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 REPLY BRIEF

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STATEMENT OF THE CASE

In this appeal, G&G Builders Inc. (G&G) asserts that the Circuit Court of Cabell County erred when it granted summary judgment to Builders Premier Mutual Insurance Company ("Builders") on G&G's claims against Builders for breach of contract, bad faith and violations of West Virginia's Unfair Trade Practices Act. Said claims arose from Builders' denial of defense and indemnification of G&G in connection with claims asserted by Randie and Deanna Lawson ("the Lawsons") related to the construction of the Lawsons' home. G&G was the owners' representative for the project and had initially filed suit against the Lawsons to recover under a mechanics lien for work G&G performed for the Lawsons on the project. (See JA143-148) In response, the Lawsons filed a counterclaim against G&G, alleging that the home had various defects (JA223). The Lawson's also asserted claims against a number of subcontractors and suppliers involved in the project. (See JA217-236)

One of the subcontractors involved in the Lawson project was Archetype Builders, Inc. ("Archetype"), which did drywall work and was insured by Builders. While Builders asserts at pgs. 2-3 of its *Brief,* and again at pg. 4, that the Lawsons *Counterclaim* did not mention defective drywalling by Archetype and asserted no direct claims against G&G seeking damages for alleged drywall defects, this assertion ignores the fact that the Lawsons' alleged, in Paragraph 7 of their June 12, 2014 *Counterclaim,* that G&G "failed to supervise the construction of various and significant areas of work," and further alleged generally that there were "other significant defects and failure of performance." (See JA223) The full nature of these alleged "other significant defects" would not be clarified until much later as discovery progressed. For example, on April 14, 2017, the Lawsons asserted in their written discovery responses that one of the defects they were alleging was that the "wall and ceiling drywall is wavy and cracking due to improper

installation." (JA1010) Therefore, despite Builders' suggestion to the contrary, the Lawsons did, in fact, assert direct claims against G&G for all of the alleged defects in their home, including the drywall defects arising from Archetype's work. As is typical in such cases, it was only through discovery that G&G was able to learn the detailed nature and extent of the Lawsons' claims against it.

Before beginning work, Archetype entered into a contract which required it to hold G&G harmless in the event of claims and losses related to Archetype's work and/or product and to obtain insurance coverage to protect G&G in the event of such a claim or loss. (JA1448-1449) In that regard, the Builders Policy expressly provided that anyone Archetype agreed to defend and indemnify in a written contract would also qualify as an insured under the Builders Policy. (See JA1088-1089, 1094-1095, 1099-1100 and 1086-1087.) In addition, a Certificate of Insurance was provided by Archetype to G&G which confirmed that Archetype had the commercial general liability insurance coverage required by Archetype's contract in place. (See JA1021)

As discovery in the litigation progressed, G&G sought defense and indemnification from the various subcontractors and suppliers in connection with the Lawsons' claims against it and requested that their respective insurance carriers defend and indemnify G&G. While a number of the carriers for the various subcontractors and suppliers eventually agreed to defend G&G in connection with the claims arising from their insureds' work or products, Builders and certain others refused to do so even though Builders was well aware of the fact that Archetype's work was at issue, and that Archetype had agreed to indemnify and hold harmless G&G for any claims arising from its work on the project. Builders was actively defending Archetype in the litigation, but ignored its responsibility to its additional insured. Therefore, G&G filed suit against Builders asserting claims for Builders' breach of contract, bad faith, and violations of West Virginia's

