duty to provide its insured a defense is broader than the duty to indemnify. Allegations in a complaint against an insured trigger the duty to defend if they are "reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policies." Syl. Pt. 3, in part, *Bruceton Bank*

> *v. U.S. Fid. & Guar. Ins. Co.,* 199 W.Va. 548, 486 S.E.2d 19 (1997). Furthermore, "if part of the claims against an insured fall within the coverage of a liability insurance policy and part do not, the insurer must defend all of the claims[.]" *Horace Mann Ins. Co. v. Leeber,* 180 W.Va. 375, 378, 376 S.E.2d 581, 584 (1988).

State ex rel. Nationwide Mut. Ins. Co. v. Wilson, 236 W. Va. 228, 233, 778 S.E.2d 677, 682 (2015).

Here, the allegations of the Lawsons' *Counterclaim* clearly indicate that G&G was being sued in connection with alleged construction defects and the Lawsons subsequently identified an expert to testify regarding defects in the stone work. (See JA 0038-0055 and JA 0476-538 at JA0477-479) Likewise, Central did not dispute that SBL agreed to indemnify G&G as the Owner's Representative in the contract between SBL and the Lawsons. (See JA0720) Because Central has admitted that potentially covered claims were being asserted against G&G, an indemnitee of SBL and an insured contract holder under the express terms of the Central Policy, it is abundantly clear that Central's duty to defend was triggered in this case. Moreover, this West Virginia State Supreme Court has recognized that construction defects which cause damage to stone work, such as that alleged by the Lawsons, can be considered an occurrence under a commercial general liability policy. Specifically, in Syl. Pt. 6 of *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W.Va. 470, 745 S.E. 2d 508 (W.Va. 2013), the Court noted:

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

(Emphasis supplied.) In so ruling, the Court in *Cherrington* recognized that it was expressly overruling its decision in *Erie Insurance Property and Casualty Co. v. Pioneer Home Improvement, Inc.*, 206 W.Va. 506, 526 S.E. 2d 28 (W.Va. 1999), that faulty workmanship claims did not constitute an occurrence. *Cherrington* at 483, 521. The Court explained:

> Application of our prior holdings to find that the defective work of subcontractors does not constitute an "occurrence" and thus is not covered by the subject CGL policy would, indeed, create an absurd result when the policy expressly provides

> coverage for damages occasioned by subcontractors acting on behalf of the insured. Therefore, we conclude that the more sound approach to interpreting the subject policy is to find that defective work performed by a subcontractor on behalf of an insured does give rise to an "occurrence" under a policy of CGL insurance to maintain consistency with the policy's stated intention to provide coverage for the work of subcontractors.

Cherrington at 483, 521. Here, SBL, as a subcontractor, was alleged to have performed defective work, leading to purported liability on the part of the Owner's Representative, G&G. As an "additional insured" under the Central Policy, G&G was clearly entitled to coverage for the defense of such an alleged "occurrence."

G&G was also clearly a party to an "insured contract" with SBL and, thus, an indemnitee under the Central Policy. Specifically, the contract between SBL and the Lawsons required SBL to defend and indemnify both the Lawsons and G&G from claims arising from SBL's work. (See JA0547) Therefore, Central had a separate and distinct duty to defend G&G under its Policy as a party to an "insured contract." In that regard, the Central Policy expressly indicates that its exclusion for contractual liability does not apply to liability "[a]ssumed in a contract or agreement that is an "insured contract," and also provides that, if Central defends an insured against a suit, it must also defend an indemnitee of the insured under an "insured contract." (See JA801 under the exclusion for "Contractual Liability" in Section I of the Commercial General Liability Coverage Form and JA0804 under "Section II -Who Is An Insured.")

In Syllabus Pt. 7 of *Consolidation Coal Co. v. Boston Old Colony Ins. Co.*, 203 W. Va. 385, 508 S.E.2d 102 (1998), the Court noted:

> In a policy for commercial general liability insurance and special employers liability insurance, when a party has an "insured contract," that party stands in the same shoes as the insured for coverage purposes.

