NO. 25-ICA-42

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

G&G BUILDERS, INC.
Plaintiff/ Counterclaim Defendant/Cross-Claimant/ Third-Party Plaintiff below,

Petitioner,

v.

BUILDERS PREMIER INSURANCE COMPANY,
Third-Party Defendant below,

Respondent.

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

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

1. The Circuit Court below erred in finding that G&G Builders Inc. (G&G) had no valid claim for breach of contract after previously finding that Builders Premier Mutual Insurance Company ("Builders") had an independent contractual duty to defend G&G in connection with the claims of defective drywall by Archetype Builders, Inc. ("Archetype").

2. The Circuit Court below erred in finding that *Soaring Eagle Development Co., LLC v. Travelers Indemnity Co. of America*, 19-0841, 2020 WL 6131741, 2020 LEXIS 699 (W. Va. Oct. 19, 2020), barred G&G's claims when *Soaring Eagle*, unlike this case, involved no breach of contract by Travelers and a claimant which had always been defended by the subcontractors' insurers on a primary basis.

3. The Circuit Court erred in finding that the collateral source rule did not apply to the payments made by other subcontractors' carriers toward the defense of G&G.

4. The Circuit Court erred when it refused to permit G&G to have an opportunity for discovery with respect to its breach of contract, bad faith and unfair trade practices claims.

5. The Circuit Court erred when it granted Builders summary judgment on G&G's bad faith and Unfair Trade Practices Act claims even though those claims raised genuine questions of fact to be decided by a jury.

STATEMENT OF THE CASE

Introduction

This action was initially instituted by G&G Builders, Inc. ("G&G") to recover sums owed for its services as the Owners' Representation in connection with the construction of a home for Randie and Deanna Lawson ("the Lawsons"). The Lawsons responded by filing counter and cross

claims in which they alleged the existence of various defects in the construction of their home. G&G was named as a counterclaim defendant by the Lawsons.

Prior to their work on the Lawsons' home, the individual contractors and suppliers who worked on the project entered into contracts which required them to indemnify and hold G&G harmless in the event of claims arising from and/or related to their work and to obtain insurance coverage to protect G&G in the event of such claims. G&G sought indemnification from the various contractors and suppliers and requested that their respective insurance carriers defend and indemnify it. When insurance carriers refused to do so, G&G joined them in the litigation so that all implicated insurance coverage could be made available. One of those contractors was Archetype Builders, Inc. ("Archetype"), which was insured by the Respondent, Builders Premier Mutual Insurance Company ("Builders").

This *Petition* addresses the Circuit Court of Cabell County's December 30, 2024, *Order Granting Motion for Summary Judgment of Builders Premier Mutual Insurance Insurance Company on G&G Builders, Inc.'s Claims for Breach of Contract, Common Law Bad Faith, and Unfair Trade Practices* (JA1614-1625). In that *Order*, the Circuit Court found that, because G&G had been defended by other subcontractors' insurance carriers against the claims being asserted by the Lawsons, G&G had no right to recover for Builders' breach of contract, bad faith, or violations of the Unfair Trade Practices Act even though Builders had refused to pay any amount for the defense of G&G in connection with the Lawsons' claims arising from Archetype's drywall work. The Circuit Court based its decision on the West Virginia State Supreme Court's decision in *Soaring Eagle Development Co., LLC v. Travelers Indemnity Co. of America*, 19-0841, 2020 WL 6131741, 2020 LEXIS 699 (W. Va. Oct. 19, 2020), which unlike this case involved a party that had been fully defended and indemnified throughout the underlying litigation by the insurers with

primary coverage. In this appeal, G&G is asking the Court to reverse the Circuit Court's December 30, 2024 *Order* and remand this action for further development of G&G's claims against Builders.

Factual Background

As noted above, this litigation arose from the construction of a residence belonging to the Lawsons. Archetype was involved in the project as a subcontractor and installed the drywall in the Lawsons' home. In their *Counterclaim*, the Lawsons asserted there was damage to wood work, broken and cracked stone, leaking windows, chimney leaks, damaged patio tiles, damaged tile, defective grout and other defects. (JA223) As discovery developed, the Lawsons indicated in their April 14, 2017 written discovery responses, that "wall and ceiling drywall is wavy and cracking due to improper installation." (JA1010) In light of these allegations, it became apparent that the Lawsons were alleging that the installation of the drywall by Archetype was defective and that the Lawsons were asserting claims against G&G in connection with those defects.

Archetype's contract with the Lawsons required it to have G&G, as the Owner's Representative, named as an additional insured on its policy of insurance and to defend and indemnify G&G in connection with any claim or dispute related to the Lawson project. (JA1448-1449) Builder's agent, KWT Insurance Agency, Inc., issued a Certificate of Insurance confirming the existence of the required insurance coverage under Archetype's Policy. (JA1021, the August 11, 2011 Certificate.) Because Builders refused to defend and indemnify G&G in this action, G&G filed a third-party claim against it for the purpose of obtaining a declaratory judgment regarding its duties to G&G by virtue of the contract the Lawsons entered into with Archetype. After discovery, G&G sought summary judgment with respect to Builders' duty to defend and indemnify G&G. On April 29, 2024, the Circuit Court entered its *Order Granting G&G Builders, Inc.'s*

Motion for Summary Judgment (JA1488-1511). The Circuit Court expressly found that Builders had a contractual duty to defend G&G in connection with the Lawsons' claims.

The Contract Between The Lawsons And Archetype

Even before Archetype's work began on the project, the Lawsons and Archetype decided how they wanted to allocate the risk of potential liability arising from Archetype's work on the home and the cost of purchasing insurance to cover that risk. To that end, the contract between the Lawsons and Archetype required Archetype to indemnify and hold harmless the Lawsons and their representative, G&G, from any liability arising out of the work and required Archetype to obtain and maintain insurance coverage for claims arising out of the project naming both the Lawsons (as "Owner") and G&G (as the "Owner's Representative ") as additional insureds. (See JA1448-1449) Specifically, "Attachment A" to the November 22, 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 JA1448-1449) Thus, the contract between the Lawsons and Archetype clearly required Archetype to obtain and maintain an insurance policy to provide liability coverage for G&G for claims arising from Archetype's work and to have G&G named as an additional insured under such insurance. (JA1448-1449) In order to confirm the existence of such coverage, a "Certificate of Insurance" was required.

