No.: 24-ICA-481

IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DAN RYAN BUILDERS, INC., DAN RYAN BUILDERS REALTY, INC., DRB ENTERPRISES, INC., MONOCACY HOME MORTGAGE, LLC, CHRISTOPHER RUSCH AND CRYSTAL RANKIN,

DEFENDANTS BELOW, PETITIONERS,

v.

EVANSTON INSURANCE COMPANY,

DEFENDANT BELOW, RESPONDENT.

In The Circuit Court of Harrison County, West Virginia
The Honorable Christopher J. McCarthy
C.A. No.: 09-C-57-1

PETITIONERS' BRIEF

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1. The Circuit Court erred in finding that there is no coverage under the Evanston insurance policies for the claims asserted by Plaintiffs against the Defendants in this action.

2. In ruling that there is no coverage under the Evanston insurance policy the Circuit Court made findings of fact that are inappropriately made on summary judgment, and in any event are unsupported by the record before the Circuit Court.

3. The Circuit Court's ruling is at odds with prevailing West Virginia law as to the proper application of Rule 56's standards regarding the grant of summary judgment, in that the determination regarding Defendants' entitlement to insurance coverage is beset by genuine issues of material fact.

4. The Circuit Court erred in failing to find that Evanston is estopped from asserting fourteen additional grounds for denying coverage which were first raised seven years after its initial denial of coverage in 2009; *inter alia*, erroneously determining without supporting evidence that Defendants did not detrimentally rely upon Evanston's initial entirely parochial grounds for denial of coverage, to-wit, an earth movement exclusion in the insurance policy.

STATEMENT OF THE CASE

A. Background And Procedural History

This action was filed in 2009 by thirty-seven (37) homeowners within a residential development to recover for property damage sustained as the result of negligent acts and omissions committed by various entities involved in designing and constructing the development.[1] The Plaintiffs sued Petitioner Dan Ryan Builders, Inc., which is the homebuilder that sold them their lots, together with various of its affiliates and employees (collectively "DRB"). Upon receipt of original process in the Spring of 2009, DRB notified its general liability insurance carrier, Respondent Evanston Insurance Company ("Evanston"). By letter dated July 22, 2009, Evanston immediately denied all coverage on the sole basis of an Earth Movement Exclusion contained within the relevant insurance policies. In short, Evanston flatly refused to defend DRB or cover Plaintiffs' claims.

Since the majority if not substantially all of the Plaintiffs' claims are in fact unrelated to earth movement and are therefore within the scope of Evanston's coverage, the Plaintiffs joined Evanston in their lawsuit as a Defendant seeking a declaration of coverage. DRB asserted crossclaims against Evanston as well. In response, Evanston reaffirmed its denial of coverage by way of a supplemental declination letter dated August 25, 2016. In its supplemental letter, issued some seven years after its initial denial, Evanston relied not just upon the Earth Movement Exclusion to deny coverage, but added no fewer than fourteen new, different grounds.

In October 2022, DRB and Evanston filed cross-motions for summary judgment on the insurance coverage issues. In their motion, DRB argued that Evanston's reliance upon the Earth

[1] While the case is styled as a class action, to date, no class has ever been certified.

Movement Exclusion to deny its obligations to defend and indemnify DRB was erroneous because the vast majority of Plaintiffs' claims were unrelated to earth movement. Moreover, DRB argued that Evanston was estopped from relying upon its newly-articulated fourteen additional grounds for noncoverage which, in any event, were equally unavailing as its reliance upon the Earth Movement Exclusion. Evanston, in its motion, relied principally upon two of its newly-articulated reasons to justify its actions. First, it argued that its coverage obligations were not triggered because DRB failed to satisfy the policy's self-insured retention. Second, it argued DRB failed to establish an "occurrence" of covered "bodily injury" or "property damage." As a catch-all, Evanston argued that other exclusions applied to Plaintiffs' claims against DRB that precluded coverage including, but not limited to, the Earth Movement Exclusion.

While the motions were extensively briefed, the Circuit Court did not entertain oral argument but solicited proposed findings of fact and conclusions of law from DRB and Evanston, which the parties provided. On September 30, 2024, the court issued its ruling. Therein, it made various findings of fact and conclusions of law ultimately agreeing entirely with Evanston's position and, in fact, copying the substance of its order directly from Evanston's proposed findings and conclusions verbatim, save Evanston's argument on choice of law. In so doing, the Circuit Court erroneously relied on evidence that was not of record, made determinations of fact where genuine issues were clearly presented and, on few occasions, seemingly weighed competing evidence and made credibility determinations in resolving issues of material fact in Evanston's favor. Further, it misconstrued the law when drawing certain of its legal conclusions. For example, the court found that coverage was barred by the Policies' "intentional acts" exclusion because DRB intentionally "negotiated for, purchased, constructed,

and developed the property at issue" and, therefore, any resulting property damage "was or should have been expected by DRB."[2] Of course, whether a party "intentionally" negotiated and entered into a contract or performed a service is nowhere near the confines of an intentional act exclusion of an insurance contract.

On November 8, 2024, following a motion by DRB, the Circuit Court entered an Agreed Order dismissing all claims against Evanston and certifying the order for immediate appeal pursuant to Rule 54(b). On December 5, 2025, DRB filed its Notice of Appeal. Thereafter, the Circuit Court entered an *Amended Order* merely to clarify certain aspects of its November 8, 2025 Order. As a result, DRB filed its Amended Notice of Appeal along with a *Motion for Leave to File Amended Notice of Appeal* on January 8, 2025, which this Court accepted on January 13, 2025.

B. Statement Of Material Facts On Appeal

1. Construction Of The Crystal Ridge Development

This case arises out of the construction of a residential housing development called the "Crystal Ridge Development" located in Bridgeport, Harrison County, West Virginia.[3] The Development began as an unimproved, 70-acre parcel of farmland owned by the Lang family.[4] A construction company owned by a member of the Lang family, Lang Brothers, Inc. ("LBI"), resolved to develop the land for single-family residences.[5] LBI retained Hornor Brothers Engineers ("Hornor"), an engineering firm, to prepare drawings and designs of the Crystal Ridge

[2] DRB-Appx. at pp. 33-34.
[3] DRB-Appx. at pp. 948-971, generally.
[4] DRB-Appx. at pp. 972-973.
[5] *Id*.

development.[6] Hornor designed the infrastructure for Crystal Ridge, which included potable water distribution, sanitary sewer collection, storm water management, and sediment and erosion control systems.[7] LBI then formed Crystal Ridge Development, Inc ("CRD"), which along with LBI oversaw the initial development of the Development. CRD and LBI are collectively referred to herein as "Lang."

After subdividing the land into individual single-family lots, Lang contracted with a homebuilder, Petitioner DRB, to purchase the lots in phases and ultimately sell packages to homebuyers including the lots and homes constructed thereon.[8] DRB agreed to purchase fifty lots upon completion of "Phase I" of the project, and then an additional six lots per quarter.[9]

Lang's physical construction of the Crystal Ridge Development began in the Fall of 2005.[10] As construction progressed, Lang entered into a series of agreements to excavate, grade, and construct fill slopes on a number of lots.[11] The first of these agreements was in April 2006.[12] It called for Lang's construction of fill slopes on Lots One through Nine and Nineteen through Twenty-Six.[13] A subsequent agreement in June 2006 called for additional grading work on the lots, including Lang's excavation for the foundations of the homes.[14] Then, in October 2006, Lang agreed to provide fill to Lots Ten through Fourteen.[15]

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[6] DRB-Appx. at p. 973; DRB-Appx. at pp. 998-1001, 1004, 1007.
[7] DRB-Appx. at p. 973; DRB-Appx. at pp. 1000-1007.
[8] DRB-Appx. at p. 974; DRB-Appx. at pp. 1055-1081; DRB-Appx. at pp. 1002-1003.
[9] DRB-Appx. at pp. 1055-1081; DRB-Appx. at pp. 1002-1003.
[10] DRB-Appx. at p. 1116.
[11] DRB-Appx. at p. 1116; DRB-Appx. at pp. 1098-1105; DRB-Appx. at pp. 1106, 1114; DRB-Appx. at pp. 1006-1012.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

In August 2006, following the completion of the fill slope on Lots One through Nine, DRB purchased Lots One through Seven and Twenty though Twenty-Four from Lang.[16] DRB began constructing homes on those lots. On January 8, 2007, DRB purchased Lots Eight through Ten, Eighteen, and Nineteen from Lang.[17]

In March 2007, the prospective purchasers of Lot Seven reported cracks in the foundation of their home due to what appeared to be differential settlement on Lot Seven.[18] DRB retained an engineering firm, CTL Engineering ("CTL"), to investigate.[19] Following its inspection, CTL concluded that structural defects existed in certain of the fill slopes attendant to Lots Three, Seven and Ten.[20] CTL recommended various remedial measures. DRB retained contractors to perform CTL's recommended remediation.[21]

Largely due to Lang's deteriorating financial condition, DRB's relationship with Lang became strained.[22] The parties ultimately agreed to terminate their relationship.[23] On May 7, 2007, the parties entered into an agreement for DRB to purchase the outstanding Phase I lots from Lang, and for DRB to oversee completion of the construction of the Crystal Ridge Development.[24] As portions of the Development were completed, DRB continued to steadily sell finished homes to the Plaintiffs.[25]

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[16] DRB-Appx. at p. 974.
[17] *Id*.
[18] DRB-Appx. at pp. 973-974; DRB-Appx. at pp. 1013-1014.
[19] DRB-Appx. at pp. 974-975; DRB-Appx. at pp. 1015-1023.
[20] DRB-Appx. at pp. 973-975; DRB-Appx. at pp. 1015-1023.
[21] DRB-Appx. at pp. 973-975; DRB-Appx. at pp. 1015-1023.
[22] DRB-Appx. at p. 975; DRB-Appx. at p. 1024.
[23] DRB-Appx. at p. 975; DRB-Appx. at pp. 1024-1026.
[24] DRB-Appx. at p. 975; DRB-Appx. at pp. 1091-10947; DRB-Appx. at pp. 1024-1027.
[25] DRB-Appx. at pp. 976-977.

In October 2007, the West Virginia Department of Environmental Protection ("DEP") inspected the site's storm water management and sediment control systems.[26] The DEP concluded that the systems that were designed by Hornor and constructed by LBI did not conform to the permits that the DEP had granted.[27] To bring these systems into compliance and cure the defects underlying the violations, DRB retained another engineering firm, Thrasher Engineering ("Thrasher").[28] After reviewing the DEP's investigative file, Thrasher identified numerous concerns with the system put in place by LBI. Thrasher concluded that one of the storm basins was not properly releasing water and was too small for the volume of water entering the basin. Thrasher developed remedial plans for the system. The DEP accepted Thrasher's plans, and DRB retained contractors to complete the work and bring the system into compliance.[29]

Additional problems with Lang's work continued to surface in subsequent months.[30] In mid-December 2007, the fill slope behind Lot Seven unexpectedly began sliding downhill toward a public highway.[31] DRB retained various engineering firms to examine the slope.[32] The engineers concluded that the fill slopes on Lots Two through Seven were failing as a result of Lang's faulty construction.[33] The engineers designed remediation proposals and DRB hired contractors to implement the proposed remediation work at DRB's own expense.[34] The work included removing the slide materials, reconstructing the slope to include appropriate drainage,

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[26] DRB-Appx. at pp. 1010-1030.
[27] *Id*.
[28] DRB-Appx. at p. 1030.
[29] DRB-Appx. at pp. 1031-1036.
[30] DRB-Appx. at pp. 1036-1042.
[31] DRB-Appx. at p. 975; DRB-Appx. at pp. 1036-1042.
[32] DRB-Appx. at pp. 975-976; DRB-Appx. at pp. 1043-1050.
[33] DRB-Appx. at pp. 975-976. DRB-Appx. at pp. 1043-1050.
[34] DRB-Appx. at pp. 975-976; DRB-Appx. at pp. 1050-1054.

repositioning various utilities to flatten the slope, and constructing retaining walls to prevent further movement of the slope.[35] The remediation was completed in mid-2008. To date, no additional earth movement has occurred.[36] Indeed, Evanston's claims correspondence acknowledges that "it is Evanston's understanding that the slope and soil problems have been repaired."[37] DRB sold the last of the instant Plaintiffs' lots and homes in November 2008.[38]

2. The Instant Lawsuit

On February 9, 2009, thirty-seven homeowners in the Crystal Ridge Development filed this putative class action lawsuit against DRB by filing their Initial Complaint.[39] Through a series of Amended Complaints, six (6) additional homeowners have joined the case as named Plaintiffs.[40] The Complaint generally alleges that DRB "knew or should have known that this tract or parcel was ill-suited for subdivision and construction of multiple single-family homes thereon" and seeks general damages for the "loss of use, annoyance, aggravation, inconvenience and all consequential damages caused or contributed to by the wrongful conduct of these Defendants."[41] Moreover, the Complaint alleges a number of particular acts of wrongdoing on the part of DRB "or its predecessors in interest," including but not limited to allegations that the Development's storm water and drainage systems are deficient and have caused water intrusion onto the Plaintiffs' properties.[42] Specifically, the Complaint alleges that DRB:

- "failed to properly investigate, study, plan, test, and engineer the Crystal Ridge Development prior to the sale of lots and homes";

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[35] DRB-Appx. at pp. 975-976; DRB-Appx. at pp. 1043-1054.
[36] DRB-Appx. at p. 993; DRB-Appx. at p. 1053.
[37] DRB-Appx. at p. 993.
[38] DRB-Appx. at pp. 976-977.
[39] DRB-Appx. at pp. 948-971.
[40] See DRB-Appx. at pp. 1128-1143.
[41] DRB-Appx. at pp. 958, 970-971.
[42] DRB-Appx. at pp. 961-962.