Similarly, in the case of *Marlin v. Wetzel Cty. Bd. of Educ.*, 212 W. Va. 215, 222, 569 S.E.2d 462, 469 (2002), the Court explained the application of the law surrounding "insured contracts" at length, and noted:

> "Liability assumed by the insured under any contract" refers to liability incurred when one promises to indemnify or hold harmless another, and does not refer to the liability that results from breach of contract.
> The phrase does not provide coverage for liability caused by a breach of contract; rather, the coverage arises from a specific contract to assume liability for another's negligence. The phrase has been interpreted "to apply only to indemnification and hold-harmless agreements, whereby the insured agrees to 'assume' the tort liability of another." *Gibbs M. Smith, Inc. v. U.S.F. & G.,* 949 P.2d 337, 341 (Utah 1997).
>
> We hold that the phrase "liability assumed by the insured under any contract" in an insurance policy, or words to that effect, refers to liability incurred when an insured promises to indemnify or hold harmless another party, and thereby agrees to assume that other party's tort liability.

Id. at 222, 469.

In this case, G&G clearly had an "insured contract" with SBL, inasmuch as the contract provided for SBL's agreement to indemnify G&G and the Lawsons and also required SBL to procure insurance to cover any such liability. Central's Certificate of Insurance represented that its policy with SBL fulfilled these requirements. In that regard, the Court examined a similar "insured contract" definition in a CGL policy in the case of *Elk Run Coal Co. v. Canopius U.S. Ins., Inc.*, 235 W. Va. 513, 775 S.E.2d 65 (2015), and noted:

> The Canopius CGL policy defines an "insured contract" in relevant part as:
>
> 9.f. That part of any other contract or agreement pertaining to your business ... under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
>
> "Language in an insurance policy should be given its plain, ordinary meaning." Syl. pt. 8, *Cherrington v. Erie Ins. Prop. & Cas. Co.,* 231 W.Va. 470, 745 S.E.2d

> 508 (2013) (internal quotations and citations omitted). Applying the plain language above, it is clear that, insofar as the indemnity agreement between Elk Run and Medford was part of their H & D Agreement and required Medford to "assume the tort liability of another party to pay for 'bodily injury' or 'property damage' to a third person or organization," it is an "insured contract" under the policy.

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

III. The Circuit Court also properly found that G&G was entitled to coverage under the Central Policy in light of the Certificate of Insurance issued by Central 's agent.

As discussed above, G&G was also provided with a Certificate of Insurance by Central's authorized agent. (See JA0554) Unfortunately, G&G's reliance on that Certificate was misplaced because, once claims were asserted, Central denied coverage based on notice provisions which were not mentioned or disclosed in the Certificate or otherwise communicated to G&G.

In *Marlin v. Wetzel County Board of Education*, supra., the Court addressed certificates of insurance at length, stating:

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

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

> We begin our analysis by considering the purpose of certificates of insurance. As previously mentioned, parties to a contract may contractually shift a risk of loss through an indemnity provision in the contract. The "indemnitee" in the contract can also require the "indemnitor" to provide some insurance protection for the indemnitee. However, while [i]ndemnitees can make very specific and comprehensive contractual requirements concerning the protection to be afforded, ... they have very few alternatives for verifying that indemnitors have complied with them....The certificate of insurance is the primary vehicle for verification that insurance requirements have been met.

Id. at 223, 470

The *Marlin* decision involved the Wetzel County Board of Education's claim that it was entitled to indemnification and coverage under its contractor's commercial general liability policy for claims brought by the employees of various sub-contractors who were allegedly exposed to asbestos while renovating a high school. The Court discussed the effect of a certificate of insurance, stating:

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

Id. at 225-226 (emphasis supplied). The Court then found that the Board of Education was entitled to coverage based on the Certificate, noting:

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

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

> The doctrine of estoppel "applies when a party is induced to act or to refrain from acting to [his/]her detriment because of [his/]her reasonable reliance on another party's misrepresentation or concealment of a material fact." Syllabus Point 2, in part, *Ara v. Erie Ins. Co.,* 182 W.Va. 266, 387 S.E.2d 320 (1989). Estoppel is properly invoked to prevent a litigant from asserting a claim or a defense against a party who has detrimentally changed its position in reliance upon the litigant's

> misrepresentation or failure to disclose a material fact. *Ara,* 182 W.Va. at 270, 387 S.E.2d at 324. The doctrine is "designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience." *White v. Austin,* 172 N.J.Super. 451, 454, 412 A.2d 829, 830 (1980).