The Certificate Of Insurance

Archetype provided to G&G the required Certificate of Liability Insurance, which confirmed that Archetype had the insurance coverage required by Archetype's contract, and

represented that the "Insurer Affording Coverage" was "Builders Mutual Insurance Company."[1] (See JA1021) Based on the provisions set forth in "Attachment A" to the November 22, 2011 "Standard Form Agreement" and the provisions of the Builders Policy, G&G, as the "Owners Representative," qualified as an additional insured and an "indemnitee" under the Builders Policy for claims arising out of the drywall work performed by Archetype on the Lawson project.

The Builders Policy

At all relevant times, Archetype was insured under an insurance policy issued by Builders, identified as Policy No. PCP 0000946 01 ("the Builders Policy"). (See JA1022-1263.) The Builders Policy provides, in relevant part:

> **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. . .
> * * *
> 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. Exclusions**
> This insurance does not apply to:
> * * *
> **b. Contractual Liability**

[1] Apparently "Builders Mutual Insurance Company" and Builders are related entities and Builders has subsequently asserted that it is the proper party to this action.

"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 the 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.

* * *

SUPPLEMENTARY PAYMENTS - COVERAGE A AND B

* * *

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

* * *

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.

* * *

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY
BUILDERS PREMIER INSURANCE COMPANY

ADDITIONAL INSURED ENDORSEMENT
This endorsement modifies insurance provided under the following:

11. Any person or organization other than an architect, engineer or surveyor, which requires in a "work contract" that such person or organization be made an insured under this policy. However, such person or organization shall be an insured only with respect to covered "bodily injury", "property damage", "personal injury" and "advertising injury" caused, in whole or in part, by:

a. Your acts or omissions; or

b. The acts or omissions of those acting on your behalf:
In the performance of your ongoing operations for the additional insured(s) only at the location designated by the "work contract"

* * *

(See JA1088-1089, 1094-1095, 1099-1100 and 1086-1087) Therefore, the contract between the Lawsons and Archetype qualifies as "a contract or agreement that is an 'insured contract'" under the Builders Policy for purposes of providing coverage for the Lawsons' claims against G&G, as an indemnitee of Archetype, such that Builders had the primary contractual duty to defend and indemnify G&G in the Lawson litigation with respect to the Lawsons' drywall-related claims.

The Civil Action

This 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 JA143-213) The Lawsons responded by filing their *Answer, Counterclaim and Cross-Claims of Randie Gail Lawson and Deanna Dawn Lawson* (JA217-236) on June 13, 2014, 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 analysis or description of each claimed defect or indicate when any allegedly defective work was performed and the parties were required to conduct discovery in order to identify the issues with the home. For example, the Counterclaim against G&G alleged that it 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.

(JA223) As the discovery process proceeded and different defects were identified, G&G sought indemnification from the sub-contractors and suppliers which performed the work and requested that their respective insurance carriers defend and indemnify G&G based upon 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, and seeking a declaratory ruling that 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.* (JA237-286), the September 3, 2019 *Third-Party Complaint* (JA313-385), the December 2, 2019 *Second Amended Third Party*

Complaint (JA463-477), the March 2, 2020 *Third Amended Third Party Complaint* (JA514-578) and the April 26, 2021 *Fourth Amended Third-Party Complaint* (JA579-645) which joined Builders as a party to the Lawson litigation. For this reason, the litigation developed on two separate tracks, with G&G eventually being defended against the Lawsons' underlying claims by some of the involved subcontractors' carriers while others denied coverage for defense and indemnification and engaged in extensive litigation contesting coverage.

Summary Judgment On The Coverage Issues

Because there was no genuine question of fact to be decided with respect to coverage under the Builders Policy, G&G filed a *Motion For Summary Judgment On Coverage Issues With Respect To Builders Premier Insurance Company* on November 18, 2021, and asserted that Builders had a contractual duty and obligation to defend and indemnify it against the Lawsons' claims. (JA983-1318) Builders responded by asserting that summary judgment was premature because it had only recently answered G&G's *Fourth Amended Third-Party Complaint,* that its Policy did not apply, and that the Circuit Court should apply North Carolina law to G&G's claims. (JA1357-1411) G&G replied (JA1412-1426) The Court announced at a hearing on February 11, 2022 that it was granting G&G's motion. Despite the Court's announced ruling, Builders continued its denial of defense to G&G related to the drywall-related claims. The matter continued and proceeded toward trial of the Lawsons' claims until a settlement of those underlying claims was reached in September of 2022.

After the Lawsons' underlying claims were settled, the Circuit Court entered its *Order Granting G&G Builders, Inc.'s Motion for Summary Judgment On Coverage Issues With Respect To Builders Premier Insurance Company Policy* on April 29, 2024. (JA1488-1511) In its *Order*, the Circuit Court explained:

> 66. Because the plain language of the contract between Archetype and the Lawsons required Archetype to defend and indemnify G&G for claims arising from the work Archetype was to perform, Builders had a separate and distinct duty to defend G&G under its Policy as a party to an "insured contract" for claims allegedly arising from Archetype's defective work.
>
> 67. Because some of the claims being asserted by the Lawsons clearly arose from Archetype's allegedly defective work and were, therefore, covered, Builders was and remains obligated to defend G&G with respect to all of them. See *Wilson*, 236 W.Va. at 233, 778 S.E. 2d at 682. ("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[.]")(quoting *Leebler* 180 W.Va. at 378, 376 S.E. 2d at 584 (1988))
>
> 68. Because the Builders Policy provides primary liability coverage for an "insured," and G&G was clearly an "insured" under the Builders Policy and under principles set forth in *Martin*, there is no genuine question of fact with respect to Builders' duty to provide a defense to G&G in this case. In that regard, a liability insurer must defend its insured if the allegations and the facts behind them "are reasonably susceptible of an interpretation" that the policy could cover the claims. *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 194, 342 S.E.2d 156 (1986).

