NO. 25-ICA-42

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

G&G BUILDERS, INC.,

Plaintiff Below, Petitioner,

v.

BUILDERS PREMIER MUTUAL INSURANCE COMPANY,

Defendant Below, Respondent.

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

RESPONDENT'S BRIEF

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RESPONDENT'S BRIEF

Respondent Builders Premier Insurance Company ("Builders") submits this brief in support of the "Order" entered by the Hon. Gregory Howard of the Circuit Court of Cabell County, West Virginia, on G&G Builders, Inc.'s ("G&G") claims for Breach of Contract, Common Law Bad Faith and W. Va. Unfair Trade Practices Act ("bad faith" claims) on December 30, 2024. The Order granted the Motion for Summary Judgment of Builders on G&G's Claims for Breach of Contract, Common Law Bad Faith and Unfair Trade Practices ("Motion") which resulted in judgment being entered for Builders on those claims.

The Circuit Court properly issued the Order as there were no genuine issues of material fact, and Builders was entitled to judgment as a matter of law in conformity with West Virginia law as enunciated by the Supreme Court in *Soaring Eagle Dev. Co., LLC v. Travelers Indem. Co. of Am. & Travelers Prop.*, 2020 W. Va. LEXIS 699 (No. 19-0841, October 19, 2020) (memorandum decision) based on the uncontested material facts that G&G was fully defended by multiple insurance carriers for the underlying claims at no cost to it, and all claims against G&G were fully settled and G&G was released without G&G paying any monies towards those settlements. Thus, the Circuit Court correctly determined that G&G received a full defense and indemnification at no cost to it. Accordingly, the Circuit Court correctly ruled that Builders was entitled to judgment pursuant to *Soaring Eagle* on G&G's "bad faith" claims. Respondent Builders asks this Court to affirm the Circuit Court's Order in all respects.

I. STATEMENT OF THE CASE

A. Initial Litigation 2014-2016

On March 20, 2014, G&G initiated the underlying civil action with a complaint against Randie and Deanna Lawson, asserting breach of contract claims, and seeking enforcement of a mechanic's lien that G&G filed on the Lawsons' property, in an effort to recover $303,686.31 that G&G claimed it was owed by the Lawsons for construction work done by G&G, as the general contractor, on the Lawsons' home. (JA000143-144). G&G's complaint stated that "[t]he Lawson Defendants choose several of their own subcontractors ... [and] G&G had no discretion with regard to the Lawson Defendants' choice of subcontractors." (JA000145). One of those subcontractors hired by the Lawsons was Archetype Builders Inc. ("Archetype") to perform drywall work at a cost of $49,600.00. (JA001517). Archetype signed a contract with the Lawsons on November 8, 2011 and was off the Lawson job in 2012. The mechanic's lien of G&G against the Lawsons did not include Archetype's work. (JA000233).

On June 13, 2014, the Lawsons filed both an answer and a counterclaim against G&G. *G&G Builders*, 238 W. Va. at 282, 794 S.E.2d at 3. (JA000217). The counterclaim alleged that G&G was the general contractor, and (1) failed to properly supervise the contractors, subcontractors and its own employees, and (2) failed to supervise the construction of various areas of defective work, which were specified. Notably, the Lawsons' counterclaim made no mention of defective drywalling in the claims against G&G, and did not include a direct claim against G&G seeking damages for alleged

drywalling defects. (JA000217-228). The Lawsons never made a direct claim against G&G seeking damages for alleged drywall defects, and it was more than five years after this case initiated before the Lawsons made a direct claim for damages for defective drywall work against the drywalling subcontractor they had hired, i.e., Archetype. (JA000386, JA000394-396).

Subsequently, G&G attempted to force the Lawsons' claims into arbitration, but was unsuccessful. See *G&G Builders, Inc. v. Lawson*, 238 W. Va. 280, 794 S.E.2d 1 (2016).

B. Litigation 2017-2021

Following the Supreme Court's decision in late 2016, and remand to the Circuit Court, those who were parties to the litigation at the time, began discovery in 2017. Neither Archetype Builders Inc. (Archetype), the North Carolina subcontractor who performed the drywalling work at the Lawsons' behest in 2011 and 2012, or Builders, Archetype's insurer, were parties to the litigation when discovery began in 2017, even though Archetype's drywalling work had been completed five years before.

On March 7, 2018, G&G filed a third-party complaint against some of the subcontractors that worked on the Lawson home, and finally named Archetype for the first time, requesting indemnification from Archetype for any damages that G&G *might* incur relative to any defective drywall work: "40. If the drywall finish is deemed defective … then Archetype Builders is answerable for any and all damages that G&G incurs as a result …. 41. Archetype Builders must indemnify G&G from any losses arising from the drywall finish …" (JA000242). The Lawsons had answered discovery in April 2017 indicating

that there was "cracked and wavy drywall." (JA000237-238, JA000266). G&G's third-party complaint was filed approximately six years after Archetype completed the drywalling work in 2012. Archetype asserted below that it received no notice or claim of defective drywall work or notice of the litigation that had been pending since 2014, from either the Lawsons or G&G, before it was named in the aforesaid third-party complaint of March 7, 2018. (JA001516). Once again, as noted above, as reflected in their counterclaim against G&G of June 13, 2014, the Lawsons were not asserting a claim for damages directly against G&G for defective drywalling (JA000217), that claim was asserted directly against Archetype. (JA000386). The Lawsons never amended the counterclaim to assert such a claim directly against G&G. (JA000237).

On March 26, 2018, G&G's own liability insurer, Westfield National Insurance Company ("Westfield"), filed a motion for leave to intervene. (JA000287). In relevant part, Westfield's motion stated: "Westfield is now providing, and will continue to provide … an active defense to G&G for the claims asserted in the counterclaim filed against it [by the Lawsons] …" (JA000293). Nothing in the record indicates that G&G's liability insurer, Westfield, ever withdrew its "active defense" of G&G.

G&G then filed a Third-Party Complaint on September 3, 2019 naming various insurers, including Greenwich Insurance Company ("Greenwich") asserting claims for declaratory relief and "bad faith" claims that were identical to those later asserted against Builders in 2021. Greenwich was allegedly G&G's professional negligence insurer. Greenwich answered the third-party complaint on November 14, 2019 and counterclaimed against G&G alleging that Westfield was G&G's insurer and was providing a defense to

G&G and paying G&G's defense costs. (CR 426 SA0008). G&G answered the Greenwich Counterclaim by admitting that Westfield was defending G&G and was paying its defense costs. (CR 459 SA0016).[1]

On September 23, 2019, in an amended cross-claim and third-party complaint, the Lawsons named their drywall subcontractor, Archetype, as a party for the first time, five years after this litigation initiated and seven years after the completion of the drywall work, alleging that "[t]o the extent that any issues with respect to the drywall finish" were caused by Archetype, it would be liable to the Lawsons for the drywall damage. (JA000395). The drywall deficiency remediation costs were later estimated to be $11,123.45 by the Lawsons in their Pretrial Memorandum, the first and only estimate ever provided to Archetype. (CR 1113 SA0021).[2] Once again, as was the case in their counterclaim against G&G dated June 13, 2014 (JA000217), no direct claim was asserted by the Lawsons against G&G for alleged drywall damage in this September 23, 2019 pleading. (JA000386). The Lawsons' defective drywall claims were made directly against the drywalling subcontractor they had hired, i.e., Archetype, not against the general contractor, G&G. (JA000386, JA000394-395).

Archetype's insurer, Builders, engaged a law firm to defend Archetype regarding claims of negligent and deficient drywalling work allegedly performed by Archetype at the

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[1] Respondent has filed a motion for leave to file a supplemental appendix and citations to the record and the proposed supplemental appendix are designated as such.