- "failed to properly plan, study, test, engineer, excavate and construct the infrastructure of the Crystal Ridge Development, specifically including, but not limited to, water and utility lines, roads, and water drainage systems";

- "failed to properly plan, study, engineer, supervise, inspect, investigate, excavate and construct the Plaintiffs' lots and the Crystal Ridge Development as a whole";

- "failed to make a proper and reasonable inspection of the Crystal Ridge Development and the work being done thereon, when they knew or should have known, in the exercise of ordinary care, that said inspection was necessary to prevent injury and damages to the Plaintiffs' lots and homes and the Crystal Ridge Development as a whole";

- "failed to properly supervise and inspect the construction of the development phase of the Crystal Ridge Development";

- "failed to properly perform project management";

- "failed to properly perform construction administration";

- "failed to design and supervise the development of the Crystal Ridge Development in accordance with all applicable codes, laws, rules, regulations, ordinances, custom, and/or industry standards";

- "committed such other wilful [*sic*] reckless and/or negligent acts and failures to act not yet known or identified as the Plaintiffs will demonstrate at trial."

DRB-Appx. at pp. 961-962 at ¶43. Significantly, the Complaint's central premise is that DRB's conduct in the way it had planned, designed and constructed the Development was negligent (if not willful or reckless) in that DRB should have known that the site was not suitable for residential development.[43]

The Plaintiffs assert a variety of causes of action against DRB including tort claims sounding in strict liability (Count II), negligence (Count III), trespass (Count IV), nuisance

[43] *Id*.

(Count V), and the tort of outrage (Count VIII).[44] The trespass claim in particular is founded upon allegations that DRB's tortious conduct "cause[d] surface water and other materials to intrude upon the Plaintiffs' property in a manner which would not otherwise naturally occur, and which such intrusion constitutes a trespass and/or invasion on the Plaintiffs' property and property rights under the law."[45] The Plaintiffs seek recovery for "damage to and diminution in value of the Plaintiffs' lots and/or homes and The Crystal Ridge Development as a whole," as well as "[s]uch other relief, both special and general, as may become apparent as this matter progresses."[46]

While the Complaint was pled generally, the specific substance of the Plaintiffs' claims has of course been developed in the discovery and expert phases of this litigation over the course of the last fifteen years. In their discovery responses, the Plaintiffs have identified specific damages for which they seek recovery in this case, including but not limited to each of the following (none of which have anything to do with earth movement):

- The Weng Plaintiffs' "backyard remains very swampy due to inadequate drainage among other causes not yet know [sic] or identified," which in turn causes their lawn to be "full of mosquitos"; [47]
- The Weng Plaintiffs' daughter's allergic reactions to mold that has grown in their home; [48]
- Flooding in the Ross Plaintiffs' garage and damage to their personal property stored therein as a result of inadequate drainage on their property;[49]

[44] DRB-Appx. at pp. 948-971, generally.
[45] DRB-Appx. at pp. 963-964 at ¶49.
[46] DRB-Appx. at pp. 970-971 at subparagraph g).
[47] DRB-Appx. at p. 1147.
[48] DRB-Appx. at p. 1148.
[49] DRB-Appx. at p. 1149.

- "Drainage problems" at the Pistenbarger Plaintiffs' home, causing flooding of the basement during heavy rainstorms and in turn resulting in damage to floors, drywall, and other items, and caused their backyard to become unusable for 2 years because "[i]t was essentially a mud pit;"[50]

- Flooding and water intrusion in the Beckner Plaintiffs' basement due to improper drainage;[51]

- Excessive wet spots in the Zirkle Plaintiffs yard due to "uncontrolled stormwater," resulting in mud, poor vegetation, and mosquitos.[52]

The Plaintiffs' expert disclosures likewise detail particular claims and damages for which the Plaintiffs seek recovery. The Plaintiffs' engineering and construction expert, Lawrence Rine ("Rine"), opines that the Crystal Ridge Development's storm water management basin is defective in a number of respects.[53] Rine posits that the basin was negligently constructed such that it never fully drains, resulting in the constant presence of standing water.[54] According to Rine, this in turn "provides an environment for mosquitoes and other insects to thrive and multiply within the development."[55] Additionally, Rine maintains that the basin also constitutes an "attractive nuisance for children residing [at] or visiting the Development."[56] He says "on-lot storm water and groundwater runoff" is not properly collected and channeled from the lots.[57] The Plaintiffs' residential development construction expert, Mark Owens ("Owens"), opines as to defects in Development's "excavation, drainage, [and] site preparation."[58]

3. Evanston Insurance Policies

[50] DRB-Appx. at pp. 1157-1158.
[51] DRB-Appx. at p. 1163.
[52] DRB-Appx. at p. 1165.
[53] DRB-Appx. at pp. 1170, 1178-1180.
[54] *Id*.
[55] DRB-Appx. at p. 1170.
[56] *Id*.
[57] DRB-Appx. at p. 1171.
[58] DRB-Appx. at p. 1192.

From October 24, 2005 through October 24, 2010, DRB was insured under five successive one-year general liability insurance policies issued by Evanston.[59] The material terms and provisions of each policy are identical.[60] The limits of each policy are $2 Million. For illustrative purposes, a true and correct copy of the policy in place from October 24, 2006 through October 24, 2007, Policy No. 06GLP1007615, is included in the Appendix as DRB-Appx. 1261-1316.[61]

The basic liability coverage provided under each of the policies is set forth in a Commercial General Liability Coverage Form, GL00010899. Under the Insuring Agreement, Evanston is obligated to "pay those sums that the insured becomes legally obligated to pay as damages because of…'property damage' to which this insurance applies,"[62] and to "defend any 'suit' seeking those damages."[63] The coverage applies so long as (1) the "property damage" is caused by "an 'occurrence' that takes place in the 'coverage territory'" and (2) "the 'property damage' occurs during the policy period."[64] "Property damage" is defined by the policies as "a. [p]hysical injury to tangible property, including all resulting loss of use of that property…or b. [l]oss of use of tangible property that is not physical injured."[65] The policies define an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[66]

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[59] DRB-Appx. at p. 982.
[60] DRB-Appx. at p. 1224.
[61] DRB-Appx. at pp. 1403-1458.
[62] DRB-Appx. at pp. 1446-1458.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*

The policies contain exclusions which modify the coverage. One such exclusion is contained in the "Subsidence/Earth Movement Exclusion" endorsement (the "Earth Movement Exclusion"), which reads in pertinent part as follows:

SUBSIDENCE/EARTH MOVEMENT EXCLUSION

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> This insurance does not apply to any claim for "bodily injury" or "property damage" caused by, arising out of, relating to, resulting from, contributing to, or aggravated by any actual or alleged "movement of land or earth."
>
> "Movement of land or earth" means:
>
> Movement in any direction, including but not limited to, instability, rising, upheaval, expansion, subsidence, settling, sinking, shrinkage, slipping, falling away, tilting, caving in, eroding, shifting in a horizontal or sideways direction, mud flow, mudslide or earthquake or any other movement of land or earth, regardless of the cause, whether manmade or natural.[67]

4. Evanston's Initial Denial Of Coverage

Following DRB's receipt of original process in this case, in April 2009 DRB's insurance broker notified Evanston of the claim.[68] Before Evanston even had a complete copy of the Complaint, its Senior Claims Examiner Jane Baumann began outlining potential exclusions to the applicable coverage.[69] By letter dated July 22, 2009, Evanston summarily denied all coverage. A true and correct copy of that Coverage Disclaimer letter is included in the Appendix as DRB-Appx. 1468-1473.[70] Evanston cited the Earth Movement Exclusion as the sole basis for

[67] DRB-Appx. at p. 1421.
[68] DRB-Appx. at pp. 1459-1466.
[69] DRB-Appx. at p. 1467; DRB-Appx. at pp. 1260-1263.
[70] DRB-Appx. at pp. 1468-1473.

denying coverage.[71] It contended that it owed no coverage since, in its view, "each count of the Complaint states that the damages arose out of the subsidence of the land."[72]

DRB's coverage counsel responded by letter dated August 26, 2009, noting that various allegations in the Complaint sought damages unrelated to any instance of earth movement, including allegations regarding the alleged failure to properly construct the infrastructure of the Crystal Ridge Development, failure to properly construct the storm water collection pond, and the Plaintiffs' claim of Trespass arising from the intrusion of "surface water and other materials upon plaintiffs' property."[73] Evanston referred that correspondence to its coverage counsel, who responded by letter dated November 9, 2009 reiterating Evanston's prior position that "each and every claim against DRB arose out of or related to 'subsidence' of land."[74] That remained Evanston's coverage position for the next six and a half years. Evanston closed its file in December 2010 and at no time revised its position or supplemented its declination correspondence.[75]

5. Joinder Of Evanston And Evanston's Supplemental Denial Of Coverage

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[71] DRB-Appx. at p. 1471.
[72] *Id*. Notwithstanding that the letter plainly cites the Earth Movement Exclusion as the sole grounds for denying coverage, Evanston's corporate designee tenaciously resisted that characterization, and suggested that perhaps Evanston initially denied coverage on additional grounds, such as whether the subject claims alleged "property damage", and whether the policy's Self-Insured Retention had been exhausted. DRB-Appx. at pp. 1271-1277, 1295-1298. She later conceded that Evanston's discussion of those other issues besides the Earth Movement Exclusion were merely reservations of rights, rather than bases to deny coverage. DRB-Appx. at pp. 1295-1298.
[73] DRB-Appx. at p. 1475 (citing Initial Complaint ¶¶29, 39-40, 43 b), 55, 77, and Count IV (Trespass)).
[74] DRB-Appx. at p. 1479.
[75] DRB-Appx. at p. 1487; DRB-Appx. at p. 1318.

The Plaintiffs joined Evanston in this case by filing of a Third Amended Complaint.[76] Therein, Plaintiffs sought a declaration that their claims against DRB were within the scope of coverage provided by the Evanston policies.[77] The Plaintiffs specifically averred that:

> Most of the 'property damage' for which the Plaintiffs seek recovery of damages herein is not caused by, nor does it arise out of or relate to or result from movement of land or earth within the meaning of the said exclusion; to the contrary, while property belonging to some of the Plaintiffs moved, most of the Plaintiffs in this matter seek damages for property damage to property they own, which did not move, expand, subside, slip, fall, tilt, etc.[78]

That pleading was served on Evanston on October 20, 2015. On January 5, 2016, Evanston filed an Answer to the Third Amended Complaint.[79] Evanston's corporate designee testified that she does not know if Evanston had received any new information since December 2010 prior to Evanston drafting its Answer.[80] Nonetheless, despite having exclusively relied on the Earth Movement Exclusion as the sole basis for denying coverage for almost seven years, Evanston suddenly raised fourteen other exclusions including: (a) "Expected or Intended Injury", (b) "Contractual Liability", (c) "Damage To Property", (d) "Damage To Your Work", (e) "Damage to Impaired Property or Property Not Physically Injured", (f) "Engineers, Architects, or Surveyors Professional Liability", (g) "Professional Liability", (h) "Punitive or Exemplary Damages", (i) "Prior Incident(s) and Prior Construction Defects", and (j) "Breach of Contract".[81] Eight months later, Evanston sent DRB a "Supplemental Declination of Coverage Letter" restating the same numerous new grounds for denying coverage.[82]

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[76] DRB-Appx. at pp. 144-263.
[77] *See* DRB-Appx. at pp. 144-263, generally.
[78] DRB-Appx. at pp. 144-263.
[79] DRB-Appx. at pp. 264-711.
[80] DRB-Appx. at pp. 1400-1401.
[81] DRB-Appx. at pp. 265-266.
[82] DRB-Appx. at pp. 972-997.