Id. at 225.

In this case, the authorized agent of Central issued the subject "Certificate of Insurance," which did not set forth or disclose any of the limitations of coverage upon which Central now apparently relies to deny coverage to G&G. In that regard, the Court in *Martin* noted:

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

Marlin, at 224, 471. Therefore, the West Virginia State Supreme Court has made it abundantly clear that an insurer must bring all exclusions on which it seeks to rely to the attention of the insured. For example, at Syl. Pt. 10 of *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.,* 177 W. Va.

734, 737, 356 S.E.2d 488, 491 (1987), overruled on other grounds by *Parsons v. Haliburton Energy Servs., Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2016), the Court explained:

> 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.

Accordingly, the Circuit Court properly found that Central was estopped from denying coverage or a duty to defend G&G in this case based on coverage limitations and notice requirements which were not included or disclosed to G&G in the Certificate of Insurance which purported to provide the insurance coverage mandated under SBL's contract with the Lawsons.

It should also be noted that indemnification agreements which transfer the duty to procure insurance, such as the one contained in the contract between SBL and the Lawsons, are not against the public policy of West Virginia and are generally enforced. For example, the West Virginia State Supreme Court has noted:

> A just public policy demands that indemnity agreements be permitted unless they go beyond a mere allocation of potential joint and several liability and indemnify against the sole negligence of the indemnitee without an appropriate insurance fund, bought pursuant to the contract, for the express purpose of protecting all concerned. A contract that provides in substance that A shall purchase insurance to protect B against actions arising from B's sole negligence *does not* violate the statute as public policy encourages both the allocation of risks and the purchase of insurance.

Dalton v. Childress Serv. Corp., 189 W. Va. 428, 431, 432 S.E.2d 98, 101 (1993). In this case, SBL was required to provide insurance that would cover the risks arising from the Lawsons' home construction project. SBL obtained a Certificate of Insurance indicating that the required coverage was in effect from Central's authorized agent and the Circuit Court properly found that Central could not deny coverage based on a previously undisclosed notice requirement which was not included with the Certificate or otherwise provided to G&G.

In its *Brief*, the *Amicus Curiae* argues that Certificates of Insurance are not intended to provide an insured with notice of all policy requirements and suggests that the Circuit Court improperly found that Central failed to bring the notice requirement in its Policy to G&G's attention. (See the *Amicus Curiae*'s *Brief,* at pgs. 8-11.) This argument misses the point. In this case, it was undisputed that the only material provided to G&G by Central reflecting the coverage being provided was the Certificate of Insurance. Likewise, it is undisputed that the Certificate made no mention of the notice requirements set forth in Central's Policy. Therefore, this case presented the Circuit Court with a classic example of an insurer seeking to rely upon restrictive policy provisions which it had never disclosed to a party which was admittedly an additional insured under its Policy. In fact, the Certificate specifically identified G&G as the "Certificate Holder" and then represented:

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

(JA0554) While the *Amicus Curiae* correctly notes that "[t]he function of a Certificate of Insurance is not to reproduce the entire policy" (see *Amicus Brief,* at pg. 10), it fails to recognize that G&G is not arguing in this case that the entire Central Policy had to be reproduced on the Certificate. Instead, G&G argued, and the Circuit Court agreed, that because the Certificate specifically promised that G&G was an additional insured under the Central Policy, Central was obligated to bring any restrictive provisions found in that Policy to G&G's attention if it wanted to be able to rely upon them to restrict the coverage it had agreed to provide. The easiest way to have done so would have been to provide a copy of the Policy with the Certificate, but it is undisputed that Central did not do so. As expressly noted in the case law cited in *Marlin*, "an insurance company that does not deliver a policy to a certificate holder is estopped from asserting exclusions contained

in the policy but not revealed in the certificate." *Marlin*, at 224, 471. Therefore, the Circuit Court did not err when it found that Central was estopped from relying upon the subject notice requirements and was not "expanding" the rule set forth in *Marlin* in some novel way as the *Amicus Curiae* suggests. Instead, the Circuit Court was merely following the established law as set forth in *Marlin* and other cases which require an insurer to bring restrictive language in an insurance policy to the attention of an insured. See, for example Syl. Pt. 10 of *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.,* supra.