[2] The amount of damages that the Lawsons attributed to the defective drywall claims, i.e., $11,123.45, was considerably less than the damage amounts they attributed to the allegedly defective work of other subcontractors, as illustrated by the Pretrial Memorandum, which ascribed damages totaling $434,947.47 to a heating and cooling subcontractor.

Lawsons' home pursuant to the Lawsons' Amended Cross-Claim and Third-Party Complaint of September 23, 2019. (JA001617). As noted above, G&G's insurer, Westfield, was already providing an "active defense" to G&G relative to the Lawsons' construction defects claims made in their counterclaim and Westfield was paying the cost of that defense. (JA000287, JA000293, CR 426 SA0008, CR 459 SA0016). Builders continued to provide an active defense of the defective drywall claims through the time it settled those claims and procured a release of Archetype and G&G, as discussed below.

G&G filed its Second Amended Cross-Claim and Third-Party Complaint on November 14 (sic), 2019 with a claim for indemnity against Archetype for damage alleging that "[i]f the drywall finish is deemed to be defective … then Archetype Builders is answerable over to G&G for any … damages that G&G incurs …" (JA000416-417). Once again, Builders retained attorneys, filed an answer and began defending Archetype for drywall claims. (JA000500).

Eventually, G&G filed a total of six third-party complaints, each adding additional subcontractors and their insurers. G&G did not name Builders as a party until April 26, 2021, nine years after Archetype completed the drywalling work and more than seven years after G&G initiated this litigation, when G&G filed its Fourth Amended Third-Party Complaint naming several additional insurers. (JA000579). Once again, G&G asserted identically worded "bad faith" claims against the additionally named insurers, including Builders, for breach of contract, which G&G claimed arose out of (1) the contractual provisions of written agreements between the Lawsons and the subcontractors, and (2) the

terms of each subcontractor's insurer's insurance policy, under which G&G claimed to be an additional insured. (JA000579).

C. Litigation Against Builders 2021

It is critical to note that G&G did not assert a claim against Builders for declaratory judgment that the Builders policy afforded a defense and coverage to G&G, although such claims for declaratory judgment were asserted by G&G against other subcontractors' insurers as well as its own insurers. Instead, G&G's Fourth Amended Third-Party Complaint of April 26, 2021 skipped a declaratory judgment request and jumped straight to the assertion of "bad faith" claims against Builders, alleging that Builders was in "bad faith" for not defending and covering G&G. (JA000600-606).

G&G's pleading of April 26, 2021 initially naming Builders was served in June 2021 and asserted that the Lawsons had made direct claims for damages for drywalling defects against G&G, when, in fact, the Lawsons had made such claims against Archetype directly, but not against G&G. (JA000600, JA000394-396). Moreover, before filing its third-party bad faith complaint against Builders on April 26, 2021, G&G had never even notified Builders of the litigation it initiated seven years before in 2014, or tendered the litigation to Builders requesting defense and coverage. (JA001569). Prior to its April 26, 2021 pleading naming Builders, G&G's only claim against Archetype was for indemnity in the event drywall damages were awarded. (JA000416-417). In the April 26, 2021 pleading, G&G also amended its claim against Archetype to request not only indemnity, but also to request attorney fees, costs and expenses in the defense of the Lawsons' counterclaim (JA000598-599), even though they were being paid by other insurers.

In spite of G&G's rather obvious notice/tender failures, from the time that the Lawsons first made a claim against Archetype for alleged defective drywall work on September 23, 2019, through the time of settlement of the claim on September 30, 2022, Builders retained attorneys to defend the defective drywall claim and indemnified the claim by paying $40,000.00 for a release of both Archetype and G&G, all at no cost to G&G. (JA000479, JA000508, JA001576-1579).

On August 4, 2021, Builders moved for dismissal of G&G's Fourth Amended Third-Party Complaint under W.V.R.C.P. 12(b)(2) for lack of personal jurisdiction, with supporting affidavits uncontested by G&G, evidencing that Builders was a North Carolina domiciled insurer who did not solicit nor issue any property and casualty products in West Virginia, and that Builders had never issued or written an insurance policy to any person or entity domiciled in West Virginia. (JA000649, JA000665-667, JA000975-977). While Builders issued the renewal of a Commercial General Liability (CGL) policy to a North Carolina corporation, Archetype, with risks insured in North Carolina on or about August 2, 2011 (JA001022-1263), Builders had no knowledge that Archetype was doing any business in West Virginia. (JA001569-1570). The policy the North Carolina insurer issued to the North Carolina insured on August 2, 2011 did not refer to any contract, person, property or risk located in West Virginia. The policy insured risks in North Carolina. Moreover, Builders had no notice of Archetype's work in West Virginia, or notice of any claim against Builders until 2021, and never received a tender of defense at any time from G&G. (JA000665-667, JA000976-997, JA001569-1570).

On November 8, 2021, the Court orally denied Builders' Motion to Dismiss, which was based on lack of personal jurisdiction, but did not enter a written order memorializing its ruling until May 5, 2022. (JA001512)

On November 18, 2021, G&G filed a summary judgment motion on coverage before Builders had even answered G&G's Fourth Amended Third-Party Complaint in which G&G had asserted claims for "bad faith" without asserting a declaratory judgment claim that it was insured under the policy the North Carolina insurer (Builders) issued in North Carolina to a North Carolina insured (Archetype) and the basis for such an assertion. (JA001555). Since G&G had not provided Builders with any notice of the litigation that it initiated in 2014, and G&G had not tendered the matter to Builders requesting defense and indemnity, G&G's November 18, 2021 Motion for Summary Judgment on coverage was Builders' first notice of the factual and legal rationale behind G&G's claim that it was insured by the Builders-Archetype North Carolina policy. (JA001393-1394).

On December 6, 2021, less than a month after the November 8, 2021, denial of Builders' Motion to Dismiss based on lack of personal jurisdiction and the filing of G&G's Motion for Summary Judgment on coverage issues of November 18, 2021, Builders filed its Answer to G&G's Fourth Amended Third-Party Complaint on December 6, 2021, which included affirmative defenses including lack of notice, statute of limitations, waiver and estoppel. (JA001319).

On December 16, 2021, Builders filed a response to G&G's Motion for Summary Judgment on coverage issues. In part, the response asserted that the motion was premature since Builders had just been haled into this case by G&G's Fourth Amended Third-Party

Complaint in June of 2021, more than seven years after G&G initiated the litigation in 2014, with no prior notice or tender of defense from G&G. Again, the summary judgment motion on coverage that G&G filed was the first notice and explanation of its claim for coverage under the policy the North Carolina insurer (Builders) had issued to its North Carolina insured (Archetype). (JA000973-977 and JA001364-1366).

Builders' response further asserted that the Builders-Archetype policy issued in North Carolina was plainly not the insurance policy contemplated and required by the November 8, 2011 work contract between the Lawsons, G&G and Archetype, wherein G&G specified the insurance requirements that Archetype was to effectuate before it began work at the Lawsons' home; i.e., Archetype was to obtain a liability insurance policy issued in West Virginia by an insurer authorized to do business in West Virginia (unlike Builders), and furnish a certificate of insurance and additional named insured endorsement. (JA001488). Because the policy it issued to Archetype in North Carolina was not mentioned in or contemplated by the insurance requirements of the work contract, and because Builders was never asked to furnish a certificate of insurance or additional named insured endorsement to G&G, Builders argued that its policy was not intended to and did not afford coverage to G&G relative to the drywall work contract. (JA001369-1371, JA001393-1394).