DRB filed a Cross-Claim against Evanston seeking a declaration that the Plaintiffs' claims fall within the scope of coverage of the Evanston policies, and separately asserting that Evanston is estopped from relying upon its fourteen additional grounds for denying coverage raised seven years after its first notice of the lawsuit. The parties ultimately filed cross-motions for summary judgment, which the Circuit Court resolved in favor of Evanston. This appeal follows.

SUMMARY OF ARGUMENT

Where an insurer seeks to deny coverage on the basis of a policy exclusion, the insurer bears the burden of proving that the exclusion applies. The insurer must demonstrate that the claims fall entirely within the clear and unambiguous terms of an exclusion.

Evanston failed to sustain its burden. And it clearly failed to demonstrate the absence of all genuine issues as to any material fact. Although the case started in 2009 focused principally on a landslide, over the intervening sixteen (16) years the damages claims in the case evolved such that few, if any, of the remaining damages have anything to do with earth movement. The damages now sought focus on defects in the design of infrastructure, and specifically the handling of surface and subsurface water. In reaching its ruling, the Court simply overlooked or misunderstood the nature of Plaintiffs' ever-evolving damages claims, and relied on a perception of the facts not of record. The Court's insurance coverage analysis cannot be sustained.

In ruling that Evanston was not estopped from belatedly raising fourteen new policy exclusions, years after its initial declination, the Court misapplied the law and facts. Evanston indisputably originally relied upon the Earth Movement Exclusion as the only basis to deny coverage. Equally undisputed is the fact that six to seven years later, Evanston suddenly raised

fourteen other exclusions, without any explanation as to why they were not brought up before. An insurer that induces its insured to detrimentally rely upon a specifically stated coverage position is estopped from later, and without explanation, raising additional grounds for noncoverage. Contrary to the Court's ruling, the evidence of DRB's detrimental reliance was clear and overwhelming—the Court just ignored it. For seven years DRB, in reliance on the earth movement exclusion as the sole ground for Evanston's denial of coverage, developed litigation strategy, engaged experts, and conducted voluminous discovery based on that reliance. Then, without explanation, Evanston suddenly raised fourteen new exclusions. Such reliance, and the resulting prejudice is manifest. Evanston should have been estopped.

The remaining aspects of the Court's rulings are either not founded on the record; contrary to the evidence of record; or plainly represent fact findings that the Court is not authorized to make under Rule 56. Based upon no evidence at all, and flatly contrary to all of the evidence in the record, the Court found that Plaintiffs did not allege "property damage" as a result of an "occurrence", ostensibly because DRB expected or intended to injure the Plaintiffs. This obvious fact finding is clearly contrary to any evidence that arguably appears in the instant record; indeed, it ought to strike this Court as nonsensical on its face. The Court found that Plaintiffs' claims against DRB were excluded by the "Damage to Your Work" exclusion, despite clear evidence that the "work" at issue in the case is not DRB's work, but the work of others. The Court found that Plaintiffs' claims were excluded by the policy's Contractual Liability Exclusion, despite clear evidence that the bulk of the claims are founded upon tort duties and not contractual breaches. The Court found that coverage was excluded by the "Impaired Property or Property Not Physically Injured" exclusion, despite clear allegations that DRB's negligent

conduct caused direct physical damage to both their real property and personal property. The Court found that the allegations fell within the Policy's "Owned Property" exclusion, despite clear evidence that DRB did not own the property that was damaged. Finally, the Court found that coverage under the policy was never triggered based on the Self-Insured Retention and "Primary Policy" language of the policy. However, the Court totally misapprehended the impact of those typical provisions, and thoroughly misunderstood that they would afford a liability insurer a basis to escape any coverage obligations pre-judgment.

Beyond all of that, the Court adopted findings of fact made by a federal court in a very different case also arising out of the Crystal Ridge development, in clear derogation of well-established West Virginia law.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral Argument is necessary under W.Va.R.A.P. 18. Oral Argument under W.Va.R.A.P. 19 is appropriate because this appeal involves assignments of error in the application of settled law.

ARGUMENT

A. Standard Of Review

A circuit court's entry of summary judgment is reviewed *de novo*. *Painter v. Peavy,* 192 W.Va. 189, 451 S.E.2d 755 (1994). The determination of the proper coverage of an insurance contract presents a question of law subject to *de novo* review, but only where the facts are clear and not in dispute. *Cherrington v. Erie Ins. Property & Cas. Co.,* 231 W.Va. 470, 745 S.E.2d 508 (2013), 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 v. Peavy,* 451 S.E.2d at syl.pt. 3. A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried, inquiry concerning the facts is not desirable to clarify the application of law and the record could not lead a rational trier of fact to find for the nonmoving party based on the totality of the evidence presented. *Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 459 S.E.2d 329 (1995); *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of NY*, 148 W.Va. 160, 133 S.E.2d 770, syl. pt. 3 (1963).

B. Applicable Principles Of Insurance Contract Construction

When interpreting insurance contracts, the language of the policy should be given its plain, ordinary meaning. *Murray v. State Farm Fire & Cas. Co.*, 509 S.E.2d 1, 6 (W.Va. 1998). When the language is clear and unambiguous, it is not subject to judicial construction or interpretation; rather full effect is to be given to the plain meaning intended. *Id.* However, where the language is ambiguous—that is, reasonably susceptible to differing interpretations—it must be strictly construed against the insurance company and in favor of the insured. *Id.* Similarly, exclusionary language must be construed strictly against the insurer and in favor of finding coverage. *National Mut. Ins. Co. v. McMahon & Sons, Inc.,* 356 S.E.2d 488, syl.pt. 5 (W.Va. 1987). Indeed, an insurance contract is to be interpreted in light of the insured's reasonable expectations, regardless of whether it is ambiguous or not. *Romano v. New England Mut. Life Ins. Co.*, 178 W.Va. 523, 362 S.E.2d 334 (W.Va. 1987). In West Virginia, "the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *McMahon & Sons,* 356 S.E.2d 488, 495 (W.Va. 1987). Significantly, an insurance company

seeking to avoid its contractual duties to defend and indemnify its insured bears the burden of proving all facts necessary to the operation of the exclusion. *Id.* at syl.pt. 7.

Finally, in determining whether a policy obligates an insurance company to defend or indemnify its insured, the insurance company must conduct a reasonable inquiry by looking beyond the mere four corners of the complaint. *Farmers & Mech. Mut. Ins. Co. of W.Va. v. Cook,* 557 S.E.2d 801, syl.pt. 6 (W.Va. 2001). Specifically,

> When a complaint is filed against an insured, an insurer must look beyond the bare allegations contained in the third party's pleadings and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of coverage that the insurer is obligated to provide.

Id.

In reaching its ruling, the Circuit Court misapplied these well-settled principles and relied on facts which present anything but undisputed issues of material fact, as well as upon facts which are not of record in this case. As detailed below, the circuit court should have found in favor of DRB because (a) the claims asserted against DRB are not within the scope of the Policy's subsidence/earth movement exclusion and (b) Evanston is estopped from relying on the fourteen additional bases for noncoverage given its intransigence, DRB's reliance upon its initial disclaimer of coverage and the extreme prejudice it sustained as a result. Alternatively, the circuit court should have found that genuine issues of material fact exist and denied the motions.

C. The Circuit Court Erred In Finding That Evanston Fulfilled Its Burden Of Establishing That Coverage Was Barred By The Earth Movement Exclusion

As stated above, as the insurer, Evanston bears the burden of establishing that any of the exclusions upon which it relied to avoid its obligations to DRB are supported by the facts of this case. *McMahon & Sons, Inc.,* 356 S.E.2d 488, syl. pt. 7 (W.Va. 1987) ("An insurance company

seeking to avoid liability though the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion."). Evanston utterly failed to do so.

In its initial Coverage Disclaimer letter, Evanston relied solely upon the so-called Earth Movement Exclusion[83] in denying its obligation to defend and indemnify DRB.[84] That exclusion excludes coverage for "'property damage' caused by, arising out of, relating to, resulting from, contributing to, or aggravated by any actual or alleged 'movement of land or earth.'"[85]

When this case was first filed almost sixteen years ago, one focus was admittedly a large landslide that affected a few homes in a relatively isolated part of the development.[86] The landslide was quickly remediated and, for the most part, plays a relatively minor role in the litigation today;[87] a point Evanston readily conceded in its August 25, 2016 Supplemental Declination of Coverage Letter ("[I]t is Evanston's understanding that the slope and soil problems have been repaired…").[88] But what started as a "landslide" case has morphed into a much more expansive set of claims and allegations, most of which have nothing to do with earth movement. The evidence of this is overwhelming. Consider the following:

1. The Plaintiffs' Initial Complaint alleges:

    a. The Development's stormwater and drainage systems are deficient and have caused water intrusion onto the Plaintiffs' properties;[89]

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[83] The majority of courts that have considered earth movement exclusions, including West Virginia, have found them to be ambiguous and have, therefore, employ doctrines of construction to interpret their scope and application. Those courts have allowed policyholders to recover, notwithstanding the application of an earth movement exclusion, where the proximate cause of the loss was an event insured by the policy. The issue of proximate cause presents a question of fact for the jury. *Murray*, 509 S.E.2d at 9-10.
[84] DRB-Appx. at pp. 1468-1473; DRB-Appx. at p. 1421.
[85] DRB-Appx. at pp. 1468-1473; DRB-Appx. at p. 1421.
[86] DRB-Appx. at p. 0159, ¶¶20-23.
[87] DRB-Appx. at pp. 2204-2205.
[88] DRB-Appx. at p. 993.
[89] DRB-Appx. at pp. 961, 964-965.

b. DRB "failed to properly investigate, study, plan, test, and engineer the Crystal Ridge Development prior to the sale of lots and homes";

c. DRB "failed to properly plan, study, test, engineer, excavate and construct the infrastructure of the Crystal Ridge Development, specifically including, but not limited to, water and utility lines, roads, and water drainage systems";

d. DRB "failed to properly plan, study, engineer, supervise, inspect, investigate, excavate and construct the Plaintiffs' lots and the Crystal Ridge Development as a whole";

e. DRB "failed to make a proper and reasonable inspection of the Crystal Ridge Development and the work being done thereon, when they knew or should have known, in the exercise of ordinary care, that said inspection was necessary to prevent injury and damages to the Plaintiffs' lots and homes and the Crystal Ridge Development as a whole";

f. DRB "failed to properly supervise and inspect the construction of the development phase of the Crystal Ridge Development";

g. DRB "failed to properly perform project management";

h. DRB "failed to properly perform construction administration";

i. DRB "failed to design and supervise the development of the Crystal Ridge Development in accordance with all applicable codes, laws, rules, regulations, ordinances, custom, and/or industry standards";

j. DRB "committed such other wilful [*sic*] reckless and/or negligent acts and failures to act not yet known or identified as the Plaintiffs will demonstrate at trial";

k. A Trespass claim (Count IV) founded upon allegations that DRB's tortious conduct "cause[d] surface water and other materials to intrude upon the Plaintiffs' property in a manner which would not otherwise naturally occur, and which such intrusion constitutes a trespass and/or invasion on the Plaintiffs' property and property rights under the law."[90]

[90] DRB-Appx. at pp. 961-965.