Unfair Trade Practices Act. (See JA579-645) Curiously, Builders suggests, at pg. 7 of its *Brief,* that G&G never placed it on notice of the litigation or tendered G&G's defense before filing suit against Builders in 2021. This assertion is perplexing because Builders also admits, at pg. 6 of its *Brief,* that it began defending G&G's indemnification claim against Archetype in connection with the drywall work in 2019. It is unclear how Builders can suggest that it was unaware of the Lawsons' claims against G&G or the contractual duty to indemnify G&G which Archetype had assumed while admitting that it was actively defending such claims for approximately two years before G&G sued it directly. Likewise, it is unclear why Builders also asserts, at pg. 7 of its *Brief,* 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." In fact, G&G expressly alleged, at Paragraph 82 of its April 26, 2021 *Fourth Amended Third-Party Complaint,* that "Builders was and is obligated to defend and indemnify G&G for claims arising from Archetype Builders' work." (See JA600) It is, therefore, obvious that G&G placed the issue of whether Builders had a duty to defend and indemnify it in dispute through its *Fourth Amended Third-Party Complaint* and was actively pursuing claims against Builders for failing to comply with that duty. It is also unclear why Builders would assert, at pg. 10 of its *Brief,* that its Policy was not the policy "contemplated" by the insurance requirements of the Archetype contract and that it was not asked to issue a Certificate of Insurance. As noted above, a Certificate was clearly provided to G&G by Archetype. (See JA1021)[1] Finally, it is uncertain why Builders has asserted, at pg. 8 of its *Brief,* that it "retained attorneys to defend the defective drywall claim" when it knows full well that those attorneys were

1 If said Certificate was not issued by Builders (or its agent, KWT Insurance Agency, Inc.) how could G&G have obtained a copy of it?

only retained to defend Archetype with respect to the drywall claim. Had Builders undertaken to defend G&G, or at least participate in the defense of G&G, there would be no need for this appeal.

Following discovery, the Circuit Court below granted summary judgment to G&G on the coverage issue and found that Builders was, in fact, contractually obligated to defend G&G. (See JA1488-1511) Despite this finding, Builders continued its refusal to participate in G&G's defense and instead 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) In that *Motion*, Builders argued that, because G&G was always defended by one or more of the insurance carriers for the other subcontractors, Builders could have no valid claims against Builders for breach of contract, bad faith or unfair trade practices. In effect, Builders took the position that, so long as someone defended G&G in the litigation against some of the Lawsons' claims, Builders could ignore its own primary contractual obligation to do so. In support of its position, Builders directed the Circuit Court to 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 suggested that, like the claimant in *Soaring Eagle,* G&G had received a full defense and full indemnification from one or more insurance carriers for other subcontractors and, therefore, could not recover against Builders regardless of its corresponding duty to defend. (See JA1566-1567)

On December 30, 2024, 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* (JA1614-1625) and found in favor of Builders. In particular, the Circuit Court found that G&G had no right to recover from Builders for its breach of contract, bad faith, or violations of the Unfair Trade

Practices Act because G&G had been defended by other subcontractors' insurance carriers and was ultimately released without payment. (JA1623-1625)

Because the Circuit Court failed to recognize that there were critical differences between this case and *Soaring Eagle*, G&G filed this appeal (JA1627-1644), asking the Court to reverse the Circuit Court's decision. Builders has now filed its *Respondent's Brief,* in which it again relies upon *Soaring Eagle* and again suggests that G&G has no valid claims against it for breach of contract, bad faith or unfair trade practices. G&G now submits its *Reply Brief* and asks that the Circuit Court's December 30, 2024 *Order* be reversed.

ARGUMENT

I. Builders' reliance upon the *Soaring Eagle* decision is misplaced

Builders begins its arguments by again suggesting that "[a]ll 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." (See Builders' *Brief,* at pg. 17.) As noted above, Builders is well aware of the fact that that the attorneys it retained were only retained to defend Archetype and not G&G. Builders' argument appears calculated to support Builders' position that this case is factually identical to the *Soaring Eagle* decision. However, Builders fails to recognize that there are important distinctions between the facts of this case and those at issue in *Soaring Eagle*. Specifically, the Circuit Court in this case determined that, under the terms of Builders' Policy and the indemnification provisions of the Archetype contract, Builders was obligated to provide "primary liability coverage" to G&G as an "insured" under its Policy to defend G&G in connection with the Lawsons' drywall-related claims. (See JA1509) In that regard, the Archetype contract for the Lawson project expressly provided, "[t]he additional named insured endorsement shall be endorsed as **primary coverage** on Contractor/Material Supplier's commercial general liability and

