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 REPLY 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. REPLY ARGUMENT

Appellant Central Mutual Insurance Company ("Central") files this Reply to the 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 ("Response"). For the reasons detailed below, the Response violates the West Virginia Rules of Appellate Procedure in several respects, fails to disagree with a single thing in Central's Statement of the Case, spend a majority of the Argument on matters not in dispute, and ultimately addresses the issues raised in Appellant's Brief ("Central's Brief") in just a few pages. Even then, however, the Response fails to address virtually any of the arguments raised in Central's Brief.

A. The Response violates the West Virginia Rules of Appellate Procedure.

As an initial matter, the Response violates W. Va. R. App. P. 10(d) because it (1) ignores the Assignments of Error detailed in Central's Brief and instead injects "Questions Presented," which are not permitted under Rule 10(d) and (2) presents a 16-page Statement of the Case that fails to correct any inaccuracy or omission in Central's Brief.

More egregiously, the Response invites this Court to reverse a critical finding of fact -- that G&G Builders' duty to provide notice to Central was triggered on June 12, 2014, when it received notice of the claims for which it seeks coverage -- without identifying any cross-assignments of error as required by W. Va. R. App. P. 10(f). The reason is obvious. G&G Builders cannot articulate a valid reason why it failed to provide notice to Central for *five years* after it received notice 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"), the named insured under the Commercial General Liability Policy issued by Central to

SBL ("the Policy"). As detailed below, G&G Builders' excuses fail to recognize that, for the entire *five year* period in which it failed to provide notice, it (1) was represented by counsel, including its present counsel; (2) possessed a copy of the Certificate of Insurance ("COI") naming it as an additional insured under the Policy (which it had since at least May 5, 2011); (3) knew that SBL – and only SBL – performed the stone work at the Lawsons' residence (starting on May 5, 2011) JA 0540;[1] and (4) knew that the Lawsons' allegations that "stone is cracked and broken, windows leak, chimney leaks" as stated in their Counterclaim filed on June 12, 2014, could only involve work performed by SBL. JA 0046.

These failures mirror the overall failure of the Response to meaningfully address the assignments of error in Central's Brief or articulate valid reasons why the Circuit Court of Cabell County ("Circuit Court") did not err when it entered its Order Granting G&G Builders, Inc.'s Motion for Summary Judgment and Denying Central Mutual Insurance Company's Motion for Summary Judgment on Coverage Issues on May 28, 2024 (the "Order").

B. The Response fails to recognize that proper notice represents a condition precedent to coverage under an insurance policy.

The vast majority of the Response represents unnecessary regurgitation of uncontested facts and irrelevant arguments that continue G&G Builders' failure to grasp a fundamental point of 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, 208 W. Va. 706, 542 S.E.2d 869, 874, (W. Va. 2000) (citing Maynard v. National Fire Ins. Co. of Hartford, 147 W.Va. 539, 129 S.E.2d 443 (W. Va. 1963)). Put another way, even if coverage exists under the terms of an

[1] G&G Builders knew this, of course, because it served as the "Owners' Representative" on every contract with every contractor who worked on the Lawson residence, and G&G Builders' representatives were on-site directing the work for the entirety of the time that SBL worked on the Lawson resident.

insurance policy, a party will still be denied that coverage if it fails to properly provide notice of claims to the insurer.

Here, G&G Builders argues vociferously (and voluminously) that the Policy provides it coverage for the claims asserted by the Lawsons. That is neither contested nor, in this appeal before the Court, relevant. The sole issue on appeal is whether G&G Builders provided adequate notice (after a 5-year delay) to Central, which represents a necessary condition precedent to receiving that coverage.

The failure of G&G Builders to recognize this fundamental point of law renders the vast majority of its Response completely irrelevant to the core issue before this Court.

C. G&G Builders seek to surreptitiously reset the date when it received notice of the claims by the Lawsons for work performed by SBL.

The Response invites this Court to reverse a critical finding of fact without identifying any cross-assignments of error as required by Rule 10(f). W. Va. R. App. P. 10(f).

Specifically, the Order found that G&G Builders' duty to provide notice to Central was triggered on June 12, 2014, when it received notice of the claims for which it seeks coverage. JA 0026. The Response notes, however, that the Lawsons filed an Expert Witness Disclosure in the underlying construction case on August 1, 2019, at which point, G&G Builders asserts, it became apparent that the Lawsons were asserting claims against G&G in connection with "defects" in the "installation of the stone by SBL[.]" Response at 2. In fact, G&G revisits this point often:

- "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." Response at 10.

- "Here, the allegations in 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." Response at 22.

- "Central then suggests that G&G's 'five year delay' in notifying it of the claims against it was unreasonable . . . ." Response at 30 (quote marks around "five year delay" in original).