The prematurity of G&G's Motion for Summary Judgment was supported by Affidavits from a Builders representative. (JA001393-1399). Builders' position was that a number of factual matters needed to be discovered regarding the claim for coverage that G&G did not make until this case had been pending for seven years, to-wit: what exactly

did G&G and/or the Lawsons obtain from Archetype regarding insurance coverage, and when it was obtained; what was the explanation for the delay in first naming Archetype as a party defendant in 2018 and first naming Builders three years later in 2021; what was the state of knowledge of G&G and the Lawsons regarding the policy the North Carolina insurer (Builders) had issued to a North Carolina insured (Archetype) at the time Archetype contracted with the Lawsons on November 8, 2011 and subsequently performed drywall work at the Lawsons' home in 2011-2012; and what was the state of G&G's knowledge concerning the Builders policy over the nine years that went by from the completion of Archetype's work in 2012 to the time that Builders was first named as a party in 2021. (JA001364-1366, JA001393-1399).

Builders' response to the summary judgment motion on coverage also pointed out that over the lengthy course of the case that G&G filed in 2014, seven years before first naming Builders as a party in 2021, a voluminous record had developed. There had been many amended pleadings adding additional claims and parties, and multiple scheduling order changes. Builders pointed out that it was in the odd position of being forced to respond to G&G's Motion for Summary Judgment on coverage issues before it had even filed its Answer to G&G's Fourth Amended Third-Party Complaint. (JA001364-1366). Builders further averred that G&G was not named as an additional insured in the Builders-Archetype policy issued in North Carolina by a North Carolina insurer (Builders) to a North Carolina insured (Archetype); that the North Carolina policy did not insure risks in West Virginia; that no request had been made by Archetype to Builders at any time to add G&G as an additional insured; that North Carolina law should apply to the policy; and the policy

would not afford coverage to G&G under North Carolina law. (JA001366-1384, JA001393-1399).

On February 11, 2022, at a hearing on the coverage based summary judgment motion, the Court rejected Builders' assertions and ruled in G&G's favor. The Court found that West Virginia law would apply to the North Carolina policy, based on a provision in the policy that indicated the policy's coverage territory was "The United States of America ..." and under West Virginia law the policy affords coverage for G&G under "insured contract" language in the policy. Under an application of West Virginia law, said the Court, G&G was entitled to coverage under the policy that the North Carolina insurer (Builders) had issued to the North Carolina insured (Archetype).

The Circuit Court also relied on the aforesaid coverage territory provision – i.e., "The United States of America" – to deny the motion to dismiss for lack of personal jurisdiction that had been filed by the North Carolina insurer, Builders. (JA001515). Once again, the Court denied the motion initially at a hearing held on November 8, 2021, and that ruling was memorialized in an order entered on May 5, 2022, three months after the Court orally granted from the bench the coverage based summary judgment motion against Builders on February 21, 2022. (JA001512-1515). A written order memorializing the coverage ruling was not entered until April 29, 2024. (JA001488-1511).

Notwithstanding Builders' position that there was a lack of personal jurisdiction, and its position that the Builders-Archetype policy by North Carolina law and did not cover G&G, it defended the defective drywall claims from the time that Archetype had notice of such claims in 2019 through the settlement of those claims on September 30, 2022.

Builders retained attorneys to actively defend the defective drywall claim and indemnified the claim by paying for a release of both Archetype and G&G, all at no cost to G&G, notwithstanding its position that there was a lack of personal jurisdiction and coverage. (JA000478, JA000500, JA001576-1579).

D. Summary Judgment for Builders

After Archetype and Builders were both included as parties to the litigation, which did not happen until April 26, 2021, seven years after G&G initiated the litigation in 2014, the following events relevant to Builders' summary judgment motion as to G&G's "bad faith" claims occurred:

- G&G obtained summary judgment against many subcontractors on each respective subcontractor's duty to provide a defense and indemnification to G&G under the terms of the written agreement between the respective subcontractor and the Lawsons, with the result that each subcontractor, including Archetype, was found to owe a defense and indemnification to G&G. (JA001543).

- G&G obtained summary judgment against a number of subcontractors' insurers on the duty of the insurers to defend G&G per the terms of the written agreements between the insurer's named insured (i.e., subcontractors) and the Lawsons, and the terms of the insurance policies issued by the respective insurers, including Builders. (JA001488).

- The Circuit Court orally granted G&G's motion for summary judgment on coverage issues with respect to Builders' policy (on February 11, 2022), determining that Builders was obligated to afford coverage to G&G. However, the order to that effect was not entered until April 29, 2024. (JA001488).

- Both before and after G&G obtained those summary judgments, G&G entered into settlement agreements with various subcontractors' insurers (not including Builders) whereby each of those insurers (1) agreed to pay a pro-rata share of G&G's past defense costs, including attorney's fees, with the pro-rata share dependent upon how many insurers reached a settlement with G&G; (2) agreed to pay a pro-rata share of G&G's

defense costs going forward, including attorney's fees, with the pro-rata share dependent upon how many insurers reached a settlement with G&G; and (3) agreed to defer G&G's claims for indemnification pending resolution of the Lawsons' claims against G&G. (JA001617).[3]

- Pursuant to a settlement agreement dated September 30, 2022, approximately seven months after the Circuit Court's February 11, 2022 verbal granting of G&G's summary judgment motion on coverage issues, Builders paid the Lawsons the sum of $40,000 to settle all claims for the allegedly deficient drywalling work, and secured a release and dismissal with prejudice of such claims on behalf of Archetype and G&G. G&G paid nothing towards the defense and settlement of the claims of negligent and deficient drywalling work. (JA001618, JA001576-1579).[4]

- All remaining subcontractors and the Lawsons also settled all claims between and among themselves related to the construction of the Lawsons' residence. Moreover, the Lawsons, the subcontractors and G&G have released any and all claims that each had against any other party including, but not limited to, the claims regarding drywalling work performed by Archetype, as discussed above. (JA001618).

The uncontested facts above established that G&G (1) received a full defense from insurance carriers at no cost to G&G relative to the work of the various subcontractors, (including the claims relative to the work of the drywall subcontractor, Archetype, which the Lawsons directed against Archetype, not G&G, claims which Builders paid to defend

[3] G&G's attorney fees relative to the defense of the counterclaims of the Lawsons were fully paid by eight different insurers in the total amount of $487,833.01. (CR 1120 SA0029). The complete accounting and the various agreements between G&G and various insurers as well as the breakdown in claimed attorney fees were either confidential and/or sealed. Thus, the exact terms of the agreements to provide a defense and indemnity are not known; the total of the defense costs paid including attorney fees (if those fees are different than $487,833.01), and, the exact nature of any other payments made to G&G. What is known and uncontested is that G&G has been defended and indemnified at no cost to it.

[4] The Lawsons' estimate of drywall damage being pursued against Archetype, not G&G, was $11,145.08 and Builders, on behalf of Archetype, settled the Lawsons' claim for drywall damage for $40,000.00 on September 30, 2024 and G&G was released.

and settle) and (2) had all claims related to the allegedly deficient work performed by the various subcontractors, including Archetype, fully settled and released at no cost to G&G.