excess insurance policy." (See the Archetype Contract, at JA1448-1449) (Emphasis added.) In contrast, the insurer for the general contractor in *Soaring Eagle* had excess coverage for the claimant developer above the primary coverage provided by the insurers for the subcontractors involved in the project. The Court in *Soaring Eagle* noted that the insurer for the general contractor (Travelers) had advised the claimant developer by letter at the outset of the litigation that its policy only provided excess coverage. The letter stated:

> "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."

Soaring Eagle, at 3. (Emphasis added.) The Court then explained:

> **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 5 (Emphasis added.) In effect, the contract in *Soaring Eagle* required the general contractor on the project to defend and indemnify the claimant developer, but also expressly mandated that the subcontractors for the project would be required to defend the claimant developer as well. Because the insurers for the subcontractors complied with that requirement and defended and indemnified the claimant developer against **all** of the claims under their primary basis throughout the litigation, the Supreme Court found that the claimant developer had no valid claim for attorney's fees against the general contractor's insurer, which provided only excess coverage to the primary coverage of the carriers for the subcontractors. The Court noted:

> As in *State Auto* and *Fisher*, petitioner herein was provided a defense at no cost to it and the claims against it were settled at no cost to petitioner. For these reasons, under the facts of this case, we find that the circuit court did not err in applying our

findings in *State Auto* and *Fisher* and awarding judgment in favor of respondents. *Soaring Eagle*, at 12.

Unlike Travelers in *Soaring Eagle*, Builders was not providing excess coverage for the claims arising from Archetype's work over and above other primary coverage. Instead, Builders was in the position of the insurers for the subcontractors in *Soaring Eagle,* who were required to, and did provide 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 drywall work. However, the similarities end there. Rather than comply with its primary contractual obligation, Builders breached its contract by denying coverage to its additional insured, G&G, and refused to participate in G&G's defense to address the Lawson's drywall related claim. While other insurance carriers for other subcontractors ultimately agreed to defend G&G, they were defending G&G under the separate contracts entered into by their insureds for the claims arising from their insured's work on the Lawson project. Likewise, while Builders was defending Archetype in connection with the Lawson's drywall claim, the attorneys it retained to do so were not defending G&G. Put simply, G&G was left undefended with respect to the drywall claims even though Builders clearly had the primary contractual duty to provide that defense.

In its *Brief*, Builders appears to be asserting that it was allowed to ignore its primary contractual obligation to G&G merely because other subcontractors' insurance carriers did not. Builders does not, however, explain how or why it deserves such a unique "free pass" while other, responsible, insurance carriers must honor their contractual obligations. Moreover, Builders appears to be suggesting that insurance carriers in such situations should wait to see if another insurer will defend their insured so that they can avoid their own contractual obligations. Such a

situation would deny West Virginia businesses the protection of the insurance coverage they purchase (or arrange to have purchased on their behalf) at great expense and reward carriers who refuse to meet their contractual duties.

II. Builders' reliance upon South Carolina law as set forth in *Crossmann Cmtys. of N.C., Inc v. Harleysville Mut. Ins. Co.,* to defeat the application of the collateral source rule in this case is also misplaced.

West Virginia Courts have long recognized that evidence of funds received or available from a collateral source is irrelevant and G&G has argued that the Circuit Court below should have applied the collateral source rule to the payment of some of its defense costs by other subcontractors' insurance carriers in this case. In that regard, the West Virginia State Supreme Court of Appeals noted, in *Ilosky v. Michelin Tire Corp.*, 172 W. Va. 435, 307 S.E.2d 603 (1983):

> 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.