(JA1509) In light of these findings, the Circuit Court specifically granted G&G's request for summary judgment, finding that Builders had a contractual duty to defend G&G. (JA1510-1511)

Summary Judgment On The Breach Of Contract And Bad Faith Claims

Despite the entry of the Circuit Court's April 29, 2024 *Order* with respect to coverage under the Builders Policy and its earlier pronouncement of coverage, Builders refused to participate in G&G's defense and 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 September 12, 2024. (JA1555-1580) Builders argued that, despite the 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 Builders' failure and refusal 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). In that regard, Builders argued that because G&G received a full defense and full indemnification from the insurance carriers for other subcontractors, G&G had no right to seek recovery from Builders. (JA1566-1567) While G&G responded by pointing out that the *Soaring Eagle* decision was not applicable to the facts of this case (JA1598-1612), the Circuit Court below entered its *Order Granting Motion for Summary Judgment of Builders Premier Mutual Insurance Company on G&G Builders, Inc.'s Claims for Breach of Contract, Common Law Bad Faith, and Unfair Trade Practices* on December 30, 2024. (JA1614-1625) In the *Order,* the Circuit Court found that, because it had been defended by other insurance carriers, G&G had no right to recover from Builders for its breach of contract, bad faith, or violations of the Unfair Trade Practices Act. (JA1624) In that regard, the Circuit Court applied the *Soaring Eagle* decision and noted:

> 36. G&G argues that Central should not be permitted to take advantage of the fact that other insurers defended and indemnified G&G at no cost to Central or G&G.
>
> 37. The *Soaring Eagle* court's decision effectively rejected this argument, focusing, as the lower court did, on whether the Developer "received a full defense and indemnity by insurers," even if that full defense and indemnity was paid for by insurers for the subcontractors, and not by Travelers. Id. at *2. The *Soaring Eagle* court quoted the lower court as follows:
>
> > [I]f the other carriers . . . believe their policies were excess to Travelers and wish to litigate that issue to recover their defense and indemnity payments, those issues would have be [sic] resolved in a separate civil action. In other words, if insurance carriers disagree among themselves, it has no bearing on the fact that [petitioner] was defended and fully indemnified throughout the case.
>
> 38. G&G argues that the collateral source rule prohibits the Court from considering the contributions of other insurers to their defense. The Supreme Court has not applied the collateral source rule to a case such as this when the insured received a defense and indemnity at no cost to it. The decision in Soaring Eagle indicates that the collateral rule does not apply to these types of cases.

39. The Court concludes that the principles of collateral estoppel do not operate here.

40. G&G also argues that it was "forced to engage in years of litigation in order to compel the various insurers of subcontractors to participate in its defense."

41. The Developer made a similar argument in *Soaring Eagle*. See id. at *3 ("[The Developer] further argues that . . . the record shows that [the Developer] incurred substantial aggravation and expense over a three-year period trying to get respondents to acknowledge coverage and provide the primary, non-contributory defense."). The *Soaring Eagle* court ultimately determined this argument lacked merit, focusing instead on the fact that the Developer was provided a defense at no cost to it and that the claims against it were settled at no cost to it. *Id.* at 4.

42. Whether or not G&G expended time and money in an effort to compel the various insurers and contractors to defend and indemnify is not of consequence here as what matters is that G&G was provided a defense at no cost to it and that the claims against it were settled at no cost to it. G&G has not presented any evidence and/or Affidavit that disputes these material facts.

43. G&G also argues that the fact that other insurance carriers paid for its defense and indemnity is not relevant and thus the Builders' motion is "unsupported."

44. The Court notes, however, that this fact—that other insurance carriers paid for G&G's defense and indemnity—which is undisputed by G&G, arose in the context of a motion for summary judgment rather than at trial. Moreover, the Soaring Eagle decision indicates that such evidence is indeed relevant. Accordingly, this evidence is properly considered in evaluating Builders's Motion and the Court concludes that Builders's motion is sufficiently "supported."

45. In short, G&G has been fully defended for all claims asserted by the Lawsons in this case at no cost to G&G. No other claims remain pending against G&G related to any work performed by any party at the Lawsons' residence, including work performed by Archetype.

46. Further, G&G has been fully indemnified for all claims asserted by the Lawsons and others against G&G related to work performed at the Lawsons' residence, including work performed by Archetype, at no cost to G&G.

47. G&G is in the same position as the Developer in Soaring Eagle, and Builders is in the same position as Travelers. The Supreme Court found in Soaring Eagle that this factual scenario supported entry of summary judgment on the claims

> of the insured (the Developer) for breach of contract, declaratory judgment, and common law and statutory bad faith.

(JA1623-1625) Because the Circuit Court ignored critical differences between this case and *Soaring Eagle* and improperly granted summary judgement to Builders, G&G filed a timely *Notice of Appeal* on January 29, 2025 (JA1627-1644) and asks that the Circuit Court's decision be reversed.

SUMMARY OF THE ARGUMENT

In this case, the Circuit Court properly found that Builders had an independent contractual duty to defend G&G 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 Builders, and G&G stands in the shoes of Builders' named insured, Archetype, for coverage purposes due to the existence of an insured contract. In particular, it is undisputed that Archetype agreed to defend and indemnify G&G in its contract with the Lawsons and it is also undisputed that the Builders Policy provides coverage for such additional insureds.

Builders based its request for summary judgment on the breach of contract and bad faith claims on the West Virginia State Supreme Court's memorandum decision in *Soaring Eagle*, a construction defect claim in which Travelers (the insurer for the general contractor) was being sued for failing to provide a defense to a development company which had been named as an additional insured on the Travelers policy. Travelers did not deny coverage for the developer, but instead noted that its coverage was excess to the coverage provided to the developer under the insurance policies for the various subcontractors whose work gave rise to the claims at issue. Because the developer had always been defended by the subcontractors' insurers in the underlying construction defect litigation on a primary basis, Travelers was entitled to summary judgment on

the development company's claims for breach of contract and bad faith because, in short, Travelers did not breach its insurance contract since it had no primary duty to defend. In *Soaring Eagle*, unlike this case, the insurance carriers for the various subcontractors on the project provided the development company's defense from the beginning (as they were required to do by contract), and they also paid for the cost of the settlement of the claims against *Soaring Eagle*. In contrast, Builders had the primary contractual duty to defend G&G against the claims arising from the work of Archetype and refused to participate in G&G's defense. As a result, G&G was forced to engage in years of litigation in this case in order to compel the insurers of the various subcontractors to participate in its defense and, in many instances, only reached settlements with those carriers after the Court announced its rulings in favor of G&G on the coverage issues. Moreover, it was undisputed that each of the participating carriers was only willing to pay a share of the total defense costs in this case and expected to be reimbursed for any amounts they paid in excess of their proportionate share of the total. Builders paid nothing toward the defense costs and effectively seeks a pass on its primary duty to defend G&G in connection with the drywall-related claims. Therefore, *Soaring Eagle* is factually distinct from this case as a matter of law and provided no support for the Circuit Court's decision to award summary judgment to Builders.