2. In their Third Amended Complaint, Plaintiffs expressly allege that

- [m]ost of the "property damage" for which the Plaintiffs seek recovery of damages herein is not caused by, nor does it arise out of or relate to or result from movement of land or earth within the meaning of the said exclusion; to the contrary, while property belonging to some of the Plaintiff's moved, most of the Plaintiffs in this matter seek damages for property damage to property they own, which did not move, expand, subside, slip, fail, tilt, etc.;[91]

- Evanston acknowledged this in its supplemental declination letter's discussion of the separate "Impaired Property" exclusion, citing the Plaintiffs' contention that "while property belonging to some of the Plaintiffs moved, most of the Plaintiffs in this matter seek damages for property damage to property they own, which did not move, expand, subside, slip, fall, tilt, etc. (Third Am. Comp., ¶26, A.) [.]"[92]

3. In addition to those allegations of the Initial Complaint, by way of extremely limited example the Plaintiffs' discovery responses have identified each of the following damages for which they seek recovery in the case:

- The Weng Plaintiffs' "backyard remains very swampy due to inadequate drainage among other causes not yet know [sic] or identified," which in turn causes their lawn to be "full of mosquitos"; [93]

- The Weng Plaintiffs' daughter's allergic reactions to mold that has grown in their home;[94]

- Flooding in the Ross Plaintiffs' garage and damage to their personal property stored therein as a result of inadequate drainage on their property;[95]

- "Drainage problems" at the Pistenbarger Plaintiffs' home, causing flooding of the basement during heavy rainstorms and in turn resulting in damage to floors, drywall, and other items, and caused

[91] DRB-Appx. at pp. 144-263.
[92] DRB-Appx. at p. 994.
[93] DRB-Appx. at p. 1147.
[94] DRB-Appx. at p. 1148.
[95] DRB-Appx. at p. 1149.

their backyard to become unusable for 2 years because "[i]t was essentially a mud pit";[96]

- Flooding and water intrusion in the Beckner Plaintiffs' basement due to improper drainage;[97]

- Excessive wet spots in the Zirkle Plaintiffs yard due to "uncontrolled stormwater", resulting in mud, poor vegetation, and mosquitos.[98]

4. The Plaintiffs' expert disclosures have likewise outlined the following claims, theories, allegations, and damages:

   a. That the Crystal Ridge Development's storm water management basin is defective in a number of respects;[99]

   b. That the basin was negligently constructed such that it never fully drains, resulting in the constant presence of standing water,[100] which in turn "provides an environment for mosquitoes and other insects to thrive and multiply within the development",[101]

   c. That the basin also constitutes an "attractive nuisance for children residing [at] or visiting the Development",[102]

   d. That the "on-lot storm water and groundwater runoff" is not properly collected and channeled from the lots,[103]

   e. Defects in Development's "excavation, drainage, [and] site preparation".[104]

5. Plaintiffs' Deposition Testimony

   a. Frank Williams: hairline crack in foundation due to water settling and issues with downspouts;[105]

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[96] DRB-Appx. at pp. 1157-1158.
[97] DRB-Appx. at p. 1163.
[98] DRB-Appx. at p. 1165.
[99] DRB-Appx. at pp. 1170, 1178-1180.
[100] *Id.*
[101] DRB-Appx. at p. 1170.
[102] *Id.*
[103] DRB-Appx. at p. 1171.
[104] DRB-Appx. at p. 1192.
[105] DBR-Appx. at pp. 2754-2755, 2757-2762.

b. Dianna Williams: water seeping into the basement;[106]

c. Richard Alix: issues with sliding door in morning room, trim not sanded and unfinished, exposed nails, unfinished drywall, plumbing not properly installed, shingles have lifted several times, and replaced lining on roof;[107]

d. Jeffrey Wright: leaks in basement windows and a gas line leak[108]

e. Jean Haught: issues with plywood that was waterlogged and swollen, carpet on stairs needed stretched, and sump pump clogged and caused water to flood basement;[109]

f. Helen Weng: hairline cracks in the drywall, repair to drywall because of leaks in roof, waterline break in basement that flooded the carpet, three repairs to the roof because of leaks and shingles not being secured, and mold in yard;[110]

g. Charles Dunn: no sump pump was initially installed so builders had to drill concrete in basement which caused cracks, electrical conduit separated several times, builders accidentally hit and broke off a piece of the garage with machinery, and issues with storm water management;[111]

h. William Finch: sidewalk would pool water.[112]

Second, Plaintiffs' contend that their property damage was caused by DRB's failure to properly plan, study, test, engineer, excavate and construct the infrastructure of the Crystal Ridge Development, specifically including, but not limited to, its water and utility lines, roads, and water drainage systems.[113] The Plaintiffs further allege that DRB "created and permitted to exist dangerous and hazardous conditions on the Plaintiffs' lots and/or within the common areas of

[106] DRB-Appx. at. p. 2764.
[107] DRB-Appx. at pp. 2766-2793.
[108] DRB-Appx. at pp. 2795-2797.
[109] DRB-Appx. at pp. 2799-2802.
[110] DRB-Appx. at pp. 2804-2820.
[111] DRB-Appx. at pp. 2822-2830.
[112] DRB-Appx. at pp. 2832-2834.
[113] DRB-Appx. at pp. 964-965.

Crystal Ridge Development, including, but not limited to storm water drainage ditches and a storm water collection pond."[114] The Plaintiffs allege that those conditions "are continuing, presently permanent, and ha[ve] not been abated."[115] The Plaintiffs' allegations regarding improperly designed utility lines, roads, water drainage systems, and storm water collection systems obviously do not involve "movement [of land or earth] in any direction, including but not limited to, instability, rising, upheaval, expansion, subsidence, settling, sinking, shrinkage, slipping, falling away, tilting, caving in, eroding, shifting in a horizontal or sideways direction, mud flow, mudslide or earthquake or any other movement of land or earth. . .."[116] Remarkably, the circuit court's order in no way mentions these allegations and evidence, nor does it refer to them or consider them in any fashion.

Third, the substance of the opinions of Plaintiffs' engineering and construction expert, Rine, likewise emphasizes that Plaintiffs' claims involve much more than "earth movement." Specifically, Rine opines that the Development's storm water management basin is defectively designed and therefore never fully drains.[117] He says the basin attracts mosquitoes.[118] He says it is surrounded only by a "decorative fencing system" which he states "offers little protection in deterring unauthorized persons from entering the pond area."[119] Of course, none of these opinions relate in any respect to earth movement. Yet, again, the circuit court's order makes no reference to them, does not explain how those allegations constitute "earth movement," or otherwise explain why they are not within the coverage provided by Evanston's policies.

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[114] *Id.*
[115] *Id.*
[116] DRB-Appx. at p. 62.
[117] DRB-Appx. at pp. 1170, 1178-1180.
[118] DRB-Appx. at pp. 1170, 1178-1179.
[119] DRB-Appx. at pp. 1178-1179.

Fourth, the Plaintiffs' discovery responses detail their damages and buttress the point as well. Therein, the Plaintiffs describe their property damage as including flooding due to inadequate drainage, development of mold, swampy backyards, water intrusion onto their properties, poor vegetation, and mosquitoes.[120] On March 18, 2024, Plaintiffs filed *Plaintiff's Sixth Supplemental Disclosure of Experts* in which they allege property damage caused by the intrusion of water onto their properties and into their homes. In specific, Plaintiffs contend that alleged acts of negligence on the part of DRB in designing and constructing the development has caused (and will continue causing):

1. Physical damage to basement areas of the Plaintiffs' residences;

2. "wet areas" which have caused, and continue to cause, physical damage to basement areas of the residences including more significant "wet areas."

3. Physical liquification and resulting compaction of soils beneath Plaintiffs' homes causing damage to floors and walls and other structural damage

Of course, none of these new theories of liability implicate the "earth movement" exclusion upon which Evanston heavily relies in denying coverage to the DRB Defendants.

Indeed, these items of damage obviously have nothing to do with "earth movement," were caused (at least allegedly) by an occurrence and, accordingly, are within the policy's coverage. Yet the circuit court did not consider them when making its ruling finding that "all damages alleged and claimed by the Plaintiffs fall within the unambiguous Subsidence/Earth Movement exclusion."[121]

Even insofar as certain of the Plaintiffs claim to fear potential earth movement in the future, those claims do not fall within the scope of the exclusion either. The exclusion instead

[120] DRB-Appx. at pp. 1147-1149, 1157-1156, 1163-1165.
[121] DRB Appx. at p. 65.

applies to damages arising out of "any ***actual or alleged*** 'movement of land or earth'".[122] If Evanston intended the exclusion to bar coverage for claims arising not from actual or alleged earth movement but from the fear of potential earth movement in the future, Evanston should have drafted its policy to say so. It did not. The exclusion does not extend to those claims.

In West Virginia, it is well-settled law that when a complaint is filed against an insured, the insurer must look beyond the bare allegations of the pleadings and conduct a reasonable inquiry into the facts in order to ascertain whether the claims asserted may come within the scope of coverage that the insurer is obligated to provide. *Farmers & Mech. Mut. Ins. Co. of W.Va. v. Cook*, 557 S.E.2d 801, syl.pt. 6 (W.Va. 2001). Indeed, Evanston itself readily admitted how Plaintiffs' claims changed from those arguably within the scope of the earth movement exclusion to claims which have nothing to do with earth movement. *See* Evanston's August 25, 2016 Supplemental Declination of Coverage Letter, DRB-Appx. at 994. ("while property belonging to some of the Plaintiffs moved, most of the Plaintiffs in this matter seek damages for property damage to property they own which did not move, expand, subside, slip, fall, tilt, etc. (Third Am. Comp., ¶ 26, A.) [.]"); *Id.* at p. MRDep01012 ("[I]t is Evanston's understanding that the slope and soil problems have been repaired…"); Evanston Brief, p. 4 ("the fill slope behind Lots 2-7 needed to be completely remediated, which was completed at a cost of $1.7 million."); *Id.* at p. 4 ("a surface slump…was reconstructed at a cost of $83,000."). "As the case has progressed and Plaintiffs' allegations have shifted, Evanston has continued to re-assess coverage." *See* Evanston Brief, p. 11 (citing Exhibit 13 thereto, Letter from Stacy L. Van Pelt to Avrum Levicoff, Esq., Oct. 28, 2020 (reviewing coverage in response to Plaintiffs' Second Supplemental Disclosure of Experts); Ex. 14, Letter from Stacy L. Van Pelt to Avrum Levicoff, Esq., Oct. 4, 2022 (reviewing

[122] DRB-Appx. at p. 1421.

coverage in response to Plaintiffs' Fourth Supplemental Disclosure of Experts). Evanston's and the circuit court's reliance upon outdated pleadings, without considering the above undisputed facts developed after years of discovery, is inconsistent with the unwavering obligation to investigate and take into consideration facts and evidence that was developed throughout the litigation process. This evidence clearly shows the potential for coverage.

In summary, none of the evidence DRB offered implicates earth movement in any way, shape or form, yet any analysis as to how they impacted Evanston's attempt to deny coverage, and why the circuit court deemed the evidence insufficient to find coverage, is totally absent from the circuit court's order. At a minimum, under the Supreme Court's precedent that exclusionary language must be strictly construed against the insurer and in favor of finding coverage, this evidence was certainly sufficient to find that Plaintiffs' claims against DRB were reasonably susceptible to an interpretation that they may be covered; that some, but perhaps not all, of Plaintiff's claims against DRB are covered; and that DRB is, therefore, entitled to a defense and indemnity. Thus, the circuit court's finding that there is no genuine issue of any material fact that the earth movement exclusion applies to all of Plaintiffs' claims and, thus, frees Evanston from its contractual obligation to defend and indemnify DRB as a matter of law is clearly in error, thus mandating reversal.

D. The Court Erred In Finding That Evanston Is Not Estopped From Relying Upon Its Fourteen Newly-Asserted Bases For Noncoverage

Evanston's supplemental declination letter issued in 2016 asserts up to fourteen new, additional grounds to deny coverage, above and beyond the Earth Movement Exclusion that Evanston solely relied upon up to that point in time. Evanston should be estopped, however,

from raising those additional grounds to deny coverage. The circuit court's failure to so find is contrary to well-settled principles of West Virginia law.