IV. The Circuit Court properly rejected Central's assertion that it did not receive adequate and timely notice.

In its *Brief*, Central asserts that it first received notice of the claims in this case on June 21, 2019, when G&G's counsel sent it a demand for defense and indemnification. (See the *Brief*, at Pg. 6.) Central then suggests that G&G's "five year delay" in notifying it of the claims against it was unreasonable and eliminates coverage under its Policy. (See the *Brief*, at Pg. 20.) These arguments are unsupported by the facts of this case.

To begin, G&G would note that Central did not initially raise failure to give proper notice as a basis for its refusal to defend and indemnify G&G. In that regard, Central denied coverage for G&G's claims in a letter dated August 21, 2019. (See JA0959 referencing Central's August 21, 2019 denial letter.) The letter stated:

> Please be advised that at this time we are unable to accept the tender of defense of G&G Builders, Inc. We have not received documentation to date indicating when Stone By Lynch & Design, LLC performed any work on this jobsite not have any indication that any work performed by Stone by lynch & Design, LLC was faulty.

(See JA0959) At no point in the denial letter did Central mention the notice provisions of the Central policy or assert that coverage for defense was barred as a result of G&G's failure to give

timely notice. (See JA0959) This failure is significant because, pursuant to *§114-14-6.5* of the West Virginia Insurance Commissioner's regulations, no insurer may deny a claim on the grounds of a specific policy provision, condition, or exclusion unless reference to such provision, condition, or exclusion is included in the denial. Here, Central clearly did not consider the notice requirements material or important at the time it initially refused to defend G&G. Instead, it only raised the policy condition after determining that the Lawsons' claims asserted against G&G were clearly covered by its Policy. Such conduct amounts to a waiver of the requirement.

Next, it should be noted that Central itself recognizes that, while the initial *Counterclaim* against G&G was filed in 2014, the parties did not begin discovery in the Lawson case until 2017, due to an appeal related to an arbitration issue. (See Central's *Brief*, at pgs. 5-6.) Moreover, even a cursory review of the docket of this case (JA1318-1396) reveals that it involves complex claims against a large number of sub-contractors. In each instance, it was necessary to determine not only what work the Lawsons claimed to be defective, but also what contracts were in place, the time periods involved, what insurance had been obtained to provide coverage during those time periods, and the position the carriers would take when asked to defend and indemnify G&G. The interrogatories, requests for production, ensuing document searches and production of voluminous file materials necessary to answer these questions all took time and involved many unavoidable delays. Therefore, Central's suggestion that notice was not given within a "reasonable" period of time ignores the circumstances under which this complex litigation developed. In the same fashion, the *Amicus Curiae*'s suggestion, at pg. 13 of its *Brief,* that a five-year delay is "unreasonable" as a matter of law ignores the fact that this was a construction defect case. By their very nature, such cases develop as experts are deposed, new parties are joined, and discovery disputes are resolved. While imposing some arbitrary time limit for giving notice would certainly make life easier for

the insurance industry, the many small businesses, sub-contractors, and individuals who are involved in a typical construction project in West Virginia cannot afford to lose the insurance coverage for which they have paid substantial premiums merely because an expert who blamed a construction defect on their work was not deposed until four or five years after a suit was originally filed against some other party. The *Amicus Curiae's* warning that finding a five-year delay to be reasonable "would create significant uncertainty for the insurance industry" (see the *Amicus Brief*, at pg. 13) misses the point. While the insurance industry is in the business of "uncertainty," the small businesses who purchase insurance to protect themselves against the risk that some claim may be raised against them in the future are doing so for peace of mind. An arbitrary finding that some particular period of time is automatically "unreasonable," without regard for the circumstances of a particular case and in the absence of prejudice, would create even more "significant uncertainty" for the construction industry which must face the possibility of such litigation every day and purchases insurance to mitigate that risk.

The notice requirement in an insurance policy is meant to give insurers such as Central "'an opportunity to investigate and marshal defenses at a time when events are fresh in the witnesses' recollections[,]'" so that the insurance company can "'acquire information upon which it can form an intelligent estimate of its liabilities[.]'" *Colonial Ins. Co. v. Barrett*, 208 W. Va. 706, 711, 542 S.E.2d 869, 874 (W. Va. 2000) (citations omitted). As the Court in *Barrett* went on to explain:

> In examining whether an insurance company has been prejudiced by an unreasonable delay in receiving notice of a claim, we set forth the following guidelines in Syllabus Point 2 of *Dairyland Ins. Co. v. Voshel*, 189 W.Va. 121, 428 S.E.2d 542 (1993):
>
> > 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.

