IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 24-ICA-481

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

Petitioners,

v.

EVANSTON INSURANCE COMPANY,

Respondent.

BRIEF AND CROSS-ASSIGNMENT OF ERROR OF RESPONDENT EVANSTON INSURANCE COMPANY

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INTRODUCTION

This is the third time that Dan Ryan Builders, Inc., Dan Ryan Builders Realty, Inc., DRB Enterprises, Inc., Monocacy Home Mortgage, LLC, Christopher Rusch, and Crystal Rankin (collectively, "DRB") have petitioned for appeal from an adverse decision in this lawsuit, which was originally filed in 2009.[1] Just as in DRB's prior two appeals, its arguments rest on a skewed version of the facts and the applicable law. And just as in DRB's prior two appeals, this Court should deny DRB's petition and affirm the well-reasoned judgment of the trial court.

This insurance coverage dispute centers around five policies of commercial general liability insurance ("CGL") issued by Evanston Insurance Company ("Evanston"). Like most CGL policies, the ones at issue in this case have conditions precedent to coverage, require an "occurrence" of covered "bodily injury" or "property damage" to trigger coverage, and contain exclusions that may divest coverage. It has been obvious from the beginning of this lawsuit—more than fifteen years ago—that Evanston has no duty to defend or indemnify DRB. After over a decade of discovery and fulsome summary judgment briefing, the trial court agreed that the Evanston Policies do not provide coverage to DRB because it has failed to meet the conditions precedent—it has not exhausted the self-insured retention or its primary coverage,

[1] *See Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 239 W. Va. 549, 803 S.E.2d 519 (2017) (affirming trial court's ruling that DRB's third-party complaint against Lang Brothers, Inc., Robert S. Lang, and Hornor Brothers Engineers was barred as *res judicata* by federal-court judgment involving same parties and based on same evidence); *Dan Ryan Builders, Inc. v. Williams*, No. 18-0579, 2020 W. Va. LEXIS 741 (W. Va. Nov. 6, 2020) (holding that DRB waived its right to arbitration by extensive participation in litigation over six-year period without seeking review of trial court's order denying arbitration).

and it has not established an "occurrence" of "bodily injury" or "property damage." Although this Court could affirm the trial court's ruling on any of these grounds without proceeding further, the Evanston Policies' exclusions also preclude coverage. The trial court memorialized its ruling in a lengthy order that—despite DRB's argument to the contrary—reflected its own independent judgment.

Now DRB seeks to unravel that ruling on appeal, arguing that the trial court inappropriately made findings of fact and ignored genuine issues of material fact. But DRB itself conceded that there were no genuine issues of material fact, and it conflates its disagreement with the trial court's ultimate ruling with error. DRB also takes issue with the trial court's rejection of DRB's nonsensical estoppel argument, which even if it had merit, would not change the outcome of this case. This Court should reject DRB's bald attempts to re-write the facts and allegations to suit its whims on appeal and affirm the trial court's judgment in Evanston's favor.

STATEMENT OF THE CASE

I. Factual Background

DRB is the developer and builder of a residential subdivision, Crystal Ridge, in Harrison County, West Virginia. Evanston is an insurer that issued five General Liability Policies (collectively, the "Evanston Policies") to Dan Ryan Builders, Inc. as the first named insured[2] for the cumulative period of October 24, 2005, to October 24,

[2] The Named Insured Schedule also includes the following entities added as "Named Insured[s]" per the General Change Endorsement of the Evanston Policy with an effective endorsement date of October 24, 2006: DR Acquisitions, LLC; DR Holdings – VA, LLC; RyKil, LLC; PDR Greencastle, LLC; Blue Ridge Land Investors, LLC; DRB Financial Corporation; Monocacy Home Mortgage, LLC; PDR Paradise, LLC; Rona Road, LLC; Dan Ryan Builders

2010.[3] DRB-Appx. 2228–2533. The Evanston Policies were obtained by the named insureds through a Maryland insurance producer, All Risks Limited, operating out of Maryland. *Id.* at 2294. The Evanston Policies' declarations pages list named insured Dan Ryan Builders, Inc. with a Frederick, Maryland address. *Id.* at 2873.