1. General Principles Of Estoppel In The Insurance Context

West Virginia has long recognized that the doctrine of estoppel applies to a liability insurer that induces its insured to detrimentally reply upon the insurer's stated coverage position. *Potesta v. USF&G Co.,* 504 S.E.2d 135, 149-50 (W.Va. 1998). "The doctrine of estoppel applies when a party is induced to act or to refrain from acting to her detriment because of her reasonable reliance on another party's misrepresentation or concealment of a material fact." *Ara v. Erie Ins. Co.*, 387 S.E.2d 320, 324 (W.Va. 1989). S*ee also, Mundy v. Arcuri*, 267 S.E.2d 454, 456-57 (W.Va. 1980). Specific to the facts of this case, West Virginia has soundly held that an insurer that issues a declination letter asserting particular grounds for denying coverage is subsequently estopped from later raising additional grounds for noncoverage where it induces detrimental reliance on the insurer's failure to assert such additional grounds in the first instance. *Potesta* at 149-150. Importantly, estoppel applies under these circumstances even if the policy's terms would not otherwise provide coverage for the claims at issue, precisely because the insurer's conduct has caused irretrievable prejudice to the insured. *Potesta*, 504 S.E.2d at 150 (quoting *Turner Liquidating Co. v. St. Paul Surplus Lines Ins.*, 638 N.E.2d 174, 179 (Ohio Ct. App. 1994)) ("An insurer should not be able to avoid liability under all circumstances in which it voluntarily relinquishes a known right or induces another into changing his position based upon reliance on the insurer's conduct when the insured is prejudiced by such reliance.").[123]

[123] *See also, Burns*, 61 S.W.3d at 268-69 (finding that the insurer may be estopped from arguing the applicability of certain exclusions at trial when insurer did not raise or address those exclusions in their initial denial letter and throughout the course of litigation); *Nationwide Mut. Ins. Co. v. Regional Elec. Contractors, Inc.,* 680 A.2d 547, 554 (Md. App. 1996) (noting that the doctrine of estoppel "must be

2. Evanston Is Estopped To Deny Coverage On Additional Grounds Beyond The Earth Movement Exclusion

Under the aforementioned principles, the circuit court erred in finding that estoppel did not apply to preclude Evanston from raising its fourteen additional grounds for denying coverage. For over a century, West Virginia has adhered to the principle that whether estoppel applies requires a fact-intensive inquiry and depends on the facts of the case. *Norfolk & W. Ry. v. Perdue*, 21 S.E. 755 (W.Va. 1895). However, the circuit court's order fails to reflect such a fact-intensive inquiry. In fact, it reflects not a single consideration of a single piece of evidence offered by DRB on the issue and, instead, reflects merely a verbatim copy of Evanston's proposed order granting its motion for summary judgment.[124]

The evidence of estoppel is clear and overwhelming. Evanston's claims notes reflect that by April 24, 2009, its claims handler was already considering no fewer than six different potential exclusions to coverage, separate and apart from the Earth Movement Exclusion.[125] Yet Evanston did not alert DRB to any of them. Rather, Evanston relied solely on the Earth Movement Exclusion in denying coverage outright, stating its conclusion that "each count of the Complaint states that the damages arose out of the subsidence of the land. Therefore, there is no coverage for this claim under our policy."[126] After being specifically alerted to numerous allegations in the Complaint which alleged damages unrelated to any instance of earth

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applied on a case-by-case basis" and the doctrine is properly applied were "permitting the [insurer] to avoid coverage 'would be contrary to equity and good conscience…'"); *Sisco v. Nations Title Ins. of New York, Inc.* 278 A.D.2d 479, 480-81 (N.Y.S. 2000) (insurer's failure to alert insured of the applicability of a policy exclusion in its declination letter may give rise to estoppel where the insured was prejudiced.)

[124] Compare Evanston's proposed order at DRB-Appx. pp. 3310-3376 with the Court's Order at DRB-Appx. pp. 41-73.

[125] DBR-Appx. at p. 1467; DRB-Appx. at pp. 1260-1263.

[126] DRB-Appx. at p. 1471.

movement,[127] Evanston's coverage counsel nonetheless continued to maintain that "[a]ll of the claims in this case were purportedly caused by, arose out of, related to, resulted from, contributed to, or were aggravated by the alleged 'movement of land or earth.'"[128] Evanston denied coverage on that sole basis.

In light of its coverage position, naturally both the Plaintiffs and DRB proceeded to litigate with the belief that Evanston would ultimately owe coverage for the loss, since the bulk of the Plaintiffs' claims do not in fact arise out of earth movement. The Plaintiffs joined Evanston to the case because their claims clearly implicated Evanston's coverage. Only then, on January 5, 2016, six and half years after its initial declination letter, did Evanston suddenly change its position by filing an Answer asserting its fourteen new grounds for denying coverage.[129] Another ***eight months later***, Evanston issued its Supplemental Declination Letter asserting these newly raised grounds to resist coverage of the Plaintiffs' claims.[130]

The prejudice to both the Plaintiffs and DRB is manifest. Had the parties been made aware that Evanston intended to rely on these fourteen additional grounds to deny coverage, their litigation strategy would obviously have been dramatically different. First, the parties were lulled into a strategy of simply demonstrating that the Plaintiffs' damages were unrelated to earth-movement, safe in the belief that such claims would be covered. The parties litigated while unaware of any need to focus their efforts on marshalling evidence sufficient to demonstrate that all of these other, additional exclusions were inapplicable. The passage of over six years before Evanston first raised these additional grounds significantly prejudices the parties' abilities to now

[127] DRB-Appx. at p. 1475.
[128] DRB-Appx. at p. 1479.
[129] DRB-Appx. at pp. 146-147.
[130] *See* DRB-Appx. at pp. 972-997, generally.

gather relevant evidence regarding the inapplicability of the other exclusions. It has now been over a decade since many of the events which gave rise to the Plaintiffs' claims transpired. Information has been lost or forgotten. That alone constitutes prejudice.

Equally if not more importantly, had the parties been aware that Evanston intended to rely on these additional grounds from the outset, they may have pursued vastly different litigation strategies. The parties could have sought to fix certain damages at the outset, and certainly could have sought to settle the claims long ago rather than expending considerable resources on litigation, having been lulled into a false sense of security that whatever liability was ultimately established would be covered by Evanston. The expenditure of these resources cannot now be undone or retrieved. Courts have recognized that insureds in analogous positions are properly considered to have detrimentally relied on their insurer's conduct. *See White v. American General Life Ins. Co.*, 651 F.Supp.2d 530, 546-67 (S.D. W.Va. 2009) (finding the insured detrimentally relied on the insurer's failure to raise additional grounds in support of rescinding a life insurance policy were the insured prepared for trial and expended both time and financial resources under the belief that the stated grounds were the sole grounds for denial of the claim); *see also Burns Nat'l Lock Installation Co. v. Am. Family Mut. Ins. Co.*, 61 S.W.3d 262, at 269, 2001 Mo. App. LEXIS 1514 (2001) ("prejudice to [the insured] was beyond the mere trouble and expense of bringing suit. For at least two years after the filing of the Petition, [the insurer] identified as its defense to [the insured's] claim the application of work product exclusions…[The insured] reasonably relied on the assertion of this specific defense by preparation to meet this issue at trial.").

Similarly, the *Potesta* Court provided three non-exhaustive examples of scenarios in which a litigant's detrimental reliance on an insurer's stated coverage position may serve to bar the insurer from raising previously unasserted policy defenses. *Potesta* 504 S.E.2d at 150. One such scenario is where the insurer defends an insured without a reservation of rights and subsequently seeks to raise policy defenses to its duty to indemnify. *Id*. at 148. If an insurer who defends its insured, but later denies coverage on the basis of a never before asserted policy exclusion, is estopped from denying coverage, so must an insurer who abandons its insured entirely, then attempts to assert a laundry list of justifications for the abandonment years later. Otherwise, the insurer that completely abandoned its insured (as Evanston has here) would get off the hook while the insurer who at least undertook to defend its insured would be estopped. West Virginia law does not countenance such an absurd result, especially in light of its long-standing principle that an insurer that refuses to defend its insured without valid justification acts at its own peril. *See, e.g., Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986).

The *Potesta* court similarly held that an insurer is estopped to raise different grounds for denial of coverage where its claims handling was carried out in bad faith. *Potesta*, 504 S.E.2d at 150. That is clearly the case here, where Evanston obviously predetermined to deny coverage, did so on grounds that are plainly inadequate, and now seeks to remedy its mistake and cover its tracks by asserting every possible defense to coverage in hopes of finding one that will stick. That is quintessential bad faith. West Virginia courts analyzing whether a carrier has acted in bad faith look to "[a]ny salient factor or circumstance regarding the reasonableness of the insurer's actions [and] its concern or lack of concern for the protection of its insured." *Shamblin*

v. Nationwide Mut. Ins. Co., 396 S.E.2d 766, 777 (W.Va. 1990). Looking at the constellation of evidence in the instant matter, it is clear that Evanston acted in disregard of both the Plaintiffs' and DRB's interests, such that it should be properly estopped from raising these additional grounds to deny coverage. Evanston demonstrated a calculated resolve to deny coverage, and then sought to justify its denial after the fact. When it became patently evident that the Earth Movement Exclusion alone was an insufficient basis to deny coverage, Evanston half-heartedly invoked additional exclusions that do not apply, many of which Evanston itself concedes likely have no application. By way of very limited example, Evanston's Supplemental Declination letter raises the "Owned Property Exclusion" barring coverage of claims for damage to property owned by DRB, despite the obvious fact that the Plaintiffs and not DRB owned the property at the time it was damaged.[131] Evanston's outcome-oriented determination to deny coverage was carried out in bad faith, and operates to estop Evanston from now raising these previously unarticulated grounds for a denial of coverage.

As these cases reflect, the question of whether an insurer should be estopped from disclaiming coverage under the facts of this case is a complex, fact-intensive question that is deserving of proper analysis. Nonetheless, the circuit court's findings on the issue essentially parrot the language Evanston offered in its proposed order and shows no meaningful consideration or analysis of the evidence offered by DRB. Had the court carefully considered all of the facts, it would have determined, without a doubt, that Evanston must be estopped from denying coverage. Accordingly, the circuit court's order must be reversed and an order entered granting DRB's motion for summary judgment.

[131] DRB-Appx. at p. 994.

E. The Circuit Court Erred In Finding That Coverage Is Barred By The Additional Grounds Evanston Cites In Support Of Its Denial Of Coverage

Even assuming *arguendo* that Evanston was not estopped to raise additional grounds beyond the Earth Movement Exclusion to deny coverage, the grounds Evanston relied upon are without merit. The circuit court's findings to the contrary are clearly in error, as discussed below *in seriatim*.[132]

1. The Plaintiffs Clearly Allege "Property Damage" Arising Out Of An "Occurrence" Within The Meaning Of The Evanston Policies

In its Order, the circuit court found that Plaintiffs' claims against DRB did not constitute an "occurrence" as defined by the policy and applicable West Virginia law.[133] Its ruling is not supported by the facts or the law.

The policies define property damage as "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "[l]oss of use of tangible property that is not physically injured."[134] Here, the Plaintiffs allege instances of flooding which has damaged the walls and floors of their homes and ruined furniture and other personal property,[135] accumulation of surface water on their property turning their yards to "swamps" and "mud pits,"[136] standing water resulting in the presence of mosquitos and other insects,[137] damage to their homes' main water lines,[138] damage to the siding of their homes,[139] and numerous other forms of physical

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[132] As with the other portions of the circuit court's order, those portions specifically dealing with each, separate exclusion are merely a cut-and-paste of Evanston's proposed order and make no reference whatsoever to the facts or law offered by DRB.
[133] DRB-Appx at p. 58.
[134] DRB-Appx. at p. 987.
[135] DRB-Appx. at pp. 1157-1158.
[136] DRB-Appx. at pp. 1147, 1157-1158, 1165.
[137] *Id*.
[138] DRB-Appx. at pp. 1163-1164.
[139] DRB-Appx. at p. 2061; DRB-Appx. at p. 2077.

injury to tangible property. Thus, the Plaintiffs clearly allege "property damage" as defined in the policies. Likewise, the policies define an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[140] The Plaintiffs clearly allege "accidental" harm.[141] Therefore, the claims obviously involve "property damage" arising out of an "occurrence". Evanston's position to the contrary is so far afield as to perfectly demonstrate its calculated predisposition to deny coverage by any means necessary.

It is clear that property damage caused by the intrusion of water onto the Plaintiffs' properties and into their residences allegedly the result of the negligence of DRB states an element of property damage caused by an occurrence within the insuring agreement of the Evanston policy. Similarly, no exclusion applies to such claims. In *Simpson-Littman Constr., Inc. v. Erie Ins. Prop. & Cas. Ins. Co.*, 2010 U.S. Dist. LEXIS 95378, 2010 WL 3702601 (S.D. W.Va. 2010), plaintiff sought a declaration that defendant was obligated to defend and indemnify plaintiff in a negligence and breach of contract case brought by owners of an allegedly defective home. Shortly after moving into their new home, the owners noticed cracks in their foundation walls, unlevel and sagging floors and other structural defects. The owners alleged that the problems with the home resulted from issues with the original site development. Accordingly, the owners sued plaintiff. Plaintiff submitted the lawsuit to defendant for defense and indemnity, which defendant denied.