Colonial Ins. Co. v. Barrett, at 712, 875. However, the Court in *Barrett* also noted that a policy's notice provision is not to be "read as a series of technical hurdles[,]" but "'is to be liberally construed in favor of'" the insured. *Barrett*, 542 S.E.2d at 874 (citation omitted). "'[S]ubstantial compliance'" with the notice requirement, so that the insurer can "'adequately investigate the claim and estimate its liabilities, is all that is required.'" *Id.* Moreover, the west Virginia State Supreme Court has recognized that the determination of whether a delay in notification was "reasonable" is normally a question of fact for a jury to decide. In that regard, the Court has noted:

> Nevertheless, our prior cases also have concluded that such a determination of reasonableness is a question of fact for the jury. See, e.g., Colonial Ins. Co. v. Barrett, 208 W.Va. at 712, 542 S.E.2d at 875 ("The question of whether an insurance company was notified within a reasonable time period is, generally, a question for the finder of fact." (citations omitted)); State Auto. Mut. Ins. Co. v. Youler, 183 W.Va. 556, 561, 396 S.E.2d 737, 742 (1990) ("Generally, whether notice has been given to an automobile insurer within a reasonable period of time is an issue to be resolved by the fact finder." (citations omitted)).

Travelers Indem. Co. v. U.S. Silica Co., 237 W. Va. 540, 547, 788 S.E.2d 286, 293 (2015) (Emphasis supplied.)

Importantly, the *Travelers* case, which was decided in 2015, involved an effort to seek coverage under policies that were in effect between 1949 and 1958. The insured had not notified

the carrier of claims which first arose in the 1970's and was seeking to recover for defense costs which had been incurred many years earlier in cases which had already been resolved. See, *Travelers Indem. Co. v. U.S. Silica Co.*, at 543-544, 289. Here, the underlying litigation was still ongoing when G&G tendered its defense and it is beyond dispute that multiple parties in the Lawson litigation amended their pleadings to bring in new parties as additional information was obtained regarding the construction defects at issue.

In this case, Central suggests that the mere existence of the *Counterclaim* in 2014 and/or the mention of problems with unidentified stone work coupled with the existence of the Certificate of Insurance and the SBL contract was sufficient to trigger G&G's duty to place it on notice of the Lawsons' claims and demand coverage. (See Central's *Brief,* at pgs. 29 -30.) It further directs the Court to case law that indicates, an "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." (See the Central's *Brief* at Pg. 34.) However, it should be noted that Central failed to provide the complete quote with respect to the lack of knowledge set forth in *Travelers Indem. Co. v. U.S. Silica Co.* In fact, the Court in *Travelers Indem. Co. v. U.S. Silica Co.*,, explained that delay in giving notice can be justified when the insurer is responsible for that lack of knowledge and indicated:

> . . . a lack of knowledge of an insurance policy does not excuse a delay in notification of an occurrence. It is true that "delay ... may be excused if there was a justifiable lack of knowledge of coverage." *Scala v. Scala*, 19 A.D.2d 559[, 559], 241 N.Y.S.2d 23, 24 (1963). A justifiable lack of knowledge of coverage, however, is to be distinguished from a lack of knowledge of the existence of a policy. Notice of the content of coverage is within the control of an insurer, and it will thus generally bear some of the responsibility for an insured's lack of knowledge of coverage. See, e.g., *Padavan v. Clemente*, 43 A.D.2d 729[, 729], 350 N.Y.S.2d 694, 696 (1973) (insurance company's failure to explain coverage provision of policy to insured led to finding that insured's seven-month delay in giving notice was excusable).

Travelers Indem. Co., at 548, 294 (Emphasis added.) In this case, Central merely provided a Certificate of Insurance to G&G, but did not provide G&G with a copy of its Policy or the notice requirements upon which it now seeks to rely. Therefore, Central cannot rely upon G&G's lack of knowledge of the notice requirements in its Policy to defeat coverage.