As discussed in more detail *infra*, the Evanston Policies contain conditions precedent to coverage: DRB must satisfy a self-insured retention of $100,000 *per applicable policy*, and the Evanston Policies' limits are excess to the limits of any other policy available to DRB. If these threshold conditions precedent to coverage are satisfied, DRB must establish that the claims against it seek damages for "bodily injury" or "property damage" caused by an "occurrence." Assuming those elements are established, for Evanston to have any coverage obligation the multiple exclusions in the Evanston Policies must not apply. In this case, the Subsidence/Earth-Movement Exclusion precludes coverage for "bodily injury" or "property damage" that is "caused by, arising out of, relating to, resulting from, contributing to, or aggravated by any actual or alleged 'movement of land or earth.'" Other applicable exclusions include the Expected or Intended Injury Exclusion, the Breach of Contract Exclusion,

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South Carolina, LLC; DRB Enterprises, Inc.; Dan Ryan Builders Realty, Inc.; Preserves At Barleywood, LLC; Newbraugh/Ryan LLC Owns develop. prop, McCauley Crossing; and Keystone Title Services. *See* DRB-Appx. 2297.

[3] The policies were attached to Evanston's summary judgment motion as Exhibit 4 (DRB-Appx. 2228): Policy No. 05GLP1007615, Policy Period 10/24/2005–10/24/2006; Exhibit 5 (DRB-Appx. 2291): Policy No. 06GLP1007615, Policy Period 10/24/2006–10/24/2007; Exhibit 6 (DRB-Appx. 2353): Policy No. 07GLP1007615, Policy Period 10/24/2007–10/24/2008; Exhibit 7 (DRB-Appx. 2412): Policy No. 08GLP1007615, Policy Period 10/24/2008–10/24/2009; Exhibit 8 (DRB-Appx. 2471): Policy No. 09GLP1007615, Policy Period 10/24/2009–10/24/2010. The pertinent policy language is substantially identical for all years at issue.

the Impaired Property Exclusion, the "Your Work" Exclusion, the Owned Property Exclusion, the Mold and Microbiological Contamination Exclusion, and the Punitive or Exemplary Damages Exclusion. DRB did not satisfy the conditions precedent and cannot demonstrate that coverage exists; even if it did, multiple exclusions would bar coverage for Plaintiffs' claims.

II. Procedural History

From the very beginning, this case has centered on the movement of earth beneath the Crystal Ridge Development. On February 9, 2009, Plaintiffs filed a complaint in the Circuit Court of Harrison County, followed by a first amended complaint on March 2, 2009, and a second amended complaint on March 25, 2009. DRB-Appx. 0155–172; 173–76; and 177–80. Plaintiffs alleged ten causes of action: Common Allegations (identifying soil, subsoil, land and earth beneath washing away, falling away, slipping and subsiding); Strict Liability; Negligence; Trespass; Nuisance; Breach of Warranty; Fraudulent Misrepresentation; Tort of Outrage and Infliction of Emotional Distress; Vicarious Liability; and Declaratory Judgment (in relation to Plaintiffs' written Purchase Agreements with DRB). All the claims and damages alleged in the Initial Complaint and each of the Amended Complaints,[4] except for the original declaratory judgment claim that any arbitration provisions in Plaintiffs' Purchase Agreements with DRB are unconscionable, clearly arise from subsidence of the land on which the development is located.

[4] The First and Second Amended Complaints added additional Plaintiffs. The Third Amended Complaint added a Declaratory Judgment claim in relation to this coverage dispute.