After a brief period of discovery, the parties filed cross motions for summary judgment. The defendant insurer contended that the owner's claims did not constitute an occurrence under the policy and, therefore it had neither the duty to defend nor to indemnity the plaintiff. The

[140] DRB-Appx. at p. 1457.
[141] *See* DRB-Appx. at pp. 948-971, generally.

plaintiff disagreed contending that the property damage—allegedly caused by sinking settlement of the soil allegedly the result of the plaintiff's negligence—constituted an occurrence under applicable West Virginia law.

As in the present case, the court had no trouble finding that the allegations of damage to walls, basements, floors, and foundations caused by the contractor's negligent design and construction constituted "property damage" caused by an "occurrence" within the policy language. First, there was no debate that such damage constituted "property damage" under the Policy. Second, citing a plethora of West Virginia cases and secondary materials, the court had little issue finding that such property damage, allegedly caused by negligent workmanship, resulted from an "occurrence" sufficient to trigger coverage under a liability policy:

> In the instant case, the property damage complained of in the underlying complaint includes cracks in the interior walls of Merlin Bush's home; cracks in the brick exterior; cracks in the block and foundation; gaps and separation between the walls and floors; unlevel and sagging floors; an inability to close or lock certain doors and windows; and other structural defects. According to Professional Engineer Robert L. Wolfe, this damage "is the obvious result of construction errors on the part of the original contractor for construction," because "the fill material in this instance was not placed as 'engineered fill' or compacted in accordance with certain engineering principles available through consulting engineering services." Put simply, a failure to use "engineered fill" (the means) caused the settling of the soil and fill material below his foundation (the result), which in turn has caused the damage to Merlin Bush's home. Therefore, for liability purposes, the important question is whether this result (the soil settlement) and the means (subcontractor negligence) were unforseen, involuntary, unexpected, and unusual from the perspective of Simpson-Littman. ***In other words, taken together, do they constitute an "accident" necessary to establish the "occurrence" required for coverage? This Court finds, conclusively, that the answer to this question is yes. The settlement of the soil and fill below Merlin Bush's home, which is (and was) caused by Smith Construction and/or Tri-State Masonry's negligence, is an "occurrence" under Policy*** [*27] No. Q33 6520012.

Id. (emphasis added).

This case demands the same result. There is no question that Plaintiff's allegations of physical damage to areas in the basement, "wet areas," damage caused by moisture migration, and damage to walls and floors caused by soil compaction constitute "property damage." Moreover, as in *Simpson-Littman*, there is no question that allegations that such property damage resulted from DRB's negligence in designing and constructing the development constitutes an "occurrence" under the policy. The circuit court's findings to the contrary are not supported by the facts and are contrary to the law.

Evanston's position on this topic is seemingly rooted in its misguided contention that "construction defects committed by the insured-contractor are not an 'occurrence' under the Policy…."[142] That position is misplaced in multiple regards. First, it demonstrates a misunderstanding of the core basis of the Plaintiffs' claims. DRB is a homebuilder, and the Plaintiffs are not asserting claims arising out of DRB's faulty construction of their homes. Evanston itself acknowledges this in its letter, which states: "It appears from the Complaints and additional information reviewed that the Plaintiff-Homeowners in the Civil Action are not claiming that their homes were defectively constructed apart from the earth movement damage. Home construction defects are only tangentially mentioned in the Complaints…"[143] Rather, the Plaintiffs assert claims for failure to properly investigate, study, plan, test, and engineer aspects of the development separate and apart from DRB's construction of the Plaintiffs' homes, and indeed prior to the sale of lots and homes. Specifically, the Plaintiffs' claims arise out of negligent planning and construction of the infrastructure of the development, inadequacies in its utility line systems, and faulty design and construction of its water drainage and storm water

[142] DRB-Appx. at p. 992.
[143] DRB-Appx. at p. 992; DRB-Appx. at pp. 1364-1365 (Admitting that "Evanston doesn't have any information indicating that there's any defective construction of the homes in the first instance").

collection system, resulting in intrusion of surface water onto the Plaintiffs' properties constituting an unabated nuisance. None of these claims arises out of DRB's home construction work. The engineering of the development was of course performed by Hornor, not DRB. The construction of the ponds, roads, and utility lines was performed by Lang, not DRB. The claims simply do not arise out of "construction defects committed by the insured-contractor," as Evanston's denial letter posits.[144]

Second, applicable law rejects Evanston's contention anyway. Specifically, West Virginia courts recognize that "defective workmanship causing bodily injury or property damage constitutes an 'occurrence' under a policy of commercial general liability." Syl. Pt. 1, *Cherrington v. Erie Ins. Property and Cas. Co.,* 745 S.E.2d 508 (W.Va. 2013). The policy at issue in *Cherrington*, just like the Evanston policies here, defined an "occurrence" as "an accident including continuous or repeated exposure to substantially the same general harmful conditions." *Id*. at 520. The *Cherrington* Court noted that West Virginia recognizes that an "accident" for the purposes of a liability insurance policy is an act or consequence that "was not deliberate, intentional, expected, desired, or foreseen." *Id*. (quoting *Columbia Cas. Co. v. Westfield Insurance Co.,* 617 S.E.2d 797 (W.Va. 2005)). The Court found that a claim for defective workmanship necessarily constitutes a covered "accident" and therefore an "occurrence", since holding otherwise "would suggest that [the contractor] deliberately sabotaged the very same construction project it worked so diligently to obtain at the risk of jeopardizing its professional name and business reputation in the process." *Id*. As such, even if the Plaintiffs' claims could be characterized as arising out of some deficiency in DRB's work, the claims would still clearly involve "property damage" arising out of an "occurrence."

[144] DRB-Appx. at p. 992.

Evanston's corporate designee acknowledged in deposition: "There are counts that may qualify as bodily damage or property damage…"[145] She later attempted to walk that back,[146] but the effort was unsuccessful. Evanston's designee pivoted and suggested that perhaps the claims involve no "occurrence" insofar as DRB's allegedly tortious conduct "could be intentional".[147] Evanston naturally concedes that it has no information suggesting any such "intentional" conduct.[148] The claims plainly allege "property damage" caused by an "occurrence". Coverage is clearly owed.

In its Order, the circuit court verbatim adopted Evanston's proposed contention that its policies provide no coverage to DRB because DRB somehow "had foresight and expectation of the Plaintiffs' damages" and that DRB's conduct therefore constituted an "intentional act." This finding is clearly in error. First, it is clearly contrary to our Supreme Court's holding in *Cherrington, supra.* that finds that very conduct not intentional, expected or intended, but an unintended accident and "occurrence." Second, Evanston's argument was completely at odds with the testimony of its own corporate designee, who acknowledged that Evanston has no information to suggest that any particular harm at issue in this case was expected or intended from DRB's standpoint:

> Q. … Does Evanston have information that Dan Ryan intentionally caused water intrusion on the plaintiffs' properties?
>
> MS BARBE: Objection to the form.
>
> A. No.
> Q. Does Evanston have information that Dan Ryan intentionally caused flooding of plaintiffs -- of certain of the plaintiffs' basements?

[145] DRB-Appx. at p. 1367.
[146] DRB-Appx. at pp. 2138-2139.
[147] DRB-Appx. at pp. 1328-1329.
[148] DRB-Appx. at pp. 1329-1332.

MS BARBE: Objection to the form.

A. No.
Q. What about standing water and mosquitos in certain of the plaintiffs' yards?
A. What about them? Do I think that Dan caused the mosquitos to come? Is that the question?
Q. Does Evanston have information suggesting that Dan Ryan intentionally caused that?
A. Caused the mosquitos to come?
Q. What is Counsel whispering to you?

MS BARBE: I'm not whispering anything.

Q. Yeah, does Dan Ryan have information -- excuse me. Does Evanston have information that Dan Ryan intentionally caused the presence of mosquitoes on certain plaintiffs' properties?
A. No. Not that I know of.
Q. Does Dan Ryan -- does Evanston have information that Dan Ryan intentionally caused any of the harms that plaintiffs claim in this case?
A. No. The allegations in the Complaint allege intentional conduct.
Q. They allege it in the alternative, don't they?
A. No. There's counts for fraud and misrepresentation I believe.
Q. You're not suggesting the Complaint contains no allegations of mere negligence rather than intentional conduct, are you?
A. No. I don't -- I'm not saying there isn't a negligence count. There are allegations of intentional conduct in the Complaint.
Q. Yeah. They're alleged in the alternative, are they not?
A. I don't believe so. No. I've have to take a look at the Complaint again.
Q. Okay, Maybe we're talking past one another. Evanston concedes that there are allegations in the Complain that could potentially describe merely negligent rather than intentional conduct. Correct?

MS BARBE: Objection to the form.

A. Is the question are there counts that allege negligent versus intentional conduct? Is that the question?
Q. That's a different question but you can answer that. That's fine.
A. Yes, there are counts – there's a negligence count in the Complaint. Yes.
Q. Okay. So to the extent the denial of coverage would be based on the fact that all the Complaint describes is intentional conduct that would be erroneous, wouldn't it?

A. I don't think that we've made that position.[149]

Not only did it take this position, the circuit court agreed with it, notwithstanding the fact that there is not a single stitch of evidence of intentional conduct in the entire case. DRB would note that the Expected or Intended Injury Exclusion was not among the grounds cited in Evanston's Initial or Supplemental Coverage Denial correspondences.[150] Thus, the circuit court erred in finding that coverage was precluded.

2. The "Expected Or Intended" Injury Exclusion Has No Application To The Bulk Of Plaintiffs' Claims Against DRB

The Circuit Court inexplicably found that some (but not all) of Plaintiffs' Claims against DRB fall within the Policy's Intentional Acts exclusion and, thus, are excluded from coverage. In so deciding, the court relied upon an unpublished decision out of the Western District of North Carolina that was cited by Evanston in its proposed order that has absolutely no support in West Virginia, *Gen Cas. Co. of Wisconsin v. Image Builders Inc.*, No. 1:09cv159, 2010 WL 4449084 (W.D. N.C. 2010).[151] First, the case does not stand for the position for which Evanston cited it, to wit: that a contractor's actions are intentional for purposes of an intentional act exclusion because the contractor intentionally "negotiated for, purchased, constructed, and developed property."[152] In fact, the case did not involve the interpretation and application of an intentional act exclusion. It involved whether a slope failure constituted an "occurrence" for the contractor that constructed it. Second, the North Carolina court held that the slope failure did not constitute an occurrence because, under North Carolina law, damage to work the contractor was contracted

[149] *See* DRB-Appx. at pp. 1330-1333.
[150] *See* DRB-Appx. at pp. 991-996. (Expected or Intended Injury Exclusion not discussed within Evanston's "Analysis of Policy" section within its denial letter); DRB-Appx. at pp. 1468-1473 (July 2009 Coverage Denial Letter omits mention of Expected or Intended Injury Exclusion).
[151] DRB-Appx. at p. 3368.
[152] DRB-Appx. at p. 3332, ¶121; Court's Amended Order, DRB Appx. p. 66, ¶ 72.

to perform does not constitute an occurrence; a holding that is completely at odds with our Supreme Court's holding in *Cherrington, supra.* Accordingly, Evanston's citation to the case is questionable and the circuit court's reliance upon it constitutes a clear error of law, thus mandating reversal.

3. The Contractual Liability Exclusion Has No Application To The Extent Plaintiffs' Allegations Against DRB Target Common Law Duties Not Contractual Ones

In its belated declination letter, Evanston cited two separate exclusions regarding contractual liability. Neither applies, and the circuit court's finding to the contrary is in error.

The first of these exclusions, entitled "Contractual Liability," is contained in the policy's basic coverage form.[153] While relying upon it in its declination letter, Evanston later admitted it had no application. Therefore, the circuit court did not consider it.

The second of these exclusions is the distinct "Breach of Contract" exclusion located in a separate endorsement. It states:

> **BREACH OF CONTRACT EXCLUSION**
>
> ***
>
> This insurance does not apply to any "bodily injury" or "property damage" arising out of, caused by, or contributed to by your failing to fulfill the terms of a contract or agreement. The company shall have no obligation to defend or indemnify any insured for any alleged breach of contract, whether such contract is written, oral or implied in law of fact.
>
> The Company shall have no obligation to indemnify you for any sums which you may be found legally obligated to pay as a result of the breach of any such contract, or as a result of the breach of any warranty, whether express or implied.[154]

[153] DRB-Appx. at pp. 983-984.
[154] DRB-Appx. at p. 988.