Central's suggestion that it was somehow prejudiced by a lack of earlier notice is also without merit. In that regard, it is important to recognize that Central is a liability insurer. Any duty to pay a claim against G&G which it might have in this case would first depend upon a finding of liability on the part of G&G. However, as discussed above, G&G was defended throughout this litigation by various carriers and there had been no finding of liability against G&G at the time G&G provided notice to Central. The West Virginia State Supreme Court has discussed the fact that an insurance carrier is less likely to be prejudiced by a lack of notice if other carriers are already investigating the claim. See *Dairyland Ins. Co. v. Voshel*, 189 W. Va. 121, 428 S.E.2d 542 (1993), wherein the Court noted:

> With no other insurance companies involved, the insurer is more likely to be prejudiced by the delay because there is no other party charged with investigating the accident.

Voshel, at 124-25, 545-46. Here, the parties were completing depositions and discovery regarding the Lawsons' claims and that information was readily available to Central if it had decided to participate in G&G's defense. No opportunity to conduct discovery or depose witnesses on G&G's behalf was lost and no evidence disappeared. In the absence of evidence to establish that Central would have somehow done a better job of gathering information or obtaining documents, it simply could not demonstrate that it was prejudiced by the timing of G&G's notice. Likewise, the fact that memories may have faded with respect to the work performed by SBL was no more prejudicial

to Central than it was to the Lawsons, G&G, or any other party. Fading memory is simply a fact of life in all litigation involving alleged construction defects where damages may not appear until months or years after work was completed. Therefore, the Circuit Court properly found that Central could not meet its burden of proving that it was specifically prejudiced by G&G's notice of the Lawsons' claims.

CONCLUSION

For all of the foregoing reasons, G&G asks the Court to deny Central's appeal and remand this action for proceedings on the merits.

Respectfully submitted,

G&G Builders, Inc.,

By counsel,

/s/ Brent K. Kesner
Brent K. Kesner (WVSB 2022)
Ernest G. Hentschel, II (WVSB 6006)
Kesner & Kesner, PLLC
112 Capitol Street
P.O. Box 2587
Charleston, WV 25329
Phone: 304-345-520mailto:carrienewton@frontier.com0
Fax: 304-345-5265
Email: bkesner@kesnerlaw.com
Email: ehentschel@kesnerlaw.com

VERIFICATION

BRENT K. KESNER, being first duly sworn, on his oath, deposes and says that he is counsel for the Appellee, G&G Builders, Inc., in the foregoing verified RESPONSE 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 Appellee, do hereby certify that I have served the foregoing "**RESPONSE BRIEF OF APPELLEE, G&G BUILDERS, INC. TO THE BRIEF FILED BY CENTRAL MUTUAL INSURANCE COMPANY AND THE BRIEF OF THE WEST VIRGINIA INSURANCE FEDERATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT CENTRAL MUTUAL INSURANCE COMPANY"** upon all parties and known counsel of record, via File & ServeXpress, as indicated below, this 3rd day of July, 2025, addressed as follows:

W. Gus Saines, Esq.
McDermott & Bonenberger, PLLC
1144 Market Street, Suite 101
Wheeling, WV 26003
wgsaines@mandblaw.com
Counsel for Builders Mutual Insurance Company

Mychal S. Schulz, Esq.
Babst, Calland, Clements & Zomnir, P.C.
300 Summers Street, Suite 1000
Charleston, WV 25301
mschulz@babstcalland.com
Counsel for Central Mutual Insurance Company

Jeffrey D. Van Volkenburg, Esq.
Varner & Van Volkenburg, PLLC
360 Washington Avenue
Clarksburg, WV 26301
jdvanvolkenburg@vv-wvlaw.com
Counsel for Archetype Builders, Inc

Jill Cranston Rice, Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501
jill.rice@dinsmore.com
Counsel for Amicus Curiae West Virginia Insurance Federation

/s/ Brent K. Kesner
Brent K. Kesner (WVSB 2022)
Ernest G. Hentschel, II (WVSB 6006)
Kesner & Kesner, PLLC
112 Capitol Street
Charleston, WV 25329
Phone: 304-345-5200
Fax: 304-345-5265
Email: bkesner@kesnerlaw.com