- "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 . . . ." Response at 31.

- ". . . 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 insurance 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."[2] Response at 32.

- "In this case, Central *suggests* that the mere existence of the Counterclaim in 2014 land/or the mention of problems with unidentified stone work coupled with the existence of the Certificate of Insurance[3] and the SBL contract was sufficient to trigger G&G's duty to place it on notice of the Lawsons' claims and demand coverage." Response at 34 (emphasis added).

These passages ignore that the Circuit Court expressly found that the allegations in the Lawson's Counterclaim filed on June 12, 2014, put G&G Builders on notice of the claims asserted against G&G Builders by the Lawsons related to the work performed by SBL. See Order at ¶ 85 JA 0026-0027. ("Under the facts of the present matter, the time between the date on which G&G

[2] Of course, G&G Builders did not pay a single penny in premiums for the insurance coverage afforded under the Central Policy.

[3] The Certificate of Insurance did not merely "exist." Rather, G&G Builders concedes that it actually possessed the Certificate of Insurance by at least May 5, 2011, when SBL began work on the Lawson home. Response at 5.

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.")[4]; Order at ¶85 JA 0026-0027. ("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.").

In the Response, G&G Builders desperately scrambles to convince this Court to reverse the Circuit Court's finding about when the five-year notice period started without actually appealing that issue. Given the ample evidence to support the Circuit Court's finding that G&G Builders was on notice no later than June 12, 2014, that the Lawsons' asserted claims against G&G Builders based upon work performed on the Lawson home by SBL, this Court should reject G&G Builders' attempted sleight of hand and acknowledge that G&G Builders' duty to provide notice to Central started on June 12, 2014.

D. The Argument Section of the Response is Largely Irrelevant.

Remarkably, the Argument section of the Response spends many pages "arguing" something not in dispute – that coverage exists under the Central Policy for the claims asserted by the Lawsons related to work performed by SBL. See Response at 20-25 (Section II of Argument). It then mischaracterizes the Circuit Court's analysis of the COI by incorrectly arguing that the "Circuit Court also properly found that G&G was entitled to coverage under the Central

[4] As detailed in both Central's Brief and below, Central asserts that the uncontested five-year delay in providing notice was unreasonable as a matter of West Virginia law.

Policy in light of the Certificate of Insurance issued by Central's agent." See Response at 25-30 (Section III of Argument). The Response concludes by failing to properly analyze the notice issue under West Virginia law. Unsurprisingly, the structure of the Argument in the Response mirrors the effort by G&G Builders to recast the issues before this Court.

1. The notice provision in the Central Policy represents a condition precedent to coverage; hence, Section II of the Response is irrelevant.

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 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 0809-0810. Any coverage provided under the Central Policy to G&G Builders only exists if G&G Builders provided notice to Central of the Lawsons' claims "as soon as practicable." As noted above, 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, 147 W.Va. 539, 129 S.E.2d 443 (W. Va. 1963)).

Tellingly, the Response completely fails to address the language of the notice requirement in the Policy. More surprisingly, the Response fails to address, or even mention, that an insured like G&G Builders must provide proper notice to an insurer *before* coverage for the insured received coverage. For that simple reason, G&G Builders' repetitive arguments that the Policy provides coverage under the terms of the Policy seeks to distract attention from its failure to provide proper notice to Central of the claims asserted by the Lawsons in June 2014, without which no coverage exists for G&G Builders. Period. For that reason, Section II of the Argument in the Response is simply irrelevant.

2. The Certificate of Insurance does not, and cannot, provide insurance coverage to G&G Builders and does not impact the notice provisions in the Policy.

Knowing that G&G Builders cannot overcome its uncontested five-year delay in providing notice, the Response contends that Central cannot, as a matter of law, "den[y] coverage based on notice provisions which were not mentioned or disclosed in the Certificate [of Insurance] or otherwise communicated to G&G." Response at 25. This argument, adopted by the Circuit Court, contradicts both the clear and unambiguous language of the COI and West Virginia law.

First, the COI clearly states 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.

JA 0554. This language, which the Response fails to mention, belies any argument that the COI either provides coverage to G&G Builders or alters the terms of the Policy in any way.

Instead, G&G Builders and the Circuit Court rely upon Marlin v. Wetzel County Bd. of Educ., 212 W. Va. 215, 222, 569 S.E.2d 462, 469 (2002), 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 0022. Remarkably, however, neither the Circuit Court nor G&G Builders ever identified any "misrepresentation" contained in the COI, nor did either identify how G&G Builders "relied" upon this unidentified misrepresentation, both of

which the Marlin court required be demonstrated before an insurer could be estopped from denying coverage reflected in a certificate of insurance.