DRB allegedly provided notice to Evanston of the underlying homeowners' suit on or around April 1, 2009. *Id.* at 0722 at ¶ 7. Evanston received an "Initial Status Report" dated April 1, 2009, from DRB's third-party administrator, International Risks Resources. *See id.* at 2534–41. As stated in that Report, Plaintiffs

> . . . alleged that the Dan Ryan Builders, by their acts and failures to act, caused or substantially contributed to a portion of the Crystal Ridge Development to subside, fall away or slip damaging the Plaintiff's lots and land and the Development as a whole and forcing the demolition o[f] at least one newly built home in the Development to date.

Id. at 2536 (emphasis added). On July 22, 2009, Evanston denied coverage for the homeowners' earth movement claims based upon the clear and unambiguous Subsidence/Earth-Movement Exclusion set forth in the Evanston Policies. *Id.* at 2542–47. In the same letter, Evanston reserved its right to revise its position or raise any other coverage issues or defenses "without prejudice, waiver, or estoppel." *Id.* at 2546. On November 9, 2009, then-counsel for Evanston reiterated that the homeowners' claims did not constitute an "occurrence" and that several exclusions, including the Subsidence/Earth-Movement Exclusion, applied. *Id.*at 2548–57. Evanston again reserved its right to revise its position and raise other coverage issues or defenses in the future. *Id.* at 2556.

On September 28, 2015, more than six years after the initial complaint and Evanston's denial of coverage, Plaintiffs filed a Third Amended Complaint to include a claim for declaratory judgment against Evanston, seeking a declaration as to whether there is coverage for the claims asserted by Plaintiffs against DRB. *Id.* at 0144. Evanston answered the Third Amended Complaint and asserted a

counterclaim for declaratory relief against Plaintiffs. *Id.* at 0264. On or about August 22, 2016, DRB moved for leave to file a crossclaim against Evanston for declaratory relief, which the Court granted. *See id.* at 720, 842.

On August 25, 2016, Evanston issued a Supplemental Declination of Coverage Letter delivered to DRB's coverage counsel. *See* DRB-Appx. 2558–83. The August 2016 letter provided Evanston's analysis of cited exclusions to the claims pleaded by Plaintiffs in the underlying action. *Id.* Again, Evanston declined coverage and reserved its rights inherent under the terms of the referenced policies.[5] *Id.* at 2582–83. On September 20, 2017, Evanston filed its Answer to Cross-Claim Against Evanston Insurance Company and Counterclaim for Declaratory Relief. *Id.* at 0854. On March 7, 2018, the trial court granted Evanston's request for bifurcation of declaratory judgment on whether coverage exists under the Evanston Policies from DRB's claims of breach of contract and/or "bad faith." *Id.* at 0875.

In October 2022, the parties filed cross-motions for summary judgment as to the declaratory judgment claims. *Id.* at 0880–2156; 2157–2717. After those motions were fully briefed, on September 30, 2024, the trial court granted in part and denied in part Evanston's motion and denied DRB's motion. *Id.* at 0010–40. DRB moved to clarify the September 30, 2024 Order, following which the trial court entered an amended order on December 23, 2024.[6] *Id.* at 0041–73. DRB requested that the trial

[5] As the case has progressed and Plaintiffs' allegations have shifted, Evanston has continued to re-assess coverage. *See* DRB-Appx. 2584–85 (reviewing coverage in response to Plaintiffs' Second Supplemental Disclosure of Experts); *id.* at 2586–88 (reviewing coverage in response to Plaintiffs' Fourth Supplemental Disclosure of Experts).

[6] The Amended Order clarifies that Court denied Evanston's motion as to the choice-of-law issue, discussed *infra*. *Id.* at 41–73.

court certify its ruling for appeal; Plaintiffs and Evanston agreed with this request, and on November 8, 2024, the trial court entered an agreed order dismissing Evanston and certifying the matter under West Virginia Rule of Civil Procedure 54(b). *Id.* at 1–9; 3453–59; 3460–63; 3464–69.