As reflected in G&G's Motion for Pro Rata Attorney Fees (August 23, 2022) against Archetype per its claims made in the Fourth Amended Third-Party Complaint, all of its defense costs and attorney fees for the defense of the Lawsons' counterclaim have been paid. (CR1120 SA0028). Westfield, Greenwich and other insurers were involved in either defending G&G on the counterclaims of the Lawsons and/or paying its attorney fees and costs, split among other insurance entities by agreement in the amount of 1/9th or $54,203.67 of a total amount of $487,833.01. (CR 1120 SA0028). The motion filed by G&G against Archetype in August 2022 for pro rata attorney fees averred that G&G had entered into settlement agreements with various insurers whereby each of those insurers (1) agreed to pay a pro rata share of G&G's past defense costs, including attorney's fees, with the pro-rata share dependent upon how many insurers reached a settlement with G&G; (2) agreed to pay a pro-rata share of G&G's defense costs going forward, including attorney's fees, with the pro-rate share dependent upon how many insurers reached a settlement with G&G; and (3) agreed to defer G&G's claims for indemnification pending resolution of the Lawsons' claims against G&G. (CR 1120 SA0028).[5]

As a result of the developments above, on September 12, 2024, Builders moved for summary judgment as to G&G's "bad faith" claims. (JA001555). In an order entered on December 30, 2024, that G&G now appeals, the Circuit Court granted Builders' summary

[5] G&G's claim against Archetype for attorney fees, all of which have admittedly been paid, is still pending in the Circuit Court. G&G's Motion for Pro Rata Attorney Fees was denied and G&G was instructed to submit a revised attorney fee request. That has not occurred. (JA001582-1596).

judgment motion, determining that it was undisputed that G&G (1) had been provided a full defense by insurance carriers in the civil action below, including the payment of all attorney's fees and expenses related to the defense of the claims, at no cost to G&G, and (2) had all claims related to the work at the Lawsons' home settled as to G&G, and released, at no cost to G&G. (JA001614). In the Order the Circuit Court applied *Soaring Eagle Development Co. LLC v. Travelers Indemnity Co. of America*, supra, to the material facts detailed above. The Circuit Court found that the Supreme Court's decision in *Soaring Eagle* was nearly identical to the case at bar and required the conclusion that Builders was entitled to summary judgment relative to G&G's "bad faith" claims. (See Order at JA001614.[6]) For the reasons detailed below, the Circuit Court's Order applying *Soaring Eagle* to grant summary judgment to Builders relative to G&G's "bad faith" claims should be affirmed.

III. SUMMARY OF ARGUMENT

Based on the uncontested facts that G&G received a full defense from insurance carriers relative to the underlying construction defects claims at no cost to G&G, and all such claims against G&G were fully settled by insurers at no cost to G&G, in its Order dated December 30, 2024 the Circuit Court correctly applied our Supreme Court's decision in *Soaring Eagle Dev. Co., LLC v. Travelers Indemn. Co. of Am. & Travelers Prop.*, 2020 W. Va. LEXIS 699 (No. 19-0841, W. Va., Oct. 19, 2020) (memorandum decision) to grant

[6] As the Court's Order states in paragraphs 17-19 (JA001618-1619), another subcontractor's insurer, Central Mutual Insurance Company, had earlier filed virtually the same motion for summary judgment as to G&G's "bad faith" claims against it, which the Court granted by order entered October 3, 2024. G&G has appealed that order to this Court in *G&G Builders, Inc. Petitioner, v. Central Mutual Insurance Company, Respondent*, No. 24-ICA-441, which is currently pending.

Builders Premier Mutual Insurance Company's Motion for Summary Judgment on G&G Builders, Inc.'s Claims for Breach of Contract, Common Law Bad Faith and Unfair Trade Practices (referred to as the "bad faith" claims). For the reasons discussed hereafter, this Court should affirm the Circuit Court's order granting summary judgment as to G&G's "bad faith" claims against Builders.

IV. STATEMENT REGARDING ORAL ARGUMENT; DECISION

Oral argument is not necessary as the issue disputed herein has already been addressed by our Supreme Court under almost identical facts in *Soaring Eagle Dev. Co. LLC v. Travelers Indem. Co. of Am & Travelers Prop.*, 2020 W. Va. Lexis 699 (No. 19-0841, October 19, 2020) (memorandum decision). Moreover, the facts and legal arguments are adequately presented in the briefs and record on appeal per Rule 18. If the court decides to entertain oral argument in this case, Builders believes the oral argument should take place pursuant to W. Va. R. App. P. 19.

V. ARGUMENT

All drywall claims of the Lawsons, with whom Archetype contracted, were defended by Builders and settled with a release of G&G at no cost to G&G. G&G was defended relative to the matters asserted in the Lawsons' Counterclaim, and was defended relative to the drywall work performed by Archetype, at no cost to G&G. G&G was also indemnified on all claims at no cost to G&G, with the ultimate result being that all claims herein were settled and released without the payment of any monies by G&G.

Accordingly, the Court correctly entered summary judgment against G&G on its "bad faith" claims pursuant to *Soaring Eagle*, supra.

A. Standard of Review

This Court's review of the Circuit Court's grant of summary judgment for Builders on "bad faith" claims of G&G is *de novo* pursuant to *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755, (1994), Syl. Pt. 1. "The circuit court's function at the summary judgment stage is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial." *Painter* at 190, 756, Syl. Pt. 3. Further, "the question to be decided is whether a genuine issue of fact exists and not how the issue should be determined." Syl. Pt. 5, *Aetna Casualty and Surety Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E. 770 (1963).

B. The Circuit Court correctly entered summary judgment for Builders on G&G's "bad faith" claims pursuant to our Supreme Court's decision in *Soaring Eagle*, as G&G was always defended in the underlying civil action at no cost to G&G, and G&G was fully indemnified for all claims at no cost to G&G.

In 2020 our Supreme Court issued an opinion, *Soaring Eagle Dev. Co., LLC v. Travelers Indemn. Co. of Am. & Travelers Prop.*, supra, that is directly on-point with the instant case involving Builders and G&G. In *Soaring Eagle*, the Supreme Court affirmed the lower court's grant of summary judgment to an insurer in the same position as Builders, facing the same bad faith, breach of contract and unfair trade practices claims asserted by G&G against Builders, under virtually identical circumstances.

In *Soaring Eagle*, Soaring Eagle Development Company, LLC ("Developer"), the developer of the Soaring Mountain Lodge, was sued in December, 2015 by Soaring Eagle Lodge Master Association, Inc. and Soaring Eagle Lodge Association, Inc. ("Property Owners"), alleging that the Developer caused defects in a lodge at the Snowshoe Mountain Resort. Subsequently, claims were brought by the Property Owners against Branch & Associates, Inc. ("Branch"), who was the general contractor, and against GBBN Architects, Inc. Much like this case, the complicated litigation lasted for many years and included numerous cross-claims and third and fourth-party claims against subcontractors, suppliers and manufacturers, some of whom filed cross-claims and counter-claims against each other. *Soaring Eagle*, 2020 W. Va. LEXIS 699 at *2-3.

Before the litigation began, the Developer tendered the matter to the contractor, Branch, and its insurer, Travelers Indemnity Company of America ("Travelers"), and demanded they defend and indemnify the Developer per the contract between Developer and Branch, and Travelers' policy insuring Branch.[7] *Soaring Eagle*, 2020 W. Va. LEXIS 699 at *2. Neither the contractor, Branch, nor the insurer, Travelers, agreed to the tender to defend or indemnify Developer, and the Developer filed a third-party complaint against both seeking defense and indemnity. As G&G did in this case, the Developer asserted claims of "bad faith" against the insurer, Travelers, who insured the contractor, Branch, alleging that Travelers was acting in "bad faith" for not agreeing to defend or indemnify the Developer. Unlike G&G, the Developer asserted a claim for declaratory judgment that

[7] Here, in stark contrast, no such pre-suit tender was ever made by G&G to Archetype or its insurer, Builders. In fact, G&G did not name either G&G or Archetype as parties until this litigation had been pending for several years.

it was entitled to defense and indemnity under the Travelers policy. *Soaring Eagle*, 2020 W. Va. LEXIS 699 at *3.