Ilosky, 172 W. Va. at 447. Apparently recognizing that the collateral source rule clearly applies to payments made by other subcontractors' insurance carriers in this case under West Virginia law, Builders directs the Court to *Crossmann Cmtys. of N.C., Inc v. Harleysville Mut. Ins. Co.,* No. 4:09-CV-1379-RBH, 2013 U.S. Dist. LEXIS 138941 (D.S.C. Sep. 27, 2013), at pgs. 29-30 of its *Brief* and argues that it should be applied here. In *Crossmann*, a federal District Court in South Carolina discussed how the collateral source rule would apply under South Carolina law to a construction defect case involving multiple subcontractors and multiple insurance carriers. While *Crossmann* did involve a construction defect case, it did not involve the same issue addressed by the Circuit Court below.

In *Crossman*, a general contractor, Beazer, sought reimbursement from its own insurer, Harleysville, for various defenses and indemnification costs incurred during a construction defect

case which also involved a number of subcontractors. Unlike Builders in this case, Harleysville was the insurer for the general contractor and actually paid for part of the general contractor's defense. The District Court explained:

> **The Court found in its March 27, 2013 Duty to Defend Order that the limited scope of Harleysville's retention of Mr. Stephen Brown and YCR regarding buildings 1-13 did not extend to defending Beazer against all claims in the *True Blue Lawsuit,*** and the evidence at trial further confirmed that finding. . . .
>
> 31. **Harleysville paid for all efforts undertaken by Mr. Brown and the law firm of Young Clement Rivers to defend Beazer Homes in the Underlying Lawsuit. Harleysville paid Young Clement Rivers $184,719.79 in attorneys' fees and $6,091.06 in expenses, for a total payment of $190,810.85. Including the other expenses paid by Harleysville, such as court reporter fees, Harleysville paid a total of $222,113.59 in defense of the Underlying Lawsuit with respect to the thirteen buildings.**

Crossmann, at 24-25 (Emphasis added.) The District Court also noted that there were a number of other carriers involved both for Beazer and its subcontractors and explained:

> In addition to tendering the Underlying Lawsuit to Harleysville, **Beazer Homes also tendered the Underlying Lawsuit to the following insurance carriers who issued policies of insurance to Beazer Homes: Cincinnati Insurance Company; Illinois Union Insurance Company; and certain London-based insurers.** Beazer Homes sought both a defense and indemnity from each of these insurers in connection with the Underlying Lawsuit.
>
> 36. **Beazer Homes also tendered the Underlying Lawsuit for defense and indemnity to the insurance companies who issued policies of insurance to numerous subcontractors and under which policies Beazer Homes claimed complete coverage for itself as an additional insured.** Beazer Homes sought both defense and indemnity from each of these insurers in connection with the Underlying Lawsuit.
>
> 37. **The only carrier who retained counsel to defend Beazer Homes as to any portion of the Underlying Lawsuit was Harleysville**.
>
> 38. The carrier for two subcontractors, and under which Beazer Homes sought coverage as an additional insured, did not retain counsel to defend Beazer Homes. However, it did reimburse Beazer Homes $79,390.51 in defense costs incurred in the Underlying Lawsuit in a confidential settlement.

Crossmann, at 26-27. (Emphasis added.) Therefore, Harleysville was in a position similar to that of G&G's personal carrier, Westfield, in this case, while Builders is in the position of the subcontractors' insurance carriers in *Crossmann* who refused to pay anything for Beazer's defense. However, the similarities end there.