The Circuit Court below also erred when it rejected G&G's assertion that the existence of other insurance coverage to pay for G&G's defense was irrelevant due to the collateral source rule. Specifically, the fact that G&G was eventually able to obtain the agreement of certain subcontractors' carriers to pay for attorneys' fees and expenses incurred in the defense of the Lawsons' claims despite the denial of coverage by Builders is irrelevant because the fees were incurred and Builders is clearly liable for them under the Circuit Court's own ruling in favor of

G&G on the coverage issue. Even if fees and expenses for G&G's defense were paid by the carriers of some other subcontractors, the existence of such other coverage represents a collateral source.

The Circuit Court below also erred when it refused to allow G&G an opportunity to conduct discovery with respect to its claims for breach of contract, bad faith and violations of the West Virginia Unfair Trade Practices Act when it was undisputed that all such claims had been stayed. Specifically, the Circuit Court awarded summary judgment against G&G even though no depositions with respect to the bad faith issues had been taken, no written discovery on those claims had been served, and no Scheduling Order with respect to those claims was in place. Here, G&G's various claims against Builders presented complex issues which warranted an appropriate opportunity for discovery. Therefore, the Circuit Court should have found Builders' request for summary judgment to be premature.

Finally, the Circuit Court erred when it granted Builders summary judgment on G&G's bad faith and Unfair Trade Practices Act claims even though those claims raised genuine questions of fact to be decided by a jury. Specifically, G&G asserted that Builders compelled it to file suit in order to obtain the coverage to which it was contractually entitled and refused to defend and indemnify G&G for the claims arising from Archetype's work, even after the Circuit Court announced its coverage ruling. At a minimum, this situation raised genuine questions of fact regarding whether Builders had violated multiple provisions of the Unfair Trade Practices Act as a business practice by failing to meet its obligation to defend G&G and by compelling its insured G&G to pursue litigation to recover amounts due under the Policy for defense, which precluded summary judgment in Builders' favor. Likewise, Builders never conceded the coverage issue and forced G&G to fully litigate the dispute through a ruling on summary judgment and beyond. Therefore, G&G clearly had "breach of contract" and "bad faith" claims since it prevailed on the

coverage issue. The Circuit Court below erroneously ignored these claims based upon *Soaring Eagle,* even though the development company there, unlike G&G, received primary defense and indemnification from the subcontractors' insurers and was never been forced to sue to obtain defense or indemnification for the claims being asserted against it.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is necessary in this matter as the Circuit Court's Order is subject to de novo review and the dispositive issues rely on a factual analysis that would be aided by oral argument. Petitioner requests that the Court set this matter for *Rule 19* argument because the *Order* of the Circuit Court improperly applied settled West Virginia law in the form of the West Virginia State Supreme Court's unpublished memorandum decision in *Soaring Eagle Dev. Co., LLC v. Travelers Indem. Co. of Am*., No. 19-0841, 2020 WL 6131741 (W. Va. Oct. 19, 2020), and because this case involves the application of settled law to a particular set of operative facts.

ARGUMENT

I. Standard Of Review.

The Petitioner appeals the December 30, 2024, *Order Granting Motion for Summary Judgment of Builders Premier Mutual Insurance Company on G&G Builders, Inc.'s Claims for Breach of Contract, Common Law Bad Faith, and Unfair Trade Practices* (JA1614-1625). 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). The West Virginia State Supreme Court of Appeals has indicated:

> In considering the evidence of record at the summary judgment stage, courts must apply the following guidelines: The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. Consequently, we must draw any permissible inference from the underlying facts in the most favorable light to the party opposing the motion. In assessing the factual record, we must grant the nonmoving party the benefit of inferences, as credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. Summary judgment should be denied even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom. Similarly, when a party can show that demeanor evidence legally could affect the result, summary judgment should be denied.

Maston v. Wagner, 781 S.E.2d 936, 946 (W.Va. 2015)

Summary judgment is proper only if "it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syl. 13 Pt. 2, *Mallet v. Pickens*, 206 W.Va. 145, 522 S.E.2d 436 (1999) (citing Syl. Pt. 3, *Aetna Cas. & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963). Drawing all permissible inferences in the non-movant's favor, the Court must deny summary judgment if the non-movant establishes a "genuine issue of fact" for trial. *Painter v. Peavy*, at 192 n. 5, 758 n. 5.

II. The Circuit Court's Order is subject to appeal and proper for consideration by this Court:

The Circuit Court's December 30, 2024 *Order* is subject to appeal at this time because it completely disposes of G&G's claims against Builders and directs entry of judgment in favor of Builders on all such claims, which effectively disposing of any issues of liability on the part of

Builders. (JA1625) While other parties and claims remain in the case and the *Order* does not contain the specific language set forth in *Rule 54* of the *West Virginia Rules Of Civil Procedure* that "no just reason for delay exists," the Circuit Court's December 30, 2024 *Order* approximates a final order in its nature and effect. In that regard, the West Virginia State Supreme Court has noted:

> The key to determining whether the order granting summary judgment and dismissing Foodland from this case with prejudice is a final order subject to appeal is not whether the Rule 54(b) language is included in the order, but whether the order "'approximates' a final order in its 'nature and effect.'"

Durm v. Heck's, 184 W. Va. 562, 566, 401 S.E.2d 908, 912 (1991). More recently, the Court has explained:

> In essence, we look to "whether the order approximates a final order in its nature and effect." *Id.* at 354, 811 S.E.2d at 884. Thus, one key question is whether an order is dispositive as to liability. *See* Syl. Pt. 2, *Durm v. Heck's, Inc.*, 184 W. Va. 562, 401 S.E.2d 908 (1991) ("**Where an order granting summary judgment to a party completely disposes of any issues of liability as to that party, the absence of language prescribed by Rule 54(b) of the West Virginia Rules of Civil Procedure indicating that "no just reason for delay" exists and "directi[ng] . . . entry of judgment" will not render the order interlocutory and bar appeal provided that this Court can determine from the order that the trial court's ruling approximates a final order in its nature and effect**."); Syl. Pt. 2, *Turner ex rel. Turner v. Turner*, 223 W. Va. 106, 672 S.E.2d 242 (2008) (same). The second key question is whether the order is dispositive as to damages. *See C & O Motors*, 223 W. Va. at 471, 677 S.E.2d at 907, Syl. Pt. 3 ("An order determining liability, without a determination of damages, is a partial adjudication of a claim and is generally not immediately appealable. However, an immediate appeal from a liability judgment will be allowed if the determination of damages can be characterized as ministerial. That is, a judgment that does not determine damages is a final appealable order when the computation of damages is mechanical and unlikely to produce a second appeal because the only remaining task is ministerial, similar to assessing costs.").