III. The Underlying Litigation

Plaintiffs are current or former owners of lots and single-family homes constructed by Dan Ryan Builders in the Crystal Ridge Development, a residential community in Harrison County, West Virginia. *Id.* at 0158 at ¶ 15. The development was conceived by Robert Lang who, along with his construction business, Lang Brothers, Inc. (collectively, "Lang"), owned land in Harrison County. *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 978 (4th Cir. 2015); *Dan Ryan Builders, Inc*, 239 W. Va. at 552, 803 S.E.2d at 522 .[7] Lang and Dan Ryan Builders, Inc. entered into a Lot Purchase Agreement dated June 30, 2005, in accordance with which Lang agreed to sell and Dan Ryan Builders, Inc. agreed to purchase finished, vacant lots for the construction of single-family homes. DRB-Appx. 2202; *Dan Ryan Builders, Inc.*, 239 W. Va. at 552, 803 S.E.2d at 522. In 2005, Lang subdivided and sold 143 lots to Dan Ryan Builders, Inc. *Dan Ryan Builders, Inc.*, 783 F.3d at 978; *Dan Ryan Builders, Inc.*, 239 W. Va. at 552, 803 S.E.2d at 522; *see* DRB-Appx. 2202.

[7] Many of the facts come from the published opinion of the Fourth Circuit in a federal case brought by Dan Ryan Builders, Inc. against Lang. As discussed *infra*, the trial court's citation to the opinion in the federal-court case is appropriate. Moreover, the Supreme Court of Appeals relied upon the same facts in prior opinions in this case, which Evanston has cited throughout. *See Dan Ryan Builders, Inc.*, 239 W. Va. at 560, 803 S.E.2d at 530 ("[B]oth the federal action and the state action rely upon the same facts, and are virtually identical in terms of time, space, and origin.").

From 2005 until May of 2007, Lang performed numerous services for the developer, Crystal Ridge Development, Inc.:[8] planning, excavation, grading, utility installation, road construction, construction of the storm water and drainage system, and construction of housing foundations. DRB-Appx. 2200. Lang was responsible for constructing a fill slope to provide grading on some of those lots, which Lang completed with the help of Hornor Brothers Engineering ("Hornor Brothers"), an entity Lang used to draw up lot-grading plans. *Dan Ryan Builders, Inc.*, 783 F.3d at 978, 987; *Dan Ryan Builders, Inc.*, 239 W. Va. at 552, 803 S.E.2d at 522; DRB-Appx. 2200–01. Among other services, Hornor Brothers determined which homes could be placed on certain lots, laid out several individual lots, and staked out the foundations of those lots. DRB-Appx. 2201. As relevant to this dispute, Hornor Brothers designed, and Lang constructed, a fill slope to make Emerald Drive, one of the streets in the subdivision, buildable.[9] *Id.* at 2203. According to DRB, Hornor failed to adequately design, and Lang failed to adequately build, the fill slope. *Id.* ("Lang Brothers failed to construct a proper keyway, strip the natural soil, implement a drainage system, bench individual lifts, obtain a compactive effort, or use good fill materials.").

Throughout 2006 and 2007, Dan Ryan Builders, Inc. entered into additional contracts with Lang, pursuant to which Lang continued to work on the infrastructure

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[8] Christopher Rusch, Dan Ryan Builders, Inc.'s General Manager (and later, Division President) of the Morgantown Division explained that the developer "owns the land and entitles it through [the] municipality, gets the approvals, the zoning, ends up grading the site, bringing the utilities to the site, the connections, putting the roads, the curbs in to where a home builder can purchase a single lot, pull a building permit, and build a home." DRB-Appx. 2212 at 44:5–10.