Eventually, as was the case here, all parties in the underlying construction defects litigation settled all claims. The net result of the settlement was that the entirety of Developer's defense, and the entirety of the amount of settlement of all claims against the Developer, were paid by other parties and insurers at no cost to the Developer, as was the case here for G&G. Travelers did not pay any amount for the Developer's defense or the settlement of the claims against the Developer (here, Builders paid for the defense of the claims for drywall defects the Lawsons made directly against Archetype, and paid the entirety of the settlement of the drywall claims that released both Archetype and G&G). (JA001576-1579). Excepted from the release of the construction defects claims were the "bad faith" claims that Developer had asserted against the general contractor's insurer, Travelers, who then moved for summary judgment on those claims. *Soaring Eagle*, 2020 W. Va. LEXIS 699 at *3-4. Since the entirety of the Developer's defense and indemnity expenses had been provided to Developer by other parties and insurers at no cost to Developer, the Circuit Court granted summary judgment to Travelers relative to Developer's "bad faith" claims and our Supreme Court affirmed the decision, even though Travelers had not paid any amount of the Developer's defense and indemnity expenses (in contrast to Builders' payments to defend and settle the Lawsons' defective drywall claims).

In its opinion affirming the lower court's decision, our Supreme Court relied upon two of its more recent decisions, i.e., *State ex rel. State Auto Prop. Ins. Co. v. Stucky*,

239 W. Va. 729, 806 S.E.2d 160 (2017) and *Admiral Ins. Co. v. Fisher*, No. 17-0671, 2018 W. Va. LEXIS 467, 2018 WL 26881002 (W. Va. June 5, 2018).

The *Soaring Eagle* Court noted that in *State Auto*, 239 W. Va. 729, 736, 806 S.E.2d 160, 167 (2017), it held that an insurer was entitled to summary judgment relative to "bad faith" claims against it where the insured had been defended and indemnified at no cost to the insured:

> [t]he insured, CMD, was defended and indemnified by its insurer, State Auto, with respect to the lawsuit filed by the plaintiffs as required by the commercial general liability policy. **A settlement was obtained at no cost** to CMD, and no adverse judgment was entered in the Circuit Court. **Consequently**, this Court is of the opinion that, **as a matter of law**, CMD **cannot maintain a first-party action** against State Auto **for common law and statutory bad faith and breach of contract**.
>
> *Soaring Eagle*, supra, 2020 W. Va. LEXIS 699 at *10 (emphasis added).

The *Soaring Eagle* Court also discussed and relied on *Admiral Ins. Co. v. Fisher*, supra, *Id.* at *10, another case where our Supreme Court held that summary judgment regarding "bad faith" claims against an insurer must be granted where the insured was defended and indemnified at no cost to the insured. In that case, an insurer denied coverage of underlying medical malpractice claims against its insured, Dr. Fisher, but nevertheless provided a defense of the claims. Dr. Fisher filed a declaratory judgment action seeking to establish coverage. During the pendency of the declaratory judgment claim, the insurer settled the underlying medical malpractice claims against Dr. Fisher, and secured his release from liability relative to those claims, at no cost to the doctor. Nevertheless, the Circuit Court, over the insurer's objection, allowed Dr. Fisher to pursue "bad faith" claims against the insurer. Following a judgment in the doctor's favor regarding those "bad faith"

claims, the insurer appealed. The Supreme Court reversed the Circuit Court's erroneous decision to permit the "bad faith" claims to go forward because the insured had been provided a defense at no cost to the insured, and the claims against the insured were settled at no cost to the insured. *Soaring Eagle*, 2020 W. Va. LEXIS 699, at *11-12 (citing *Fisher*, 2018 W. Va. LEXIS 467, 2018 WL 2688182 at *7-8).

Critically, in *Soaring Eagle*, the Supreme Court stressed the fact that the Developer, as was the situation in *State Auto, Fisher* and with G&G here, "was provided a defense at no cost to it and the claims against it were settled at no cost to [Developer]." *Soaring Eagle*, 2020 W. Va. LEXIS 699 at *12. Therefore, in *Soaring Eagle*, our Supreme Court found that the Circuit Court correctly applied *State Auto* and *Fisher* to grant the insurer's summary judgment motion as to the Developer's "bad faith" claims. *Soaring Eagle*, 2020 W. Va. LEXIS 699 at *12.

In summary, the Supreme Court held that an insured cannot maintain claims against its insurer for common law or statutory bad faith, or breach of contract, where the insured has been provided a defense at no cost to the insured and a settlement was reached at no cost to the insured. This is exactly what occurred with G&G Builders here. G&G admits that all of its defense and indemnity expenses in the underlying construction defects litigation were paid by various insurers. (CR 1120 SA0028). Moreover, (1) the Lawsons' claims of defective drywalling that were made directly against the drywaller, Archetype, were defended entirely at Builders' expense, and (2) Builders fully covered the cost of the settlement of the defective drywalling claims and secured G&G's release relative to such claims, all at no cost to G&G. (JA001576-1579). As the Circuit Court stated in its Order

granting summary judgment: "The claims of the Lawsons concerning the drywall were fully defended, and Builders obtained a release for both Archetype and G&G." (JA001622).

It is also important to note that the Developer in *Soaring Eagle* unsuccessfully advanced the same argument that G&G now attempts in various parts of its brief; i.e., that the insurer, Travelers, should not have been permitted to take advantage of the defense and indemnification of the Developer that were paid by other parties and insurers. Again, as the Circuit Court found below (JA001623), Builders paid for the defense of the deficient drywalling claims through the defense of the drywaller, Archetype, against whom the Lawsons' claims were made, and also paid for the entirety of the settlement of the drywalling claims, and G&G's release, all at no cost to G&G. It is critical to emphasize that in *Soaring Eagle* the Supreme Court found that it was a distinction without a difference that insurers other than Travelers made those defense and indemnity payments, directly contradicting the very same argument that G&G attempts here. According to the Supreme Court in *Soaring Eagle*, the outcome determinative fact was that the Developer "received a full defense and indemnity by insurers," even if that fully funded defense and indemnity was paid for by insurers for the subcontractors, not by Travelers. Accordingly, the Supreme Court affirmed the Circuit Court's grant of summary judgment in favor of Travelers on the Developer's claims for "bad faith." *Soaring Eagle*, 2020 W. Va. LEXIS 699 at *3-4, *12. That was, of course, exactly what happened in this case; i.e., G&G received a fully paid defense and indemnity by insurers relative to all of the defective construction claims, including the claims the Lawsons made against Archetype alleging

deficient drywalling. *Soaring Eagle* thusly requires that the Circuit Court's order granting summary judgment as to G&G's "bad faith" claims against Builders be affirmed.

C. The Circuit Court correctly applied the principles in *Soaring Eagle*, as G&G was defended in the underlying construction defects case at no cost to G&G, and was fully indemnified at no cost to G&G for the construction defects claims, including the defense and indemnity of claims relative to the drywalling work performed by Archetype.

An application of the facts of *Soaring Eagle*, and the legal principles applied by our Supreme Court therein, certainly vindicates the conclusion reached by the Circuit Court in this case, as the circumstances here involving G&G and Builders are virtually identical to those at issue in *Soaring Eagle*.

Just as the homeowners in this case, the Lawsons, sued their general contractor, G&G, by counterclaim, for various specified construction deficiencies (which did not include defective drywalling), in *Soaring Eagle*, the property owner sued the Developer for construction deficiencies. In *Soaring Eagle*, in contrast to G&G in this case, the Developer had tendered the matter to Branch, the general contractor, and its insurer, Travelers, demanding that they defend and indemnify the Developer relative to the claims made by the Property Owner. Significantly, in *Soaring Eagle*, the Developer was defended and indemnified by insurers for the subcontractors, just as G&G was fully defended and indemnified in this case by insurers for subcontractors that performed work on the Lawson home, including the work performed by drywalling subcontractor, Archetype.[8] (CR 1120 SA0028, JA001576-1579).

[8] In addition to the defense provided by subcontractors' insurers, the record here also reflects that G&G's own liability insurer, Westfield, was providing G&G with an "active defense" as well.

Critically, in *Soaring Eagle*, the Developer was defended and indemnified fully for all claims asserted against it at no cost to the Developer, and Travelers did not pay any amount of the defense or indemnification. Here, G&G admits that it was fully defended and indemnified at no cost for all of the construction claims made by the Lawsons, including, but not limited to, claims based on the drywalling work done by Archetype.