Nat'l Union Fire Ins. Co. of Pittsburgh, PA. v. Westlake Chem. Corp., 249 W. Va. 575, 581-82, 900 S.E.2d 1, 7-8 (2024) (Emphasis added.) Therefore, because the Circuit Court's December 30, 2024 *Order* is final in its nature and effect and is dispositive as to damages, it is not interlocutory

and is subject to appeal at this time.

III. The Circuit Court erred by finding that G&G had no right to recover for breach of contract after finding that Builders had an independent contractual duty to defend G&G in connection with the claims of defective drywall work by Archetype.

In order to explain why the Circuit Court's award of summary judgment to Builders on G&G's breach of contract and bad faith claims was erroneous, it is first necessary to address the fact that Builders had an independent primary contractual duty to defend G&G in connection with the claims of defective drywall work by Archetype which was not shared with the insurance carriers for any other sub-contractors involved in the construction of the Lawson home.

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.

In the case of *State ex rel. Nationwide Mut. Ins. Co. v. Wilson*, 236 W. Va. 228, 778 S.E.2d 677 (2015), the West Virginia State Supreme Court recognized that, after being notified of a claim, an insurer such as Builders 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).

Wilson, at 236 W. Va. 233, 682.

Here, the allegations of the Lawsons' *Counterclaim* clearly indicated that G&G was being sued in connection with alleged construction defects related to the work of various subcontractors and the Lawsons subsequently identified problems with the drywall work in discovery. (See JA1010) Builders did not dispute that Archetype agreed to indemnify G&G as the Owner's Representative in its contract with the Lawsons. (See JA1369-1371) Because potentially covered claims were being asserted against G&G, an indemnitee of Archetype and an insured contract holder under the express terms of the Builders Policy, it was clear that Builders' had a primary duty to defend G&G which was triggered in this case and the Circuit Court properly found that Builders had an independent contractual duty to provide such a defense. (JA1488-1511) Moreover, West Virginia has recognized that construction defects such as those 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* 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. (Emphasis added.) Here, Archetype, as a subcontractor, was alleged to have performed defective work, leading to purported liability on the part of G&G.

G&G was also clearly a party to an "insured contract" with Archetype. Specifically, the contract between Archetype and the Lawsons required Archetype to defend and indemnify both the Lawsons and G&G from claims arising from Archetype's work. (See JA1448-1449) Therefore, Builders had a separate and distinct primary duty to defend G&G under the Builders Policy as G&G was a party to an "insured contract" and qualified as an additional insured. In that regard, the Builders 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," (JA1089) and also provides that if Builders defends an insured against a suit it will also defend an indemnitee of the insured under an "insured contract." (See JA1095.)

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 Archetype, inasmuch as the contract provided for Archetype's agreement to indemnify G&G and also required Archetype to procure insurance to cover such liability. (JA1448-1449) 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 at issue in *Canopius,* G&G stood in Archetype's shoes for purposes of determining Builders' duty to defend and the Circuit Court properly found that Builders had the primary duty to defend G&G in connection with the Lawsons' claims arising from Archetype's drywall work.

G&G was also provided with a Certificate of Insurance issued by Builders' authorized agent. (See JA1021) In *Marlin v. Wetzel County Board of Education*, supra., the Court addressed such 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 Builders issued a "Certificate of Insurance," which did not set forth or disclose any limitations on the coverage noted in the Certificate. As the Court in *Marlin* 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.
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> 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. Here, the Certificate issued by Builders made no mention of the requirements set forth in Builders' Policy. (JA1021) Therefore, this case presented the Circuit Court with a classic example of an insurer seeking to rely upon restrictive policy provisions inconsistent with the coverage noted in its Certificate. 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 properly found that Builders was required to defend and indemnify G&G in connection with the Lawsons' drywall-related claims.

While Builders argued that the law of North Carolina (where the policy was issued) should have been applied to the coverage dispute, it failed to recognize that North Carolina law is inherently inconsistent with the law of West Virginia because North Carolina law does not recognize faulty or defective workmanship claims as an occurrence under property damage liability coverage. Specifically, in *Builders Mut. Ins. Co. v. Mitchell*, 210 N.C. App. 657, 709 S.E.2d 528 (2011), a North Carolina Court noted:

> We have explained that our courts have interpreted "property damage" to mean "damage to property that was previously undamaged and not the expense of repairing property or completing a project that was not done correctly or according to contract in the first instance."

Mitchell, at 661–62, 532. In contrast, West Virginia's State Supreme Court has expressly found that damages resulting from defective workmanship does constitute an "occurrence" for coverage purposes under a contractor's commercial general liability policy in West Virginia. See *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 745 S.E.2d 508, 511–12 (2013). In fact, when the Court in *Cherrington* overturned a number of earlier decisions which followed an approach similar to North Carolina, it noted:

> **We recognize that a definite trend in the law has emerged since we rendered our determinative decision in *Corder* sufficient to warrant this Court's reconsideration of the issues decided therein and that, if warranted, a departure from this Court's prior opinions would be consistent with this Court's steadfast resolve to follow the law to achieve just, fair, and equitable results**. *See, e.g., State v. Sutherland*, 231 W. Va. 410, 745 S.E.2d 448, 2013 W. Va. LEXIS 605 (No. 11-0799 June 5, 2013) (overruling Court's prior precedent to adopt view in line with majority of jurisdictions addressing issue); *State of West Virginia ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 744 S.E.2d 625, 2013 W. Va. LEXIS 603 (Nos. 13-0086 & 13-0102 June 4, 2013) (overruling Court's prior precedent to correct "serious judicial error" therein (internal quotations and citation omitted)).
>
> **As we have noted, many cases have emerged since this Court's 2001 definitive holding in *Corder* considering whether defective workmanship is an "occurrence" under a policy of CGL insurance. To summarize these rulings,**

> **the courts adopting the majority view have concluded that the subject CGL policy provided coverage for the defective work**.Three states have enacted legislation requiring CGL policies to include coverage for defective work and/or injuries and damages attributable thereto. By contrast, since this Court's decision in *Corder*, a minority of jurisdictions have adopted the position espoused by this Court therein to find that defective workmanship is not an "occurrence" however, the decisions of three of these courts have since been superseded by statutory enactments that specifically require CGL policies issued in those states to include coverage for defective workmanship and/or injuries and damages resulting therefrom.