[9] Emerald Drive runs parallel to Route 50 and is the location of the large "landslide" repeatedly referred to by DRB. *See* Pet'rs' Br. at 16, 23, and 24.

in the development. *Dan Ryan Builders, Inc.*, 783 F.3d at 978; *Dan Ryan Builders, Inc.*, 239 W. Va. at 553, 803 S.E.2d at 523. Unfortunately, beginning in early 2007, issues with subsidence began to materialize. *See* DRB-Appx. 2203; *Dan Ryan Builders, Inc.*, 239 W. Va. at 553, 803 S.E.2d at 523. In March 2007, a prospective homeowner visiting the development noticed cracks in the basement concrete slab of the house on Lot 7. *See Dan Ryan Builders, Inc.*, 783 F.3d at 978; *see also* DRB-Appx. 2204. Dan Ryan Builders, Inc. attempted to remediate what it then believed to be differential settlement on Lot 7. DRB-Appx. 2203.

Recurrent subsidence issues led Dan Ryan Builders, Inc. to purchase the remaining lots in the development from Lang and reapportion the parties' contractual responsibilities. *Dan Ryan Builders, Inc.*, 783 F.3d at 978; *see also* DRB-Appx. 2214–15 at 178:18–179:11. In this regard, in 2007 Dan Ryan Builders, Inc. purchased the remaining 33 lots and oversaw the development of the remainder of Crystal Ridge. DRB-Appx. 2204; 2216 at 227:2–8.

In December 2007, the slope behind Lot 7 "began sliding downhill toward a nearby highway." *Dan Ryan Builders, Inc.*, 783 F.3d at 979; *see* DRB-Appx. 2204. The slope had failed "due to its natural composition, soil type, and poor construction." *Id.* Dan Ryan Builders, Inc. ultimately repurchased and razed the house on Lot 7. DRB-Appx. 2204; *Dan Ryan Builders, Inc.*, 239 W. Va. at 553, 803 S.E.2d at 523. A geotechnical investigation concluded that the fill slope behind Lots 2 through 7 needed to be completely remediated, which was completed at DRB's cost. DRB-Appx. 2204. In 2008, "a surface slump appeared at the cut slope to the rear of Lots 15 and

16, extending to Lot[] 17." *Id.* The slump, which was the result of ground and possibly surface water, was reconstructed. *Id.* at 2205.

DRB also had difficulties with the development's stormwater management system, development permits, and entrance. *Id.* at 2202–05. Notwithstanding these issues, DRB sold homes in the development "while the repairs were happening, while Route 50 was closed, while everybody in the community was aware, without significant price decreases in order to do that." *Id.* at 2213 at 87:14–18.

SUMMARY OF THE ARGUMENT

DRB claims that the trial court erred by finding no coverage under the Evanston Policies, by making unsupported and inappropriate findings of fact on summary judgment, by overlooking genuine issues of material fact, and by ruling that Evanston is not estopped from asserting additional grounds for disclaiming coverage. DRB is wrong on all counts. The trial court correctly ruled that Evanston has no duty to defend or indemnify DRB under the Evanston Policies, and it did so by discerning that there were no genuine disputes of material fact and concluding that Evanston was entitled to judgment as a matter of law. The trial court also correctly rejected DRB's spurious argument that Evanston should be estopped from raising additional grounds to disclaim coverage, which it specifically reserved the right to do in 2009 (and in all subsequent position letters) and as warranted after its entry into the lawsuit more than six years later and during subsequent litigation developments.

The trial court erred by applying West Virginia law instead of Maryland law, but it nonetheless reached the correct result—there is no duty to defend or indemnify DRB under the Evanston Policies for the claims asserted in this lawsuit.

The trial court correctly deemed a ruling on DRB's estoppel argument was unnecessary to its determination, and then also went on to correctly conclude that Evanston was not estopped from asserting additional grounds for denying any duty to defend or indemnify beyond the Subsidence/Earth-Movement Exclusion because Evanston continually reserved its rights to revise its coverage position (which remained the same—a denial of coverage), and DRB cannot establish it reasonably relied upon the initial denial of coverage to its detriment. Moreover, as the trial court concluded, DRB cannot establish any of the exceptions to the reasonable reliance rule. Even if DRB could somehow prevail on estoppel, the outcome is the same—the Subsidence/Earth-Movement Exclusion still bars any duty to defend or indemnify DRB in this lawsuit.