Accordingly, G&G occupies virtually the same position as the Developer in *Soaring Eagle*, and Builders occupies virtually the same position as Travelers, although Builders actually did more than Travelers by paying for the defense and settlement of the drywall claims. Builders defended the drywall claims throughout the underlying litigation from the time it had notice that drywall claims were being made by the Lawsons in its Amended Cross-Claim and Third-Party Complaint on September 23, 2019, through the time it paid indemnity, settling the claims of the Lawson and obtaining a release for G&G at no cost to G&G. In contrast Travelers paid nothing towards the Developer's defense and indemnity in *Soaring Eagle*. (JA001576-1579, JA000478, JA000500).

Here, when faced with virtually the same factual and legal situation at issue in *Soaring Eagle*, where our Supreme Court affirmed the grant of summary judgment on the insured's "bad faith" claims, the Circuit Court correctly applied the Supreme Court's precedent and entered summary judgment for Builders on G&Gs "bad faith" claims. Again, the Circuit Court, like our Supreme Court in *Soaring Eagle*, emphasized the outcome determinative fact that G&G had been fully defended and indemnified for all of the construction defect claims at no cost to G&G, including but not limited to claims relative to the drywalling done by Archetype.

D. The circumstances under which G&G received a full defense, full indemnification at no cost to it, are not relevant.

G&G makes other flimsy and irrelevant arguments in its desperate attempt to avoid the obvious application of *Soaring Eagle*, a decision that mandates affirmation of the Circuit Court's grant of summary judgment below. G&G's arguments are largely the same arguments made by the putative insured Developer in *Soaring Eagle*, and rejected by the Supreme Court.

In one such argument, G&G complains that it was "forced to engage in years of litigation in order to compel the various insurers of subcontractors to participate in its defense." Petitioner's Brief at pg. 15. Initially, this argument is inconsequential, since: (1) the settlements reached between G&G and various insurers provided for the full payment of G&G's attorney's fees and costs back to 2017, when G&G first provided notice of the Lawsons' construction defects claims to its own insurer, Westfield, who was providing G&G an "active defense" according to the record; and (2) G&G did not even provide Builders notice of any claims against G&G or Archetype, or notice of any claims for coverage under the Builders policy, until April 26, 2021, when it first named Builders as a party to the litigation, more than seven years after G&G initiated this lawsuit on March 20, 2014. (JA001393-1399). Here, once again, the Lawsons made claims for drywalling defects directly against Archetype, not against G&G. (JA000386, JA000394-395). Builders fully funded the defense of the drywalling claims that were made directly against Archetype and fully funded a settlement of the drywalling claims under the release of

September 30, 2022, that fully released G&G, a little over a year after G&G's first named Builders as a party in the April 26, 2021 third-party complaint. (JA001576-1579).

Moreover, G&G's argument was expressly rejected by our Supreme Court in *Soaring Eagle*, as the Circuit Court in this case noted in its Order. (JA001614). In *Soaring Eagle* supra, at 3, our Supreme Court stated: "[T]he 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." The Supreme Court determined that this argument lacked merit, and focused instead on the fact that the Developer was provided a defense and the claims against it were settled at no cost to the Developer. The Supreme Court noted that in its order granting summary judgment as to the "bad faith" claims against Travelers, "the Circuit Court found that a construction defect case, such as the one presented here, comes with ... inevitable disputes over the nature of the loss and extent of coverage." 2020 W.V. LEXIS 699, *2.

In reliance on *Soaring Eagle*, the Circuit Court stated below in its summary judgment order: "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 ..." (JA001624).

G&G also argues that "it is undisputed that each of the participating carriers was only willing to pay a pro-rata share of the total defense costs in this case and expected to be paid back for any amounts they paid in excess of their disproportionate share of the total." (Petitioner's Brief at pg. 15). With regard to Builders, such an argument is clearly

irrelevant as the settlements that G&G reached with various other insurance carriers for the claims involving those carrier's subcontractors would obviously not somehow bind or obligate Builders. In addition, any additional attorney fees that G&G would continue to seek pursuant to these agreements with other insurers would only go to lessen the other insurers' proportionate share. There are no fees owed to G&G, i.e., G&G is not "out" these fees, and has no obligation to the other insurers to lessen their proportionate share of the fees paid.

Similarly, G&G argues that the total cost of G&G's defense was eventually split among a number of different insurance carriers who had originally denied G&G's tender for defense and indemnification and against whom "bad faith" claims were made by G&G.[9] This argument merely reiterates G&G's admission of the outcome determinative fact that all of G&G's defense costs were completely paid by insurance companies, at no cost to G&G. G&G admits to having incurred no defense costs relative to the underlying claims, and admits that it paid nothing at all toward the settlement and release of any of the Lawsons' construction defects claims against it, so the only "damages" that G&G might possibly incur going forward would be self-inflicted as a result of G&G's continued pursuit of "bad faith" claims against Builders in an effort to double recover amounts already paid on G&G's behalf. (CR 1120 SA0028, see also CR 459 SA0013, JA001576-1579).

[9] As noted previously, G&G made no pre-suit tender to Archetype or Builders requesting defense/indemnity. In fact, G&G did not even notify Builders of the litigation that it initiated in 2014 before suing Builders for "bad faith" on April 26, 2021 for allegedly failing to provide G&G with a defense/indemnity for drywall claims that were not even being advanced directly against G&G by the Lawsons in their counterclaim. (JA001393-1394)

E. The Circuit Court correctly determined that the collateral source rule did not apply to payments for defense costs and indemnity made by other insurers to and on behalf of G&G Builders when examining G&G Builders' breach of contract, common-law bad faith and statutory bad faith claims against Builders.

In reliance on the Supreme Court's decision in *Soaring Eagle*, the Circuit Court rejected G&G's collateral source rule argument that, notwithstanding its admission that it received a defense and indemnity at no cost, the collateral source rule should nevertheless prohibit the consideration of the payments of other insurers to fully fund G&G's defense and indemnity in the underlying construction defects case. The Circuit Court noted: "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." (JA001614, JA001623).

In Syllabus Point 7 of *Ratlief v. Yokum*, 167 W. Va. 779, 280 S.E.2d 584 (1981), the Supreme Court explained that "the collateral source rule normally operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party."

In fact, the Circuit Court's rejection of G&G's collateral source rule argument not only comports with *Soaring Eagle*, but also represents the national consensus of courts that have rejected the application of the collateral source rule in the present context, where more than one insurance policy or third party provides a defense and coverage for the same loss. See, e.g., *Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, No. 4:09-CV-1379, 2013 U. S. Dist. LEXIS 138941 (S.C. D., September 27, 2013).

Like *Soaring Eagle*, the *Crossman Communities* case is directly on point with the instant case. Like this case, *Crossman* was a construction defects case. In *Crossman*, a general contractor, Beazer, sought reimbursement from Harleysville, an insurer that insured the general contractor under a policy originally issued to the general contractor's predecessors in interest, and also sought reimbursement from a number of its subcontractors' insurers, for defense and indemnity payments made by the general contractor to plaintiff homeowners association to resolve claims asserted against the general contractor in an underlying construction defects lawsuit. The *Crossman* Court specifically rejected the collateral source rule argument made by the general contractor Beazer, the identical argument now made by the general contractor G&G herein, that the amounts paid by subcontractors' insurers for defense costs and indemnity on behalf of the general contractor as an "additional insured" constituted a "collateral source" for which Harleysville could not receive an offset under of the collateral source rule. The Court, however, held that to allow the general contractor, Beazer, to recover from its insurer, Harleysville, for defense and indemnity costs for which it had already been reimbursed by the various subcontractors' insurers, would allow the general contractor to obtain a legally impermissible windfall and double recovery. *Crossman*, 2013 U. S. Dist. LEXIS 138941, * 76-79.