Cherrington v. Erie Ins. Prop. & Cas. Co., at 479-81, 517-19 (Emphasis added.) Therefore, there is a clear divergence between the manner in which North Carolina, and West Virginia handle this issue. Likewise, *N.C. Gen. Stat. §22B-1* provides, in relevant part:

> (a) Provisions in, or in connection with, a construction agreement or design professional agreement purporting to require a promisor to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, or indemnitees against liability for damages arising out of bodily injury to persons or damage to property proximately caused by or resulting from the negligence, in whole or in part, of the promisee, its independent contractors, agents, employees, or indemnitees, is against public policy, void and unenforceable. Nothing contained in this subsection shall prevent or prohibit a contract, promise or agreement whereby a promisor shall indemnify or hold harmless any promisee or the promisee's independent contractors, agents, employees or indemnitees against liability for damages resulting from the sole negligence of the promisor, its agents or employees.
>
> (b) Provisions in, or in connection with, a construction agreement or design professional agreement purporting to require a promisor to indemnify or hold harmless the promisee, the promisee's independent contractors, agents, employees, indemnitees, or any other person or entity against losses, damages, or expenses are against public policy, void, and unenforceable unless the the fault of the promisor or its derivative parties is a proximate cause of the loss, damage, or expense indemnified.

N.C. Gen. Stat. §22B-1(a)-(b). In effect, Builders argued that Archetype had somehow brought this North Carolina law prohibiting indemnification agreements with it to West Virginia where such indemnification agreements are encouraged as a matter of public policy. For example, in *Canopius*, supra., the Court explained:

> **("[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."** (emphasis added)). The H & D Agreement between Elk Run and Medford clearly included an agreement to purchase insurance for the benefit of all concerned; therefore, even under *Dalton*, the agreement is not void and unenforceable. Finally, the circuit court's conclusion is contrary to this Court's precedent. Indeed, this Court has expressly declared that **"[c]ontracts of indemnity against one's own negligence do not contravene public policy and are valid**.

Canopius US Ins., Inc., 520, 72 (Emphasis added.) Similarly, in *Marlin*, supra. the Court indicated:

> **West Virginia law allows indemnity provisions in contracts because "indemnity clauses serve our goals of encouraging compromise and settlement by reducing settlement discussions to bilateral discussions, by encouraging adequate levels of insurance, and by allowing the parties to a contract to allocate among themselves the burden of defending claims."** *Dalton v. Childress Service Corp.*, 189 W.Va. 428, 431, 432 S.E.2d 98, 101 (1993) (emphasis omitted). Indemnification and hold harmless agreements are a means of shifting the financial consequences of a loss, and are essentially non-insurance contractual risk transfers.

Marlin, 221, 468 (Emphasis added.) This difference between the public policy of West Virginia and North Carolina is significant because the West Virginia State Supreme Court has noted in *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 182 W. Va. 580, 390 S.E.2d 562 (1990), that:

> In a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, **unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state.**

Triangle Indus., Inc., at 581, 563 (Emphasis added.) Here, Archetype entered into a construction contract to be solely performed in West Virginia. The construction contract is clearly a valid West

Virginia contract, which was intended to be entirely carried out in West Virginia. The construction contract includes a clear and unambiguous indemnification agreement which is valid and enforceable under West Virginia law. Applying a patchwork of different states' laws to identical coverage disputes would hardly be uniform or predictable. Instead, it would allow the laws of North Carolina to control the resolution of disputes involving West Virginia contracts which all arose from the same underlying work and incidents in West Virginia. Because West Virginia clearly has "the more significant relationship to the transaction and the parties" and the laws of North Carolina are contrary to West Virginia public policy, the Circuit Court properly applied West Virginia law to the coverage dispute.

IV. The Circuit Court erred in finding that *Soaring Eagle* barred G&G's claims when *Soaring Eagle*, unlike this case, involved a claimant which had always been defended by the subcontractors' insurers on a primary basis.

Builders based its request for summary judgment on the West Virginia State Supreme Court of Appeals' Memorandum Decision in *Soaring Eagle*. supra. In that case, Travelers had asserted that because its additional insured, the developer on the project, had always been defended in the underlying construction defect litigation, Travelers was entitled to summary judgment on the developer's claims against it for breach of contract and bad faith. The Court described the facts of that case as follows:

> In December of 2015, the plaintiffs below, Soaring Eagle Lodge Master Association, Inc., and Soaring Eagle Lodge Association, Inc., filed a complaint against the defendant below and petitioner herein Soaring Eagle Development Company, LLC,2 asserting that petitioner caused certain structural and material defects in the Soaring Eagle Lodge at the Snowshoe Mountain Resort ("Snowshoe") in Pocahontas County, West Virginia. On February 9, 2016, petitioner tendered the claim for defense and indemnity to Branch & Associates ("Branch") and Branch's insurer, respondents herein, pursuant to the contract between petitioner and Branch. In a March 1, 2016, response letter respondents advised petitioner that they do "not address [petitioner's] tender as a putative additional insured under the above captioned policy" and directed petitioner to

> address those questions to the additional insured claims handler. In their March 10, 2016, letter, respondents informed petitioner that they were "unable to make a determination as to whether [petitioner] is entitled to any rights or coverage in connection with any claims, actions or proceedings relating to the captioned matter under policy(ies) of insurance issued to Branch by [respondents]." In both of the March of 2016 letters, respondents requested additional information from petitioner. However, according to respondents, it is undisputed that petitioner made no effort to respond to either of those requests until February 15, 2017. In respondents' later response to Cincinnati Insurance Companies, respondents wrote that "Travelers has determined that [petitioner] may qualify as an additional insured under the commercial liability policies issued to Branch by Travelers, but such coverage would apply on an excess basis only and there is no defense obligation at this time." Petitioner claims that while it made several other attempts to obtain indemnification and defense from respondents, respondents did not respond to those letters.
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> Petitioner then filed an amended third-party complaint against respondents alleging breach of express contract, breach of implied contract, declaratory judgment, and unfair claims practices. All parties participated in mediation in June of 2018 and settled all claims other than petitioner's preservation of its right to pursue existing claims against "The Travelers Indemnity Company of America and possibly Zurich (a non-party)." On May 8, 2019, respondents filed a motion for summary judgment and supporting memorandum of law, arguing that they were entitled to summary judgment on all claims due to the fact that petitioner was provided a defense and indemnity. Petitioner filed a response in opposition, and respondents submitted a reply.