As a threshold issue, DRB indisputably failed to satisfy the self-insured retention that is a condition precedent to Evanston's duty to defend or indemnify DRB. And Evanston has no duty to defend or indemnify DRB because the Evanston Policies are excess to the primary Travelers policy. Even assuming the threshold requirements were satisfied, this Court should affirm the trial court's ruling that DRB cannot prove the claims against it constitute an "occurrence" because DRB had foresight of and expected Plaintiffs' damages and because certain claims can only be based on intentional—thus non-accidental—acts and are not an "occurrence."

The Court need not go any further, but if it does, the trial court correctly concluded that the original reason Evanston disclaimed coverage—the Subsidence/Earth-Movement Exclusion—completely bars coverage because Plaintiffs' claims all arise from subsidence and/or earth movement. The trial court also correctly concluded that other exclusions in the Evanston Policies are separate, additional reasons Evanston does not have a duty to defend or indemnify DRB.

DRB's other aspersions of error fall flat. The trial court did not err by incorporating throughout its opinion findings of fact following a bench trial in the related federal case *Dan Ryan Builders, Inc. v. Crystal Ridge Development, Inc.* because DRB previously conceded the accuracy of those facts and waived this argument on appeal by not raising the issue below. The trial court did not adopt verbatim Evanston's proposed findings of fact and conclusions of law, made obvious by its ruling on choice of law, which was adverse to Evanston. Even if it had, it is not reversible error to adopt proposed findings verbatim. And the trial court did not improperly "weigh" the evidence on summary judgment—it took what all parties conceded were undisputed facts and applied them to the relevant law. For these reasons, this Court should affirm the trial court's decision.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary because DRB's appeal lacks merit. *See* W. Va. R. App. P. 18(a)(2). Moreover, the facts and legal arguments in this appeal are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. *See* W. Va. R. App. P. 18(a)(4). If the Court

deems oral argument to be necessary, a Rule 19 argument is appropriate because this appeal involves an assignment of error in the application of settled law. *See* W. Va. R. App. P. 19(a). If the Court holds a Rule 19 argument, a memorandum decision is appropriate.

CROSS-ASSIGNMENT OF ERROR[10]

1. The trial court erred by holding that West Virginia law, and not Maryland law, applies to this coverage dispute because the Evanston Policies were issued in Maryland.

The trial court denied in part Evanston's Motion for Summary Judgment on the grounds that West Virginia, not Maryland, law applied to the coverage dispute. DRB-Appx. 0053. The trial court acknowledged the relevant authority for the choice-of-law analysis before ignoring it. *See id.* at 0051–53. In cases like this one "involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state." Syl., *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 182 W. Va. 580, 390 S.E.2d 562 (1990); *Allstate Ins. Co. v. Hart*, 327 Md. 526, 530, 611 A.2d 100, 102 (Md. 1992) ("[T]here is a limited exception to the rule of *lex loci contractus*, however, when a contractual provision is contrary to Maryland public policy."). It is irrelevant in which state the services under the contract are to be performed; rather, the relevant consideration is where the

[10] Evanston should prevail under either West Virginia or Maryland law. If, however, this Court determines that the trial court's order cannot be upheld under West Virginia law, then it should be upheld under Maryland law.

contract is made." *Triangle Indus., Inc.*, 182 W. Va. at 585, 390 S.E.2d at 567; *Cunningham v. Feinberg*, 441 Md. 310, 107 A.3d 1194 (Md. 2014) ("This doctrine requires that, when determining the construction, validity, enforceability, or interpretation of a contract, we apply the law of the jurisdiction where the contract was made."). The "contract is made at the time when the last act necessary for its formation is done, and at the place where the final act is done." Syl. Pt. 8, *Carper v. Kanawha Banking & Tr. Co.*, 157 W. Va. 477, 207 S.E.2d 897 (1974); *see also Cooper v. Berkshire Life Ins. Co.*, 148 Md. App. 41, 810 A.2d 1045 (Md. Ct. Spec. App. 2002) ("A contract is made in the place where the last act occurs necessary under the rules of offer and acceptance to give the contract a binding effect.").