This exclusion does not apply either, and the circuit court's finding to the contrary is clearly in error. DRB is a homebuilder that contracted with the Plaintiffs to build and sell homes. The bulk of the Plaintiffs' claims, however, are not founded upon an alleged breach of those contracts. The Plaintiffs instead assert mostly tort claims for property damage, including claims of strict liability, negligence, trespass, nuisance, fraudulent misrepresentation, intentional infliction of emotional distress, and vicarious liability arising out of the negligent acts of DRB's agents.[155] By definition those claims are founded upon common law duties, not contractual ones.

West Virginia courts recognize this important distinction, holding that claims sound in contract rather than tort only when the following factors are satisfied:

> (1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent on the success of the breach of contract claim.

Tri-State Petroleum Corp. v. Coyne, 814 S.E.2d 205, 218 (W.Va. 2018) (quoting *Gaddy Eng'g Co. v. Bowles Rice McDavid Graff & Love, LLP,* 746 S.E.2d 568, 577 (W.Va. 2013)). The bulk of the Plaintiffs' claims, however, are founded upon common law duties, not contractual ones. The claims are therefore outside the embrace of the exclusion. *See, e.g., Continental Casualty Co. v. County of Chester*, 244 F.Supp.2d 403, 409-11 (E.D. Pa. 2003) (noting that "whether the 'arising out of a breach of contract' exclusion applies turns on whether the cause of action is characterized as sounding in contract or in tort" and finding that where "the wrongful acts sound in tort, the 'arising out of contract' exclusion does not apply"); *Nat'l Fire Ins. Co. of Hartford v.*

[155] DRB-Appx. at pp. 948-971, generally. Evanston's corporate designee, who is an attorney, strenuously resisted the conclusion that the Plaintiffs assert a variety of claims sounding in tort rather than contract. DRB-Appx. at pp. 1384-1389. She debated whether negligence was a tort claim and went as far as to say that a nuisance claim "could be a contract claim" rather than a tort. DRB-Appx. at pp. 1386-1389.

OMP, Inc., 2012 WL 13012418, at *2 (C.D. Cal. Aug. 22, 2012) (citations omitted) (In determining the applicability of exclusions for injury arising out of a breach of contract, "the 'relevant inquiry is whether the *facts* alleged all arise from the alleged breach of [contract] *and could not otherwise constitute covered, tortious behavior*.") (emphasis in original)*; Sprintcom, Inc. v. Clarendon Nat'l Ins. Co.,* No. CIV 06-0702 BB/RLP, 2007 WL 9733663, at *6 (D.N.M. Aug. 2, 2007) (finding that a claim of negligent misrepresentation sounded in tort such that it was not barred by a breach of contract exclusion); *Looney Ricks Kiss Architects, Inc. v. State Farm Fire & Cas. Co.,* 677 F.3d 250, 256 (5th Cir. 2005) (citations omitted) ("Where an injured party has 'alleged a breach of duty owed to all persons which supports an action in tort…the breach of contract exclusion is inapplicable."). Thus, coverage is not barred by the "contract" exclusions.

While the circuit court found that this exclusion barred coverage for certain of Plaintiffs' claims, it made no analysis explaining why. Specifically, its order is silent as to why Plaintiffs' allegations against DRB sounded in contract as opposed to being tort claims targeting DRB's common law duties. Instead, the circuit court merely copied and pasted those sections from Evanston's proposed order granting its motion for summary judgment into its order. However, to the extent Plaintiffs' purported "contract" claims are actually tort claims, the circuit court's ruling is in error and must be reversed.

4. The "Damage To Impaired Property Or Property Not Physically Injured" Exclusion Has No Application To Plaintiffs' Claims Against DRB

Evanston relies upon the "Damage to Impaired Property or Property Not Physically Injured" exclusion (the "Impaired Property Exclusion") to deny DRB coverage.[156] While the

[156] DRB-Appx. at pp. 993-994.

circuit court agreed with Evanston, its agreement is in error. The Impaired Property Exclusion on its face excludes coverage of claims for damage to property that has not been directly physically injured, but rather has been impaired or rendered unusable because it incorporates the insured's defective work. Evanston endorses that construction of the exclusion.[157] The exclusion does not apply "if there is damage to property other than the insured's work." *Standard Fire Ins. Co. v. Chester O'Donley & Associates, Inc.,* 972 S.W.2d 1, 10 (Tenn Ct. App. 1998) (citing *Imperial Cas. & Indem. Co. v. High Concrete Structures, Inc.,* 858 F.2d 128, 136 (3d Cir. 1988); *Lang Tendons, Inc. v. N. Ins. Co. of New York*, No. 2001 WL 228920, at *9 (E.D. Pa. Mar. 7, 2001) (citations omitted) ("The exclusion does not apply if there is physical injury to property other than the insured's work itself."); *Stewart Interior Contractors, L.L.C. v. Metalpro Indus.*, 969 So.2d 653, 664 (La. Ct. App. 2007) (numerous citations omitted) ("the exclusion does not apply where there is physical damage to property other than the insured's work or product after the product has been put to its intended use."). As detailed hereinabove, the Plaintiffs unequivocally make claims for direct physical injury to both their real and personal property. Neither is DRB's work. The Impaired Property Exclusion is therefore plainly inapplicable.

Evanston's declination letter purports to apply the exclusion to the Plaintiffs' claims involving defective "slopes and/or lots", but those claims are clearly outside the scope of the exclusion, since the slopes and lots do not incorporate any of DRB's work. DRB is a homebuilder. It constructs houses. The "slopes and/or lots" obviously do not incorporate any homes. On its face the exclusion does not apply.

In interpreting the term "your work" as used in the Impaired Property Exclusion, the West Virginia Supreme Court has specifically held that the exclusion does not apply to work

[157] DRB-Appx. at pp. 1389-1390.

performed by others besides the insured, and does not apply to work performed by subcontractors. *Cherrington*, 745 S.E.2d at 487. The Court held this way notwithstanding that "'your work,' as it is used in [the Impaired Property Exclusion], contemplates either '[w]ork or operations performed by you' or '[w]ork or operations performed...on your behalf.'" *Id.* The Court held that in order for the policy to be consistent with the insured's reasonable expectations, the phrase "on your behalf" must be read out of the exclusion, such that only the insured's own work is within the embrace of the exclusion. *Id.* The Court reasoned that this is necessary because the "Your Work" exclusion discussed hereinabove excepts subcontractors' work from its embrace, such that work performed by others besides the insured is covered. The Court held that "[a]s such, [the Impaired Property Exclusion], on its face, precludes coverage for the very same work of subcontractors that [the Your Work exclusion] specifically found to be covered by the subject policy." *Id.* at 488. The Court rejected that result as impermissibly anomalous, since the law of West Virginia "do[es] not subscribe to an insurance policy construction that lends itself to the mantra: what the policy giveth in one exclusion, the policy then taketh away in the very next exclusion." *Id.* at 448 (citations omitted). Thus, the Court declined to apply the exclusion to work carried out by subcontractors. *Id.*

The Development's "slopes and/or lots" were engineered by Horner and others, and constructed by Lang. They do not incorporate DRB's work. The Impaired Property Exclusion does not apply, and the circuit court's finding to the contrary is in error.

5. The "Damage To Your Work" Exclusion Does Not Apply Because The "Work" At Issue Was Not DRB's Work

Evanston's supplemental declination letter invoked the "Damage To Your Work" exclusion, which applies to "'property damage' to 'your work' arising out of it'" but contains a

specific exception "if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor".[158] In other words, where the work at issue was performed by others besides DRB's own forces, the exclusion does not apply. Evanston's declination letter acknowledged this, and stated: "It is not clear at this time based on the information provided to date what portions, if any, of the engineering, excavating, and construction of the slopes, lots, houses, and other elements of the Crystal Ridge subdivision were performed by DRB's own forces or by subcontractors. Moreover, Evanston's corporate representative conceded the point during his deposition. *See* DRB-Appx. at pp. 1364-1365 (conceding that "Evanston doesn't have any information indicating that there's any defective construction of the homes in the first instance"). Therefore, any claims by the Plaintiffs that DRB's work, not performed by subcontractors, was defective and requires repairs is excluded by the 'Your Work' exclusion."[159]

The exclusion obviously does not apply, however, as the Plaintiffs' claims do not involve DRB's work. As discussed above, DRB is a homebuilder, and the claims do not involve faulty construction of the homes. The engineering and site development work that is the subject of the Plaintiffs' claims was performed by contractors, not DRB. The core of the Plaintiffs' claims relate to deficiencies in the Crystal Ridge Development's planning and engineering,

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[158] DRB-Appx. at p. 993. The "Damage to Your Work" exclusion provides:

> This insurance does not apply to:
>
> ***
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The policy defines "your work" in pertinent part as "[w]ork or operations performed by you or on your behalf."

[159] DRB-Appx. at p. 993.

infrastructure, drainage, utility lines, and storm water retention pond, none of which was DRB's "work". All of that "work" was performed by Hornor, Lang, and others. Horner engineered the Crystal Ridge Development's infrastructure and water drainage systems. Lang did the excavation, and constructed and installed the water and utility lines, roads, and water drainage systems. Additional work with regard to the installation of utilities and construction of roads was carried out by independent contractors, not DRB. Remediation of fill slopes was performed by contractors. None of DRB's own "work" is at issue. The exclusion has zero application.

West Virginia courts have enforced the subcontractor exception to the "Damage To Your Work" exclusion, and have specifically held that it does not bar claims arising out of work done by subcontractors. *Cherrington*, 745 S.E.2d at 524 (finding that the language of the Your Work Exclusion "does not apply to preclude coverage for the work of subcontractors" and that the exclusion did not apply where "the majority of the construction and completion of [the project] was done at the behest of [the insured] by its subcontractors."); *State Auto. Mut. Ins. Co. v. Old Republic Ins. Co.,* 115 F.Supp.3d 615, at 623 (Md. 2015) (finding the language of the exclusion to be inapplicable to claims for damages arising out of work done by subcontractors). The exclusion simply does not apply.

Because Evanston clearly understands this, it proffered a creative argument in an effort to implicate the exclusion, and the circuit court seemingly bought into it. Evanston's declination letter states:

> The Plaintiffs' claims appear to be centered upon the negligent planning and construction of the slopes and lots, and resulting earth movement. It is our understanding that Honor Brothers and Lang Brothers, the two entities involved in the slope construction with Dan Ryan Builders, were not subcontractors of DRB but were separate prime contractors retained by DRB to perform excavation and lot construction for the subdivision on lots owned (or under contract to be

> purchased from Lang by DRB) but not yet sold by DRB; which places DRB in the position of an owner and not a general contractor relative to Horner's and Lang's allegedly negligent work. Moreover, as discussed in the Timeline above, during the subdivision construction DRB and Lang Brothers revised their original Lot Purchase Agreement, where Lang was to construct the slopes and lots and install the infrastructure and DRB was to purchase the lots ready to sell to prospective homeowners, with construction of the home to then be accomplished by DRB.[160]

Though inventive, that reasoning has no impact. The fact of the matter is the claims do not arise out of DRB's own work. The plain language of the exclusion does not apply to work performed by "separate prime contractors retained by DRB", whatever that amorphous portion of Evanston's letter might mean. The "Damage To Your Work" exclusion is inapplicable, and the circuit court's finding to the contrary is in error.

6. The "Owned Property" Exclusion Has No Application To Plaintiffs' Claims Against DRB Because DRB Does Not Own The Property

The Evanston policies contain an exclusion barring coverage for claims of property damage to "[p]roperty you own, rent or occupy" (the "Owned Property Exclusion").[161] Evanston cites the exclusion in its denial letter, but provides no basis for its application. Rather, Evanston states that the exclusion "may" apply to the extent the Plaintiffs' damages occurred while the property was owned by DRB.[162]

The exclusion is clearly inapplicable. The damages sought by the Plaintiffs are for property damage that occurred while they and not DRB owned the properties. The Owned Property Exclusion does not apply, and the circuit court's finding to the contrary is in error.

7. Neither The SIR Nor The "Primary Policy" Language Empowers Evanston To Outright Deny Coverage

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[160] DRB-Appx. at p. 977.
[161] DRB-Appx. at p. 994.
[162] *Id.*

Contrary to the circuit court's findings, neither the policies' $100,000 self-insured retention nor the existence of the Travelers policy that ostensibly provides "primary coverage" entitles Evanston to outright deny coverage to DRB.[163] As an initial matter, it is important to note that, contrary to the circuit court's findings, Evanston never purported to deny coverage for all or even most of the claims on those grounds. Rather, Evanston merely reserved its rights on those points. [164] Therefore, the court should not have addressed those issues in its order because they do not form the basis of Evanston's coverage denial. Nonetheless, with respect to the SIR, DRB provided the circuit court with its August 25, 2021 letter written to Evanston's counsel by DRB's counsel, in which DRB authorized a $100,000 contribution toward settlement of this matter. Given this, the policy's $100,000 self-insured retention is therefore a complete non-issue. Moreover, there is no dispute that DRB is being defended by Travelers. While this may affect Evanston's present duty to defend, it does not affect its duty to indemnify. Indeed, the circuit court could certain have determined that Evanston's policies provide coverage for the claims asserted against DRB while still finding that the Travelers policies provided the primary obligation to defend.