Soaring Eagle, at 1–2. Therefore, in *Soaring Eagle*, unlike this case, the insurance carriers of the various subcontractors involved in the construction project, who had primary coverage for the defense of the developer, provided the developer with a defense from the beginning and also paid the cost of the eventual settlement. The Court then explained that the developer had been indemnified for all payments made to resolve the claim, noting:

> In its order, the circuit court stated that "[t]he question the Supreme Court directs the trial court to is whether the insured party was defended without incurring costs and was indemnified for any payment made to resolve the underlying claim." It determined that there were no genuine issues of material fact remaining regarding coverage and that
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> > [i]f the other carriers, Cincinnati, Erie, or Liberty Mutual, believe their policies were excess to Travelers and wish to litigate that issue

> to recover their defense and indemnity payments, those issues would have be [sic] resolved in a separate civil action. In other words, if insurance carriers disagree among themselves, it has no bearing on the fact that [petitioner] was defended and fully indemnified throughout the case.
>
> According to the circuit court, petitioner received a full defense and indemnity by insurers for subcontractors "as envisioned by the parties as expressed in their contractual agreements." It also found that these are sophisticated parties which negotiated a large-scale construction project at Snowshoe, including contracting insurance obligations. The circuit court, therefore, granted respondents' motion for summary judgment.

Soaring Eagle, at 2. Put simply, the developer in *Soaring Eagle* had entered into a contract which required the general contractor on the project to defend and indemnify it but also mandated that the general contractor would require any subcontractors to defend the developer as well. Because the insurers for the subcontractors complied with that requirement and defended the developer on a primary basis throughout the litigation, the Supreme Court found that the developer had no valid claim for attorney's fees against the general contractor's insurer, which had excess coverage to that provided by the carriers for the subcontractors. In short, there was no breach by Travelers since it had no primary duty to defend the developer.

Here, Builders seized upon the fact that some of the insurance carriers for other subcontractors in this case eventually agreed to defend G&G under a reservation of rights and suggested that this similarity meant that Builders was entitled to summary judgment in the same fashion as the insurer in *Soaring Eagle*. In fact, each of the insurers defending G&G were doing so under the separate contracts entered into by their insureds related to the claims arising from their insured's subcontracted work on the project. They were not defending G&G under the Archetype contract for claims arising from Archetype's drywall work and Builders was not providing excess coverage. Here, there clearly was a breach of the Builders Policy because

Builders refused to defend G&G, which refusal continued even after the Circuit Court found it was required to do under its Builders Policy (JA1488-1511). Unlike Travelers, the general contractor's carrier in *Soaring Eagle*, Builders was obligated to provide primary coverage and defense under its contract and refused to do so. The defenses provided by carriers for other subcontractors who performed other work and allegedly caused other damages were not a substitute for the defense by Builders in connection with the claims against G&G arising from Archetype's drywall work.

With respect to claims for defense and indemnification, such as those being asserted by G&G, the West Virginia State Supreme Court has held:

> In most cases, if an indemnitor does not assume control of the indemnitee's defense, he will be held liable for the attorney fees and costs incurred by the indemnitee in the defense of the original action.

State ex rel. Vapor Corp. v. Narick, 173 W. Va. 770, 774–75, 320 S.E.2d 345, 350 (1984). Here, G&G eventually was able to obtain a defense shared by a number of different insurance carriers for subcontractors which had originally denied G&G's tender for defense and indemnification. Each of those carriers was defending in connection with the damages allegedly caused by the work of their respective insured and continued to refuse indemnification for claims unrelated to their insured's work. Pursuant to the Circuit Court's earlier ruling, Builders had a primary contractual duty to defend G&G in connection with damages allegedly caused by Archetype's drywall work. It refused to do so, but instead asserts that, because other subcontractors' insurers did eventually agree to participate in G&G's defense in connection with claims arising from their insureds' work, Builders can avoid its own independent contractual obligations to G&G altogether.

Unlike Travelers in *Soaring Eagle*, Builders was not providing excess coverage for the claims arising from Archetype's drywallwork over and above some other coverage. Instead, Builders is in the position of the insurers for the subcontractors in *Soaring Eagle,* who stepped up

and provided the primary defense and indemnification of the claimant developer. Like the subcontractors' insurers in *Soaring Eagle*, Builders had a primary duty to defend and indemnify G&G in connection with the claims arising from Archetype's work. However, the similarities end there. Rather than comply with its contractual obligations, Builders breached its contract by denying coverage to its additional insured, G&G, and refused to participate in G&G's defense. While other insurance carriers for other subcontractors ultimately agreed to participate in G&G's defense, they were defending G&G under the separate contracts entered into by their insureds for the claims arising from their insured's subcontractor work on the project. In effect, Builders is suggesting that insurance carriers in such situations should wait to see if someone else will step up to defend their additional insureds so that they can simply avoid their own contractual obligations. Such a situation would deny West Virginia businesses the benefit of contracted insurance coverage and reward carriers who refuse or delay their contractual duties. Therefore, *Soaring Eagle* is factually distinct from this case as a matter of law and provides no support for the Circuit Court's decision to award summary judgment to Builders on all of G&G's claims against it.

V. The Circuit Court erred by failing to recognize that the collateral source rule applies to the payments made by other carriers for the defense of G&G.

In *Aetna Casualty & Surety v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), the West Virginia Supreme Court noted:

> Most Courts have held that where an insured is required to retain counsel to defend himself in litigation because his insurer has refused without valid justification to defend him, in violation of its insurance policy, the insured is entitled to recover from the insurer the expenses of the litigation, including costs and reasonable attorney's fees ... . The theory for allowing this recovery is that these damages directly resulted from the insurer's breach of contract.

Pitrolo, 176 W. Va. at 193 (citations omitted). Here, the fact that G&G was eventually able to obtain defense under reservation of rights from the carriers for some subcontractors is irrelevant

because attorney fees and expenses were incurred and Builders is clearly liable for them under *Pitrolo* and the Circuit Court's own ruling in favor of G&G on the coverage issue under the Builders Policy. Even if the fees and expenses associated with G&G's defense were participated in by other insurers that covered G&G as an additional insured, the existence of such other coverage represents a collateral source.

West Virginia law is abundantly clear that evidence of funds received or available from a collateral source are irrelevant. In that regard, the State Supreme Court has noted:

> The collateral source rule was established to prevent the defendant from taking advantage of payments received by the plaintiff as a result of his own contractual arrangements entirely independent of the defendant. Part of the rationale for this rule is that **the party at fault should not be able to minimize his damages by offsetting payments received by the injured party through his own independent arrangements**.