Crossman held that allowing Harleysville an offset for the defense costs and indemnity payments paid by subcontractors' insurers on behalf of the general contractor did not violate the collateral source rule. Id. at *76. Initially, the Court explained that "[u]nder the collateral source rule, a tortfeasor has no right to any mitigation because of

payments or compensation received by the injured person wholly independent of the wrongdoer" and "[t]he purpose of the collateral source rule is to prevent a tortfeasor from obtaining a windfall." Id. at *76-77. The *Crossman* Court noted that "the clear majority of Courts have rejected the application of the collateral source rule where more than one insurance policy or third party provides coverage for the same loss[,]" and cited the following cases in support of this "clear majority" rule: *Pan Pacific Retail Prop. v. Gulf Ins.* 471 F.3d 961, 973-74 (9th Cir. 2006) (applying California law); *Safeco Ins. Co. of Am. v. City of White House, Tenn.*, 191 F.3d 675, 693 (6th Cir. 1999) (applying Tennessee law); *Asher v. Unarco Material Handling, Inc.*, 862 F. Supp. 2d 551 (E.D. Ky. 2012) (applying Kentucky law); *Garofalo v. Empire Blue Cross & Blue Shield*, 67 F. Supp. 2d 343, 347 (S.D.N.Y. 1999) (applying New York law); *Centon Elecs., Inc. v. Bonar*, 614 So. 2d 999, 1004 (Ala. 1993); *Grover v. Ratliff*, 120 Ariz. 368, 586 P.2dd 213, 215 (Ariz. Ct. Appl. 1978); *City of Miami Beach v. Carner*, 549 So. 2d 248, 253-54 (Fla. DCA 1991); *Amalgamated Transit Union Local 1324 v. Roberts*, 263 Ga. 405, 434 S.E.2d 450, 452 (1993); *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W. 2d 823, 830 (Iowa 1998); *Carl v. Huron Castings, Inc.*, 450 Mich. 620, 544 N.W. 2d 278, 286 (1996); *Cone Mills Corp. v. Allstate Ins. Co.*, 114 N.C. App. 684, 443 S.E.2d 357 (N.C. App.) 1994.

The *Crossman* Court explained at 2013 U. S. Dist. LEXIS 138941 *77-79:

> This national consensus exists for good reason: the policies underlying the collateral source rule "are less compelling" in breach of contract cases than in tort actions. (Reinstatement (Second) of Contracts §347Cmt. e (1979). Tort law's focus on punishment and deterrence favors the risk of plaintiff's double recovery over the risk of under-deterring the defendant. Unlike in tort law, the purpose of damages in contract law is not deterrence or punishment. The purpose of an award of damages for breach of contract is

> to put the plaintiff in as good a position as he would have been if the contract had been performed. (citation omitted). Instead, contractual damages are almost purely compensatory, measured by the amount that the non-breaching party would have received if the contract had been performed as promised. [citation omitted]. Applying the collateral source rule to contract law would contravene this principle by awarding the non-breaching party more damages than necessary to compensate it for the breach. [citation omitted]

Crossman was cited and relied upon by the Court in *Pa. Nat'l Mut. Cas. Ins. Co. v. Portrait Homes – S.C., LLC*, No. 3:18-CV-00561, 2019 U. S. Dist. LEXIS 160414 (W.D.N.C., September 18, 2019). The *Portrait Homes* case was also a case where a general contractor, Portrait, and various subcontractors were sued over construction defects. The general contractor's primary insurer, Admiral, fully paid the defense costs and the amount necessary to settle the case. Nevertheless, the general contractor sued the insurer of one of its subcontractors, i.e., Pennsylvania National Mutual Casualty Insurance Company ("Penn Mutual"), as an "additional insured," seeking coverage and indemnity relative to the claims made against the general contractor in the underlying construction defects case. Since the general contractor's own insurer had already paid all of its defense and indemnity costs, the Court held that the general contractor could not maintain its claims for the defense and indemnity amounts against the subcontractor's insurer, Penn Mutual, even though it qualified as an additional insured under the subcontractor's policies with Penn Mutual. The Court rejected the application of the "collateral source" rule, citing *Crossman* and various other authorities discussed in the opinion. 2019 U. S. Dist. LEXIS 160414 *14 - *19. The Court emphasized that Penn National was not a tortfeasor or wrongdoer alleged to have caused the damages in the underlying construction litigation; instead, it was an insurer of an alleged subcontractor tortfeasor, so the collateral source rule simply had no

application. See also *State Farm Mut. Auto. Ins. Co. v. Schatken*, 230 W. Va. 201, 208, 737 S.E.2d 229, 236 n. 5 (2012) (explaining that the insurer was not the tortfeasor, or party at fault, for purposes of the collateral source rule).

For the reasons discussed in these cases, the collateral source rule has no application to the present matter. Here, the drywaller's insurer, Builders, was obviously not a tortfeasor or alleged "wrongdoer" who caused any of the damages at issue in the underlying construction defects litigation; it was an insurer of an alleged subcontractor tortfeasor (Archetype) that allegedly breached its contract. Consequently, as the *Portrait Homes* case found, the "collateral source" rule would have no application in this context. Again, as the Court below emphasized, "[t]he decision in *Soaring Eagle* indicates that the collateral [source] rule does not apply to these types of cases." (JA001623). G&G concedes, and the Court below found it to be undisputed, that the defense and settlement costs relative to the underlying construction defects claims were fully paid on G&G's behalf at no cost to G&G. To allow G&G to use the collateral source rule as a weapon to advance "bad faith" claims in spite of the fact that its defense and settlement were fully paid at no cost to G&G would be highly inappropriate and tantamount to allowing a prohibited "double recovery."

This Court must thusly reject G&G's misplaced attempt to weaponize the "collateral source" rule, as the Supreme Court did in *Soaring Eagle,* consistent with the clear majority of courts that have rejected the application of the collateral source rule in a context like this, where more than one insurance policy or third party provides payment of defense and indemnity costs for the same loss.

F. The Circuit Court correctly entered summary judgment for Builders on G&G's "bad faith" claims against Builders as no additional discovery was needed.

G&G has regurgitated yet another argument that was rejected by the Supreme Court in *Soaring Eagle*, supra, 2020 W. Va. LEXIS 699 at *7 – *8, namely that the Circuit Court's grant of summary judgment was premature because G&G was denied the opportunity to develop through discovery certain matters pertaining to its "bad faith" claims (such as the reasons for Builders' alleged refusal to provide a defense; the reasons for Builders' decision to pay to settle the drywalling claims against G&G). Petitioner's Brief VI., pg. 36.

In *Soaring Eagle*, supra, just as G&G attempts here, the Petitioner (Developer) argued that the circuit court erred in granting Travelers' motion for summary judgment as to the "bad faith" claims against it without there being discovery regarding Travelers' denial of coverage and other matters related to the "bad faith" claims. *Id.* at *7 – *8. The Supreme Court noted that the Petitioner failed to adequately articulate why further discovery was necessary for the lower court to rule on the summary judgment motion. As the Court explained, under Rule 56(c) of the West Virginia Rules of Civil Procedure, "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that **there is no genuine issue as to any material fact** and that the moving party is entitled to a judgment as a matter of law. (Emphasis added)." The Court went on to state that Petitioner failed to meet its burden under Rule 56(f) of the West Virginia Rules of Civil Procedure by demonstrating why further discovery would have been necessary to put the Circuit Court

in a position to rule on Travelers' motion for summary judgment as to the "bad faith" claims against it. *Id.*

As set forth above, in *Soaring Eagle* the Supreme Court held that the only "material facts" necessary for the Court's determination of the insurer's motion for summary judgment as to the "bad faith" claims against it were (1) that the putative insured received a defense at no cost to the putative insured, and (2) all claims were settled at no cost to the putative insured. Here, where those very same "material facts" necessary to the adjudication of Builders' Motion for Summary Judgment were not in dispute, the Circuit Court was certainly in the appropriate position to grant Builders' summary judgment as to G&G's "bad faith" claims without the discovery that G&G weakly claims it needed. No amount of discovery would have altered the undisputed facts that were material to the Circuit Court's grant of summary judgment here, i.e., that G&G received a defense at no cost to it, and all claims were settled at no cost to G&G.