To be clear, the COI contains no misrepresentations. Neither the Order nor the Response identify anything within the COI that "misrepresents" anything. Critically, the insurer in Marlin *denied* that coverage existed under the policy, notwithstanding the information in the certificate of insurance, because the certificate holder was never added to the policy as an additional insured. The "misrepresentation" in Marlin was that the coverage ever existed in the first place. Here, however, Central concedes that coverage existed under the Policy for the claims asserted against G&G Builders by the Lawsons related to work performed by SBL -- exactly as reflected in the COI. G&G Builders failed, however, to fulfill a condition *precedent* to that uncontested coverage, i.e. provide notice as "soon as practicable" as required by the Policy.

In short, without a misrepresentation in the COI -- and the Order and the Response fail to identify any such misrepresentation -- Central cannot be estopped from relying upon the notice requirement in the Policy.[5]

To overcome its failure to identify any misrepresentation in the COI, the Circuit Court erroneous 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 0021 (emphasis added). As detailed in Central's Brief, however, to support this conclusion, the Circuit Court inexplicably expanded the term "exclusionary clause" at issue in Nat'l Mut. Ins. Co. v. McMahon & Sons, 177 W. Va. 734, 737, 356 S.E.2d 488, 491 (1987), which represents a specialized term of art in the context of an insurance policy, to include "limitations" -- a phrase that has no meaning in insurance law.

[5] Of course, without a misrepresentation, G&G Builders cannot show that it "relied" on anything to its detriment, as also required for the estoppel analysis in Marlin. When G&G Builders received the COI from SBL no later than May 5, 2011, when SBL began work at the Lawson residence, G&G Builders was, in fact, an additional insured under the terms of the Policy; i.e., the COI was accurate, and G&G Builders "relied" upon it to allow SBL to begin working.

Central's Brief at 25-29. Notably, the Response does not, because it cannot, justify or even reasonably explain the Circuit Court's expansion of "exclusionary clauses" at issue in Nat'l Mut. Ins. Co. to include "limitations" on coverage. Instead, the Response simply restates the contents of the Order. As emphasized by both Central and *amicus curiae* the West Virginia Insurance Federation, requiring a certificate of insurance to include both "exclusionary clauses" and "limitations" before an insurer can rely upon them represents an unreasonable, unprecedented, impracticable, and dangerous change in existing insurance law.

3. The Response fails to address West Virginia cases concerning unreasonable notice.

Perhaps unsurprisingly, the Response fails to address the West Virginia cases cited in Central's Brief that address unreasonable delay in providing notice to an insurer. Specifically, the Response fails to address either Ragland v. Nationwide Mut. Ins. Co., 146 W. Va. 403, 120 S.E.2d 482, 490-91 (W. Va. 1961) (finding 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"), or Medical Assurance of W. Va., Inc. v. United States, No. 06-1156, 2007 U.S. LEXIS 9331 (4th Cir. April 24, 2007) (holding that "[a]n unexplained, four-year delay in notice is unreasonable as a matter of law.").

Further, the Response inaccurately portrays the facts in Travelers Indem. Co. v. U.S. Silica Co., 237 W. Va. 540, 788 S.E. 2d 286 (2015), in which Travelers, the insurer, complained "that over three years elapsed between the time that U.S. Silica first demanded coverage, on September 20, 2005, and the date upon which U.S. Silica provided the complaints for such claims to Travelers, i.e., September 24, 2008." Travelers Indem. Co., 237 W. Va. at 547, 788 S.E.2d at 293. The court, however, noted that the insured should have put the insurer on notice of claims that the insured knew about beginning in 1975 and continuing until the insured gave of claims notice in 2005 of

claims that arose up to the time of the notice. Travelers Indem. Co., 237 W. Va. at 547, 788 S.E.2d at 293. The court, however, denied coverage for *all* claims, even those asserted less than 3 years before the insured gave notice to Travelers. Travelers Indem. Co., 237 W. Va. at 549, 788 S.E.2d at 295 ("Accordingly, we find that U.S. Silica is not entitled to coverage under the subject Travelers policies and, therefore, reverse the circuit court's contrary ruling.").

Instead of addressing these cases, the Response (1) improperly attempts to recalibrate the notice period to something less than five years (as discussed above); and (2) tries to excuse G&G Builders' delay as "reasonable" under "the facts of the present matter." G&G Builders' excuses, however, lack both candor and merit.[6]

The "facts of the present matter" simply do not support the Circuit Court's conclusion that G&G Builders' delay was "reasonable," and the Response fails to justify the Circuit Court's conclusion.

a. G&G Builders did not need discovery in the underlying case to provide notice of the Lawsons' claims to Central.