Ratlief v. Yokum, 167 W. Va. 779, 787, 280 S.E.2d 584 (1981) (emphasis supplied). This principle was further explained in *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 307 S.E.2d 603 (1983), where the Court stated:

> Simply put, the collateral source rule excludes payments from other sources to plaintiffs from being used to reduce damage awards imposed upon culpable defendants. **The rule is premised on the theory that it is better for injured plaintiffs to receive the benefit of collateral sources in addition to actual damages than for defendants to be able to limit their liability for damages merely by the fortuitous presence of these sources**.

Ilosky, 172 W. Va. at 446 (emphasis supplied). Importantly, the Court also indicated:

> **The purpose of the collateral source doctrine is to prevent reduction in the damage liability of defendants simply because the victim had the good fortune to be insured or have other means of compensation**.

Id. at 447 (emphasis supplied). In this case, Builders could not rely upon the existence of other coverage available to G&G from a collateral source (the insurers for other subcontractors) to reduce the *Pitrolo* damages for which it was and is responsible. As noted above, the State Supreme

Court has clearly held that, under the collateral source rule, it does not matter who paid the expenses. Instead, what matters is that someone lost the use of that money. Builders cannot take advantage of G&G's good fortune that other subcontractors' carriers were eventually compelled to comply with their legal responsibilities to participate in G&G's defense. Such a situation clearly violates the principles behind the collateral source rule.

VI. The Circuit Court erred by failing to recognize that Builders' *Motion* was premature because G&G had no possible opportunity for discovery with respect to its breach of contract, bad faith and unfair trade practices claims.

It is undisputed that, because of a stay of discovery, there was no possible opportunity for G&G to conduct discovery with respect to its claims for breach of contract, bad faith and violations of the West Virginia Unfair Trade Practices Act, which were the subject of Builders' *Motion For Summary Judgment*. No depositions with respect to the defense and indemnification issues could be taken and no written discovery could be served. No Scheduling Order with respect to those claims was in place. Therefore, Builders' request for summary judgment was premature on its face.

In the case of *Elliot v. Schoolcraft*, 213 W.Va. 69, 576 S.E.2d 796 (W.Va. 2002), the West Virginia State Supreme Court of Appeals noted, "[a]s a general rule, summary judgment is appropriate only after the parties have had an adequate time to conduct discovery." *Elliot* at 73, 800. The Court went on to state:

> A party opposing a motion for summary judgment must have a reasonable opportunity to discover information that is essential to [its] opposition to the motion.

Id. The Court then reversed an award of summary judgment which was entered before a Scheduling Order had even been entered, indicating:

> And lastly, "good cause" for the appellant's "failure to have conducted discovery earlier" was shown by the fact the appellees began filing motions for summary judgment only four months after a complex lawsuit with multiple parties was filed,

even before depositions of the parties could be taken.

Id. at 74, 801. As in *Elliot*, this case and G&G's various claims against Builders presented complex issues which warranted an appropriate opportunity for discovery. For example, discovery was needed concerning Builders' decision to refuse to provide a defense to G&G and its decision to continue that refusal even after the Court announced its ruling in G&G's favor on the coverage issue. Because the parties had not yet completed necessary depositions or necessary discovery with respect to those issues, Builders' request for summary judgment was not ripe for consideration by the Circuit Court.

Pursuant to the requirements of *Rule 56(f)* of the *West Virginia Rules of Civil Procedure*, G&G's counsel provided an Affidavit Of Counsel identifying the areas of discovery which needed to be addressed before G&G could fully respond to Builders' *Motion.*(JA1609-1610) The Circuit Court improperly ignored this need for discovery and erred when it granted Builders' premature request for summary judgment.

VII. The Circuit Court erred when it granted summary judgment on G&G's bad faith and Unfair Trade Practices Act claims.

In this case, G&G asserted a private cause of action against Builders for violations of West Virginia's Unfair Trade Practices Act, found at *W. Va. Code §33-11-4(9),* and a cause of action for "bad faith" pursuant to cases such as *Hayseeds v. State Farm Fire and Casualty Company*, 352 S.E.2d 73 (W.Va. 1986) and *Pitrolo*, supra.. Specifically, G&G asserted that Builders compelled it to file suit in order to obtain the coverage to which it was entitled and failed to defend and indemnify G&G for claims arising from Archetype's work. While Builders asserted that it did not have a duty to defend G&G, the Circuit Court rejected that argument and ruled that coverage for G&G's defense existed under the Builders Policy. (JA1488-1511) Nevertheless, Builders

continued its refusal to participate in G&G's defense with respect to the drywall-related claims. At a minimum, this situation raises genuine questions of fact regarding whether Builders violated multiple provisions of the Unfair Trade Practices Act as a business practice by failing to meet its obligation to defend G&G and compelling G&G to pursue litigation to pursue defense under the Builders Policy which precluded summary judgment in Builders' favor.

With respect to G&G's common law "bad faith" claims, the Court in *Pitrolo*, supra. held:

> Where a declaratory judgment action is filed to determine whether an insurer has a duty to defend its insured under its policy, if the insurer is found to have such a duty, its insured is entitled to recover reasonable attorney's fees arising from the declaratory judgment litigation.

Pitrolo, at 192, 158. Here, Builders never conceded the coverage issue and forced G&G to fully litigate the dispute through a ruling on summary judgment and beyond. Therefore, G&G clearly has a "bad faith" claim for *Pitrolo* damages since it has prevailed on the coverage issue. Unlike G&G, the developer in *Soaring Eagle* received primary defense and indemnification from the subcontractors' insurers consistent with the development company's contract and, therefore, was never forced to sue to obtain defense and indemnification for the claims asserted against it. Therefore, the Circuit Court erred when it found that *Soaring Eagle* disposed of G&G's bad faith claims.

CONCLUSION

For all of the foregoing reasons, G&G asks the Court to reverse the Circuit Court's ruling in favor of Builders and remand this action for proceedings on the merits.

Respectfully submitted,

G&G Builders, Inc.,

By counsel,

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VERIFICATION

BRENT K. KESNER, being first duly sworn, on his oath, deposes and says that he is counsel for the Petitioner, G&G Builders, Inc., in the foregoing verified **PETITIONER'S BRIEF**; that the facts and allegations contained therein are true, except so far as they are therein stated to be upon information and belief; and that insofar as they are therein stated to be upon information and belief, he believes them to be true.

/s/ Brent K. Kesner
Brent K. Kesner (WVSB 2022)

CERTIFICATE OF SERVICE

I, Brent K. Kesner, counsel for Petitioner, do hereby certify that I have served the foregoing "**PETITIONER'S BRIEF"** upon all parties and known counsel of record, via File & ServeXpress, as indicated below, this 31st day of March, 2025, addressed as follows:

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