In *Crossmann*, the District Court noted:

> 39. **Shortly before the December 2012 trial was to begin, on November 21, 2012, Beazer and the subcontractor-defendants reached an agreement to settle the Underlying Lawsuit.** Pursuant to that agreement, and after final settlement agreements were executed, **Beazer paid the True Blue HOA a total of $3,336,800 to settle the *True Blue Lawsuit*. . . . . Subcontractor-defendants paid the True Blue HOA additional amounts to settle claims against them. The litigation efforts by Beazer against various True Blue subcontractors resulted in those subcontractors paying approximately $2.8 million directly to the True Blue HOA to settle claims by the True Blue HOA,** which resulted in a lower settlement amount for Beazer than would have been the case had Beazer not pursued the subcontractors. . . .
>
> 40. Beazer recovered insurance proceeds from third parties other than Harleysville . . . Some of the individual amounts paid to Beazer by the other insurers are set forth in confidential settlement agreements or other confidential documents. In the aggregate, **Beazer recovered a total of $3,045,391 from other insurance carriers. This includes $79,391 set forth above which was specifically allocated to defense costs**.
>
> 41. **Beazer Homes spent a total of $2,572,522.05 in attorneys' fees and costs** to defend Beazer Homes Corp. in the Underlying Lawsuit.

Crossmann, at 27-28 (D.S.C. Sep. 27, 2013) The Court then set forth the various amounts Beazer eventually recovered from other carriers and noted:

> 57. To determine what portion of these additional settlements should be allocated to reimbursement of defense costs and what portion of these additional settlements should be allocated to reimbursement of those amounts paid by Beazer Homes to settle covered damages, this Court finds: The total settlement paid by Beazer to True Blue was $3,336,800, which included both covered and non-covered damages. (Repairs were also made by Beazer before the lawsuit was brought, but the cost of the repairs have not been included in connection with the Court's analysis relating to defense costs because they were not made in reference to the lawsuit.) The total of Beazer's unreimbursed attorney's fees (after deduction of $79,390.51 paid by a carrier for two (2) subcontractors which was specifically allocated to defense costs)

was $2,493,131. The total out of pocket cost to Beazer for the lawsuit was therefore $5,829,931.

Crossmann, at 35-38. Because Harleysville had only paid for part of Beazer's defenses costs and none of the settlement, the District Court then turned to Beazer's claims against Harleysville for its attorneys fees and costs as well as the remaining amounts paid for the settlement. The Court noted:

> Beazer Homes has argued that the amount that Beazer Homes has already received from other carriers to compensate it for its defense costs constitutes a collateral source and cannot be used to offset what Harleysville may owe to reimburse Beazer Homes for its reasonable attorneys' fees and defense costs. Beazer asserts that, if an offset is allowed, it would not be made whole. **Specifically, Beazer contends that it paid the True Blue HOA $3,336,800 to settle the underlying action and incurred attorney's fees and costs of $2,572,522 to defend the True Blue lawsuit; and that it recovered payments from other sources in the amount of $2,986,000. It further contends that all of the amounts received from other sources were internally allocated by Beazer to indemnity and not defense costs.** Therefore, Beazer contends that it still has $350,800 in unreimbursed indemnity costs for the settlement payment and unreimbursed defense costs of $2,493,131 (after deduction of the $79,390 paid toward defense costs discussed above). However, **Beazer Homes' argument is without merit. The settlement payment by Beazer to True Blue HOA included both covered and non-covered damages. Also, the fact that Beazer internally allocated the settlements received from other carriers to indemnity is not binding on this Court**.
>
> This Court's allowance of an offset for the amounts paid by other insurance carriers to reimburse Beazer Homes for its defense costs does not violate the collateral source rule. Under the collateral source rule, a tortfeasor has no right to any mitigation of damages because of payments or compensation received by the injured person from a source wholly independent of the wrongdoer. *Johnston v. Aiken Auto Parts,* 311 S.C. 285, 428 S.E.2d 737 (S.C. App. 1993). The purpose of the collateral source rule is to prevent a tortfeasor from obtaining a windfall. *Dixon v. Besco Eng'g, Inc.,* 320 S.C. 174, 182, 463 S.E.2d 636, 640 (Ct. App. 1995). A source is wholly independent of the wrongdoer "when the wrongdoer has not contributed to it and when payments to the injured party were not made on behalf of the wrongdoer." *Mount v. Sea Pines Co., Inc.,* 337 S.C. 355, 357, 523 S.E.2d 464, 465 (S.C. App. 1999) (citation omitted).
>
> **Application of the collateral source rule to exclude an offset for the amounts already received by Beazer to reimburse it for the defense costs it incurred in the Underlying Lawsuit would result in an unjust windfall and a double recovery for Beazer.** While South Carolina has not addressed the issue, 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**.