G. G&G's *Pitrolo* argument lacks merit.

Against the backdrop of this case, exhaustively detailed above, G&G audaciously argues (VII) at page 38 of its brief that the Circuit Court erred in its grant of summary judgment because it has a "bad faith" claim for damages based on *Aetna Casualty & Surety v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). G&G stated that, relative to its common law "bad faith" claims, the Court in *Pitrolo* 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.

G&G's argument that it has a *Pitrolo* based "bad faith" claim for damages is incorrect for any number of rather obvious reasons. Initially, unlike the situation in *Pitrolo*, G&G never even initiated a declaratory judgment action against Builders seeking a declaration that Builders had a duty to defend G&G with respect to defective drywall claims. (JA000579, JA000600-602)

Moreover, in contrast to the situation in *Pitrolo*, G&G was defended. The Lawsons did not assert defective drywall claims directly against G&G in their counterclaim. They made the claims directly against the drywall subcontractor they hired, i.e., Archetype, and Builders paid for the defense and settlement of the defective drywall claims at no cost to G&G, and procured a release inuring to G&G's benefit relative to claims of defective drywalling. Builders fully defended and indemnified the Lawsons' claim of defective drywalling.

In *Pitrolo*, Mr. Pitrolo had to hire and pay a lawyer himself to defend three civil actions filed against him, because Aetna denied a defense and coverage. That most certainly did not happen to G&G here. As noted above, according to the record in this case, G&G's liability insurer, Westfield, and others were providing G&G with what it called an "active defense." As noted previously, G&G admitted that Westfield was defending G&G and was paying its defense costs. (CR 459 SA0016). More importantly, perhaps, it is undisputed that the insurers for the subcontractors paid for the entirety of G&G's defense costs, in stark contrast to the situation in *Pitrolo*, where Mr. Pitrolo had to personally pay for an attorney to defend the suits against him due to his insurer's refusal to

defend. Here, G&G was never left to provide for its own defense. As the Supreme Court indicated in *Admiral Ins. Co. v. Fisher*, supra, 2018 W. Va. LEXIS 467 at *20-21, under the facts presented here where an insured has been defended, as G&G was, an insured may not recover *Pitrolo* damages, or damages pursuant to *Hayseeds, Inc. v. State Farm Fire & Cas.,* 177 W. Va. 323, 352 S.E.2d 73 (1986).[10]

Clearly, this is not a case where *Pitrolo* applies, and that case is simply not relevant to the Circuit Court's grant of summary judgment as to G&G's bad faith" claims.

H. The Circuit Court correctly entered summary judgment on G&G's claims for "bad faith."

Lastly, G&G argues that "[u]nlike G&G, the developer in *Soaring Eagle* received defense and indemnification from the subcontractors' insurers consistent with the development company's contract[.]" VII., Petitioner's Brief at 38.

Once again, G&G's argument attempts to direct this Court's attention away from the outcome determinative facts of this case, namely (1) that the various insurers fully funded G&G's defense of all claims, including the drywalling claims advanced by the Lawsons directly against the subcontractor they hired, claims they did not make directly against G&G, claims that Builders paid to defend; and (2) that all claims against it were settled at no cost to G&G by the subcontractors' insurers, including Builders, who paid for the defense and settlement of the drywalling claims and secured G&G's release from such claims. As the Supreme Court held in *Soaring Eagle*, under virtually identical

[10] It should also be noted that G&G did not file a motion subsequent to the Circuit Court's ruling granting summary judgment to G&G on coverage against Builders, claiming entitlement to attorney's fees and costs pursuant to *Pitrolo*.

circumstances, those undisputed material facts – i.e., that the putative insured's defense and indemnity were fully funded at no cost to the putative insured – mandated the grant of summary judgment as to G&G's "bad faith" claims against Builders. The fact that G&G received a fully funded defense and indemnification, at no cost to G&G, is the only material fact necessary to the grant of summary judgment as to G&G's "bad faith" claims against Builders according to our Supreme Court in *Soaring Eagle*.

It should be noted that G&G was defended by its own insurer, Westfield, from the time that it first notified Westfield of the Lawsons' claims. Moreover, additional insurance carriers, including the subcontractors' insurers, paid all of G&G's defense and indemnity costs, including Builders, who paid for the defense of the drywall claims. No monies were paid by G&G itself to defend or settle the claims, as G&G admits. Simply put, G&G was made whole when all of its defense and indemnity costs were paid at no cost to G&G.

At this point, through the advancement of its "bad faith" claims, it is rather obvious that G&G is attempting to go well beyond being made whole. Once again, under these circumstances, G&G's "bad faith" efforts are tantamount to seeking double recovery. Here, G&G's ongoing efforts on behalf of other insurers to collect attorney fees that have already been paid, with no obligation to do so, in order to effectuate "bad faith" claims, is exactly the situation addressed in *Soaring Eagle*. The Supreme Court in *Soaring Eagle* understood this and would not allow it to occur, and the same is true of the Circuit Court below. Respectfully, this Court should affirm the Circuit Court's December 30, 2024 Order granting summary judgment to Builders relative to G&G's claims for "bad faith" for the reasons detailed herein.

VI. CONCLUSION

This Circuit Court correctly determined that there was no issue of material fact and applied the law as set forth by our Supreme Court in *Soaring Eagle*, decided on almost identical facts, and entered its Order granting Builders summary judgment on G&G's "bad faith" claims. The relevant material facts, that are uncontested by G&G, are that G&G was fully defended and indemnified for all counterclaims asserted by the Lawsons in the litigation initiated by G&G. After G&G's initiation of the litigation, it was then defended on all counterclaims of the Lawson by various insurers, at no cost to G&G, and indemnity was paid by multiple insurers on all claims made by the Lawsons. G&G did not pay any monies for the defense and settlement of the claims of the Lawsons. In particular, the drywall claims made in the case by the Lawsons against Archetype were defended by Builders at no cost to G&G, and Builders paid indemnity and obtained a release for G&G at no cost to G&G. Since G&G has been fully defended and indemnified for all claims in the underlying matter, as set forth in the Circuit Court's Order, Builders is entitled to judgment as a matter of law pursuant to the legal principles enunciated by the Supreme Court in *Soaring Eagle* on almost identical facts. Accordingly, this Court should affirm the Order appealed from in all respects.

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NO. 25-ICA-42

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

G&G BUILDERS, INC.,

Plaintiff Below, Petitioner,

v.

BUILDERS PREMIER MUTUAL INSURANCE COMPANY,

Defendant Below, Respondent.

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

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2025, I electronically filed the foregoing **Respondent's Brief** via File & ServeXpress, which will provide electronic notification to the following counsel of record:

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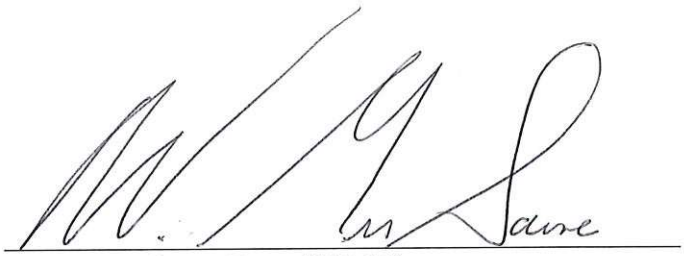

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