F. The Circuit Court Erred By Basing Its Ruling On Findings Of Fact Made By A Federal Court In An Entirely Separate Case Involving Different Parties

West Virginia has long held that when addressing a motion for summary judgment, it is reversible error for the trial court to base its ruling on, and adopt as its own, findings of fact made by a different court. Our Supreme Court of Appeals adopted this rule in Syllabus Point 11

[163] DRB-Appx. at pp. 994-996.

[164] *See* DRB-Appx. at pp. 994-996 (Evanston merely reserves rights regarding alleged failure to comply with self-insured retention rather than disclaiming coverage on that ground); *see also* DRB-Appx. at pp. 2161, 2179-2180 (Evanston cites self-insured retention only with regard to duty to defend, not its separate duty to indemnify).

of *Arnold Agency v. West Virginia Lottery Comm'n,* 206 W. Va. 583, 526 S.E.2d 814 (1999). In *Arnold Agency*, the plaintiff sued the defendant alleging breach of contract and fraud in connection with a contract for advertising services. While denying the allegations, the defendant also raised the defense of sovereign immunity, thus presenting the question of whether the plaintiff's allegations against the defendant were covered by the defendant's state insurance policy. If the claims were covered, then the plaintiff would be permitted to pursue its claims against the policy under the Court's decision in *Parkulo v. West Virginia Bd. Of Probation and Parole*, 199 W.Va. 161, 483 S.E.2d 507 (1997).

Ultimately, the defendant moved for summary judgment. Pertinent to the case before this Court, the defendant contended that the state's insurance policy did not provide coverage for plaintiff's claims and that sovereign immunity, therefore, barred plaintiff's claims. On the other hand, plaintiff contended that, at a minimum, the policy provided coverage for its breach of contract claim.

The circuit court agreed with the defendant, granted its motion for summary judgment and dismissed the case. In reaching its conclusion, it relied heavily on the fact that the defendant's director had been convicted of mail fraud in federal court for crimes related to plaintiff's claims against defendant. It further relied upon copies of the indictment and final judgment pertaining to this criminal conviction supplied by defendant in support of its motion. The circuit court concluded that based on these federal materials, it was clear that plaintiff's claims were predicated on "fraud and dishonesty" and were, therefore barred by the policy's wrongful act exclusion. The plaintiff appealed.

Our Supreme Court reversed. In so doing, it held that it was reversible error for the trial court to essentially adopt the findings of another court as its own without conducting its own analysis of the facts. Specifically, the Court stated:

> It was certainly within the circuit court's prerogative to use these records for the purpose of ascertaining that Bryant had, in fact, been convicted of mail fraud. Under W. Va. R. Evid. 201, a court is permitted to take judicial notice of adjudicative facts that cannot reasonably be questioned in light of information provided by a party litigant. However, while a court may take judicial notice of the orders of another court, such notice is "'not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.'" *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992) (citation omitted). *See also United State v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994) ("a court may take judicial notice of another court's order only for the limited purpose of recognizing the 'judicial act' that the order represents or the subject matter of the litigation"). As one treatise explains, "if it were possible for a court to take judicial notice of a fact because it has been found to be true in some other action, the doctrine of collateral estoppel would be superfluous." 21 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5106, at 247 (2d ed. Supp. 1999).

Id., 526 S.E.2d at 827. The Court concluded that it was error for the circuit court to rely on the findings of the federal court to grant defendant's motion for summary judgment and, therefore, reversed the circuit court's ruling finding no insurance coverage.

This case demands the same result. In its order, the circuit court acknowledges that it pulled facts from a published federal court opinion involving very different parties and adopted them without question, accepting them as undeniable truths, when making its Findings of Fact. Specifically, in Footnote 2 on Page 3 of 32 of its Order, the court states:

> Many of the facts cited in this [Findings of Fact] section come from the published opinion of the Fourth Circuit in a federal case brought by Dan Ryan Builders, Inc. against Lang.

DRB-Appx. at p. 44.[165] Under *Arnold Agency*, it was error for the court to do so and, accordingly, its order granting Evanston's, and denying DRB's motion for summary judgment must be reversed.

G. The Circuit Court Erred In Adopting, Verbatim, Evanston's Proposed Findings Of Fact And Conclusions Of Law

While West Virginia law permits a trial court to solicit proposed findings of fact and conclusions of law from the parties, it is important that the court's ultimate findings and conclusions reflect the court's independent analysis and consideration of ***all relevant facts and evidence*** that pertain to the issues of law. In short, "[f]indings of fact must include as much of the subsidiary facts as is necessary to disclose to the reviewing court the steps by which the trial court reached its ultimate conclusion on each factual issue." *Gross v. Gross*, 469 S.E.2d 636, 639 (W.Va. 1996) (citing 9A C. Wright and A. Miller, *Federal Practice and Procedure,* § 2579 (1995)). In *Gross,* our Supreme Court said it this way:

> From the discussion in *Federal Practice and Procedure,* it is apparent that the purpose of the law in imposing the obligation on a trier to make findings of fact and conclusions of law is to insure that the trier, in reaching a decision, goes through a mental process whereby he relates the evidence adduced to the principles of law governing the dispute. Further, the making of findings and conclusions enables a reviewing court to examine the trier's mental process to determine if the ultimate judgment is rationally and legally related to the evidence adduced.
>
> In this Court's opinion, the critical stage of fact finding and making conclusions of law is the mental activity of relating facts developed by evidence to the relevant law; it is not the mechanical reduction of findings and conclusions to paper.

Id. The Court emphasized that findings and conclusions must demonstrate that the court "actually, independently made findings of fact and conclusions of law, and thus appropriately

[165] Even more, the "findings of fact," including the referenced footnote, were pulled directly from, and are verbatim reproductions of, the proposed findings of fact offered by Evanston.

used the assistance and recommendations of counsel" and did not "improperly surrender his responsibilities to counsel." *Id.* at 640. This determination is to be made objectively. *Id.*

In this case, respectfully, the circuit court's order does not objectively reflect the type of deliberate consideration required by *Gross* because there is no indication that the court even considered the evidence DRB offered. Specifically, to prevail, it was incumbent upon Evanston to prove by competent evidence that there was no genuine issue as to any fact material that coverage was barred by, for example, the Earth Movement exclusion *and* that it was entitled to judgment as a matter of law. This required the Court to look carefully at the evidence presented by both parties and determine whether plaintiff's claims are ***reasonably susceptible of an interpretation*** that they may be covered; there is no requirement that the facts specifically and unequivocally make out a claim for coverage. Yet the court's order does not contain this analysis. Nor does it explain how DRB's evidence factored into its analysis that there are no genuine issues as to any material facts that all of "Plaintiffs' issues are caused by subsidence of land and earth movement" without exception.[166] Moreover, the circuit court was obligated to analyze the entirety of the evidence in light of the well-settled law holding that Evanston has a duty to defend and indemnify its insured even where some, but not all, of the claims are covered by the policy. Again, the court's order does not contain this analysis. Finally, the circuit court was obliged to strictly construe exclusionary language against Evanston in order that the purpose of providing indemnity would not be defeated. *Camden-Clark Mem. Hosp. Ass'n v. St. Paul Fire & Marine Ins. Co.,* 682 S.E.2d 566 (W.Va. 2009). Again, the court's order is silent on this issue. So while the evidence presented by DRB clearly establishes a right to coverage, the court's findings of fact and conclusions of law hardly mentions this evidence, contains no analysis of

[166] DRB-Appx. at p. 65.

this evidence whatsoever, and does not reflect the type of deliberate, mental activity of relating the facts to the law as required by *Gross*. Instead, the circuit court merely adopted, essentially verbatim, Evanston's proposed *Order Granting Evanston Insurance Company's Motion for Summary Judgment and Denying Dan Ryan Builders, Inc., Dan Ryan Builders Realty, Inc., DRB Enterprises, Inc., Monocacy Home Mortgage, LLC, Christopher Rusch, and Crystal Rankin's Motion for Summary Judgment.*[167] Accordingly, the circuit court's order granting summary judgment in Evanston's favor, and denying DRB's motion, must be reversed.

H. The Circuit Court Erred In Weighing The Evidence And Resolving Factual Issues In Evanston's Favor

As the circuit court correctly recognized, its role 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 v. Peavy,* 451 S.E.2d at syl.pt. 3. A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried, inquiry concerning the facts is not desirable to clarify the application of law and the record could not lead a rational trier of fact to find for the nonmoving party based on the totality of the evidence presented. *Williams v. Precision Coil, Inc.,* 194 W.Va. 52, 459 S.E.2d 329 (1995); *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of NY*, 148 W.Va. 160, 133 S.E.2d 770, syl. pt. 3 (1963). However, where the facts are in dispute in an insurance coverage case, summary judgment is inappropriate. *Cherrington*, *supra.* Importantly, at summary judgment, a court may not peremptorily "weigh the evidence and determine the truth of the matter . . . ." Instead, it must "grant the nonmoving party the benefit of inferences, as credibility determinations, the

[167] Compare the Court's *Amended Order*, DRB-Appx. at pp. 0042-0073 with Evanston's *Proposed* Order, DRB-Appx. at 3343-3376.

weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."

Here, in making its ruling, the circuit court improperly weighed the evidence, drew inferences, and resolved disputed issues of material facts in Evanston's favor. Nowhere is this clearer than in its conclusion that Plaintiffs' claims against DRB do not constitute an "occurrence" under Evanston's policies. Indeed, the circuit court expressly stated that it was weighing the evidence and resolving the issue in Evanston's favor:

> ***Even in giving weight*** to DRB's perspective as the insured, and in following the *Cherrington* court's ruling that defective workmanship causing bodily injury or property damage constitutes an "occurrence," this Court finds that DRB had foresight and expectation of the Plaintiffs' damages, and they are not entitled to a defense and indemnification.

DRB-Appx. at p. 58 (emphasis added). Moreover, for whatever reason, the circuit court inexplicably rejected DRB's evidence entirely, yet accepted each and every piece of evidence Evanston offered, ***plus*** the conclusions Evanston drew from them, and granted Evanston's motion. Our Supreme Court has held that "[p]articularly in complex cases . . . where issues involving motive and intent are present,' summary judgment should not be utilized as a method of resolution." *Kelley v. City of Williamson*, 221 W.Va. 506, 510, 655 S.E.2d 528, 532 (2007) (per curiam) (quoting *Masinter v. WEBCO Co.*, 164 W.Va. 241, 243, 262 S.E.2d 433, 436 (1980)). To be sure, the Court has warned that trial courts must be cautious in granting summary judgment motions in cases dealing with motive and intent. *Hanlon v. Chambers*, 195 W.Va. 99, 105, 464 S.E.2d 741, 747 (1995). While the Court has moved away, ever so slightly, from the rule in cases such as *Kelley*, it has done so only in cases where "the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation.'"

W.Va. Dept. of Human Services v. David B., 2024 W.Va. LEXIS 504 (2024). Of course, that is not the case here. On the contrary, DRB presented a mountain of evidence on the issue to the trial court. The circuit court erred in weighing that evidence, drawing inferences, and resolving legitimate issues of fact in Evanston's favor.[168]

CONCLUSION

Based on the foregoing, DRB respectfully requests that this Honorable Court reverse the Circuit Court's *Order Granting in Part and Denying in Part Evanston Insurance Company's Motion for Summary Judgment and Denying Dan Ryan Builders, Inc., Dan Ryan Builders Realty, Inc., DRB Enterprises, Inc., Monocacy Home Mortgage, LLC, Christopher Rusch, and Crystal Rankin's Motion for Summary Judgment* and direct the entry of judgment in its favor finding that Evanston Insurance Company has both the duty to defend and to indemnify DRB.

Dated: February 5, 2025

Respectfully submitted,

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[168] It is not without moment that, as with most of the Court's order, these portions were copied essentially verbatim from Evanston's proposed Order granting summary judgment in its favor.

CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, the foregoing ***Petitioners' Brief*** was filed electronically and served on the parties indicated below via E-Service:

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