Crossmann, at 75-77 (Emphasis added.)

Put simply, in *Crossmann*, the District Court was addressing an effort to obtain multiple recoveries for the cost of defending precisely the same claims against Beazer. It rejected such claims because Beazer would have been receiving more than one payment for the same loss i.e. the cost of defending Beazer for its work on the underlying project. In contrast, this case involves G&G's claim for defense costs associated with defending the Lawson's defective drywall claims which Builders had a primary duty to defend because they arose from the work of its insured, Archetype. Payments by other carriers for the cost of defending other claims involving work done by other subcontractors are irrelevant under the collateral source rule in this case because they do not represent a double recovery for the same loss. *Crossman* is simply inapplicable and is not controlling in any event because it involved the application of South Carolina law.

Similar considerations apply with respect to the case of *Pa. Nat'l Mut. Cas. Ins. Co. v. Portrait Homes-S.C., LLC*, No. 3:18-CV-00561-KDB-DCK, 2019 U.S. Dist. LEXIS 160414 (W.D.N.C. Sep. 17, 2019), which Builders cites at pg. 32 of its *Brief*. In *Portrait Homes*, the North Carolina District Court explained:

> In summary, Admiral paid the entire amount of the defense costs and settlement on behalf of Portrait in the Underlying Litigation. And, those are the only costs that Portrait may properly claim as an "additional insured" under JJA's Penn National policies. On these undisputed facts, the Court finds that Portrait is not entitled to any further reimbursement from Penn National for any defense costs or settlement payments, which would amount to a prohibited "double recovery" under North Carolina law.

Portrait Homes, at 20. In this case, other subcontractors' insurance carriers paid to defend G&G with respect to the claims caused by their respective insureds and the cost of the defense was split

pro-rata among the insurers. Builders simply wishes to avoid paying its share of those costs for the defense of the claims arising from the work of Archetype and is suggesting that, because other carriers paid their share, it should be allowed to avoid paying anything at all. Cases such as *Crossmann* and *Portrait Homes* denying a double recovery for the same defense costs arising from the same claims are simply not applicable.

III. Builders fails to recognize that unlike the claimant in *Soaring Eagle*, G&G did explain why additional discovery was necessary.

At pg. 34 of its *Brief*, Builders suggests that the claimant in *Soaring Eagle*, supra. also argued that additional discovery regarding the denial of its claims was needed but that claim was rejected by the Supreme Court because no further discovery could change the fact that all of the defense and indemnification costs had been paid by other carriers. However, in this case, unlike *Soaring Eagle*, G&G's counsel provided an Affidavit Of Counsel as required under *Rule 56(f)* of the *West Virginia Rules of Civil Procedure*, which identified the areas of discovery which G&G needed to address (JA1609-1610) and also pointed out that, because of a stay of discovery, there was no possible opportunity for G&G to conduct discovery with respect to its breach of contract, bad faith and Unfair Trade Practices Act claims. Specifically, G&G's Counsel pointed out that discovery was needed regarding Builders' decision to continue its refusal to participate in G&G's defense after the Circuit Court ruling on its duty to defend. (JA1610) In that regard, such discovery could have revealed why Builders felt it was exempt from its duty to defend when the carriers of other subcontractors had begun to participate in the defense of G&G after the Court ruled on their respective duties to defend G&G with respect to the claims arising from their insured's work on the Lawson project. As discussed above, this case is different from *Soaring Eagle* because it involves the insurance carrier for a subcontractor which had the primary duty to defend and indemnify G&G in connection with the Lawsons' claim arising from Archetype's work. While

Builders would clearly prefer to gloss over that significant difference, it cannot avoid the fact that G&G was never allowed to discover the basis for Builders' position that it was exempt from the requirements which applied to the other carriers for the other subcontractors.