Specifically, the Circuit Court concluded 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 0026. This "fact" fails, however, to recognize that G&G Builders already had all the information necessary to send a notice of claim no later than June 12, 2014. To

[6] The response argues that Central "did not initially raise failure to give proper notice as a basis for its refusal to defend and indemnify." Response at 30. Central initially refused "at this time" to provide coverage, however, because its named insured, SBL, failed to cooperate with Central by providing any documents concerning its work done on the Lawson home. Only after being brought into the litigation did Central have access to the documentation that demonstrated G&G Builders' five-year delay in providing its notice of claims. Further, G&G Builders failed to make this argument below, and this issue is not addressed in the Order; hence, it should not be raised on appeal. See Sotak v. S. Charleston Hous. Auth., 2024 W. Va. App. LEXIS 121, *4 (W. Va. ICA, April 22, 2024) (Court "will not consider an error which is not properly preserved in the record nor apparent on the face of the record[,]" and "[b]ecause nothing in the appendix record establishes that Ms. Sotak preserved this issue for review on appeal, we consider the same to be waived.") (citations omitted).

be crystal clear, G&G Builders possessed the following information on that date (and 3 years before discovery began in the underlying litigation):

- The COI, which named G&G Builders as an additional insured under the policy and contained all the identifying information for the Policy, including the name of Central. JA 0554.

- Knowledge that SBL, and only SBL, performed the stone work at the Lawson residence beginning on May 11, 2011, and ending sometime in 2013. JA 054, JA 0843, and JA 0870-0877.

- The Lawsons' allegations that "stone is cracked and broken, windows leak, chimney leaks" as stated in their Counterclaim filed on June 12, 2014. JA 0046.

Moreover, G&G Builders has been represented by counsel since at least March 20, 2014, when it initiated its civil action against the Lawsons, including its present counsel. See G&G Builders, Inc. v. Lawson, 238 W. Va. 280, 794 S.E.2d 1 (2016). Together, these facts demonstrate that no discovery in the underlying litigation was necessary for G&G Builders to provide timely notice of claims to Central, and the Circuit Court clearly erred in excusing G&G Builders' delay on that basis.

b. The alleged "complexity" of the claims and the number of subcontracts is irrelevant to the issue of G&G Builders' notice 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 0026.

Whether liability issues were "complex" is completely irrelevant to whether G&G Builders had all the information necessary to give notice of the Lawsons' claims to Central starting on June 12, 2014. In fact, any alleged "complexity" of the claims is exactly why Central should have been given timely notice of those claims. Moreover, regardless of the "complexity" of the claims, 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.

Likewise, the "large number of subcontractors" is likewise irrelevant to whether G&G Builders had all the information necessary to provide notice beginning on June 12, 2014. It did. In addition, G&G Builders was the Owners Representative at the worksite (i.e., the Lawson residence) and directly managed the "large number of contractors" during the work in 2011 – 2013. Moreover, G&G Builders presumably had certificates of insurance from *all* of the "large number of subcontractors" because it unequivocally required all subcontractors to "continue to submit current certificates of insurance to G&G Builders for this project for an additional two (2) years after completion of the project. No exceptions." See Memo re. Additional Insurance Requirements from Sherry Means, G&G Builders' Project Services Manager. JA 0553 (emphasis in original). Again, the "large number of subcontractors" involved in the project offers no excuse for G&G Builders' failure to provide Central with notice of the Lawsons' claims.

Finally, the excuse that "discovery was integral to determining the contracts in place during specific times and what insurance contracts applied" is simply nonsensical. As detailed above, G&G Builders, as the Builders Representative, managed all the contracts with subcontractors and explicitly required that it receive certificates of insurance from those contractors before each began working at the Lawson resident, including the COI that reflected coverage as an additional insured under the Policy. Discovery was not "integral" to G&G Builders learning any of these things as G&G Builders already had all the necessary documents and information to provide a notice to Central no later than June 12, 2014.

In short, the "facts of the present matter" by which the Circuit Court excused G&G Builders' failure to provide notice for over five years simply fail to provide a reasonable excuse

for G&G Builders' delay. Moreover, the Circuit Court clearly abused its discretion in dressing these unreasonable excuses up as "facts" and committed clear error by concluding that those alleged "facts" made G&G Builders' five-year delay in providing a notice of claim to Central "reasonable."

In short, the Circuit Court committed clear legal error in concluding that, [u]nder the facts of the present matter," G&G Builders' more than 5-year delay "was reasonable." JA 0026. The Response simply fails to present any reasonable basis to conclude otherwise.

IV. CONCLUSION

As detailed above and in Central's Brief, the Order made numerous erroneous legal conclusions, none of which G&G Builders reasonably rebuts in the Response.

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 condition precedent to coverage for G&G Builders under the terms of the Policy.

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 July 18, 2025, I electronically filed the foregoing **Appellant's Reply 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

/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