IV. Builders attempts to distinguish *Pitrolo* are without merit.

Finally, at pgs. 35-36 of its *Brief*, Builders attempts to distinguish the case of *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986), to argue that it does not apply here. Its efforts fail.

In this case, 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 has asserted that it did not have a duty to defend G&G, the Circuit Court below found that primary coverage for G&G's defense existed under the Builders Policy. (JA1488-1511) Therefore, it is beyond dispute that Builders refused to defend G&G and forced it to file suit to obtain a ruling that coverage existed. In *Pitrolo*, the Court held:

> 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 litigation, including costs and reasonable attorney's fees.

Pitrolo, at 192, 158. Builders apparently does not dispute that G&G needed to be defended in connection with the Lawsons' defective drywall claim. Instead, it asserts at pg. 37 of its *Brief* that "G&G was never left to provide for its own defense," and argues that, so long as some other carrier defended G&G against the Lawsons' drywall claim, Builders could disregard its contractual duties to G&G and its liability for G&G's *Pitrolo* attorney fees in connection with proving that coverage existed for the claims arising from Archetype's drywall work. In effect, Builders is asserting that it has a right to avoid its legal responsibilities so long as someone else paid for the

defense it was obligated to provide. The Court in *Pitrolo* explained why such a situation should not be tolerated, noting:

> The general reason stated for allowing recovery of attorney's fees in this situation is that **where an insurer has violated its contractual obligation to defend its insured, the insured should be fully compensated for all expenses incurred as a result of the insurer's breach of contract, including those expenses incurred in a declaratory judgment action**. **To hold otherwise would be unfair to the insured, who originally purchased the insurance policy to be protected from incurring attorney's fees and expenses arising from litigation**. . . .
>
> Whether an insurer's refusal to defend was in good or bad faith is largely irrelevant once it has been established that the insurer breached its contract with its insured. The focus of the declaratory judgment inquiry is simply whether the insurer had a duty to defend under the terms of the insurance policy. One of the most thoughtful statements criticizing the anomaly of denying attorney's fees incurred by an insured in this situation based upon the insurer's reasons for breaching the contract is contained in 7C J. Appleman, *supra,* § 4691 at 282-83:
>
> > "But, despite the qualifications placed upon this rule by the court, it still appears to be unfair to the insured. After all, the insurer had contracted to defend the insured, and it failed to do so. It guessed wrong as to its duty, and should be compelled to bear the consequences thereof. If the rule laid down by these courts should be followed by other authorities, it would actually amount to permitting the insurer to do by indirection that which it could not do directly. **That is, the insured has a contract right to have actions against him defended by the insurer, at its expense. If the insurer can force him into a declaratory judgment proceeding and, even though it loses in such action, compel him to bear the expense of such litigation, the insured is actually no better off financially than if he had never had the contract right mentioned above**."
>
> We agree with this statement and conclude the trial court acted properly in also awarding attorney's fees incurred by Mr. Pitrolo in the declaratory judgment action.

Pitrolo, at 194-95, 160-61 (Emphasis added.) Here, the Circuit Court appeared to recognize that G&G had incurred the cost and expense of proving that Builders was contractually obligated to defend it, but chose to ignore the fact that Builders was also obligated to pay those costs even

though Builders' liability under *Pitrolo* was obvious. *Soaring Eagle* never addressed the validity of such claims and is, therefore, inapplicable.

CONCLUSION

For all of the foregoing reasons, G&G asks the Court to reject Builders' arguments and reverse the Circuit Court's ruling so that G&G's claims against Builders can proceed.

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 REPLY 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 REPLY BRIEF"** upon all parties and known counsel of record, via File & ServeXpress, as indicated below, this 15th day of May, 2025, addressed as follows:

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