The trial court ruled that there was no dispute of material fact as to where the relevant insurance contracts were made—at DRB's offices in Maryland. DRB-Appx. 0053. And the trial court acknowledged that Maryland law *did not* offend the public policy of West Virginia. *Id.* Nonetheless, the trial court held that West Virginia law applied due to the "significant connections to West Virginia"—Plaintiffs' state of residence, where the alleged misconduct occurred, where the property at issue is located, and where the lawsuit was brought. *Id.* at 0053. This was error.

The Evanston Policies were formed in Maryland because they were tendered to DRB at its Frederick, Maryland corporate location. *Id.* at 2238. The Evanston Policies insure risks in several states—not just West Virginia. DRB-Appx. 2237. In these circumstances, the default choice-of-law rule applies and the law of the state of

formation—here, Maryland—governs.[11] *See* Syl., *Triangle Indus., Inc.*, 182 W. Va. 580, 290 S.E.2d 562; *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 765 F. Supp. 881, 884 (N.D. W. Va. 1991) (ruling that New Jersey law applied in coverage dispute regarding policy issued to New Jersey corporation operating plant in West Virginia); *Johnson v. Neal*, 187 W. Va. 239, 241, 418 S.E.2d 349, 351 (1992) (per curiam) (reversing trial court's determination that West Virginia law applied and ruling that law of state where policy was issued controlled); *Com. Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 698 A.2d 1167 (Md. Ct. Spec. App. 1992) (Maryland courts follow the rule of *lex loci contractus*, which requires that the construction and validity of a contract be determined by the law of the state where the contract was made); *Aetna Cas. & Sur. Co. v. Souras*, 78 Md. App. 71, 552 A.2d 908 (Md. Ct. Spec. App. 1989) (ruling that insurance policy was issued and policy paid in Maryland and therefore Maryland law applied despite accident occurring in Virginia). This rule makes sense—because the policy issued in Maryland covers risks in multiple states, applying Maryland law reduces the risk of inconsistent applications of the same contract. *Cf. Triangle Indus.,* Inc., 182 W. Va. at 585, 390 S.E.2d at 566–7. It was error to rule otherwise, particularly on the basis that the alleged wrongdoing occurred in West Virginia. *See id.* at 585, 390 S.E.2d at 567 (explaining that state in which services are to occur is irrelevant for choice of law analysis).

[11] Coverage counsel for DRB previously conceded that Maryland law applies to this coverage dispute by applying Maryland law in his communications with Evanston. DRB-Appx. 2687–89.

ARGUMENT

I. Standard of Review

This Court reviews a trial court's entry of summary judgment *de novo.* Syl. Pt. 1, *Painter v. Peavy*, 192 W. Va. 189, 190, 451 S.E.2d 755, 756 (1994). In conducting a *de novo* review, this Court must apply the same standard for granting summary judgment as the trial court: "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." *Id.* at Syl. Pt. 2. "Summary judgment is appropriate if, from the totality of the evidence presented … the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syl. Pt. 2, *Williams v. Precision Coil*, 194 W. Va. 52, 56, 459 S.E.2d 329, 333 (1995). "[T]he party opposing summary judgment must satisfy the burden of proof by offering more than a mere 'scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in a nonmoving party's favor." *Id.* at 60, 459 S.E.2d at 337 (cleaned up).

The "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law." *Westfield Ins. Co. v. Carpenter Reclamation, Inc.,* No. 5:13-CV-1281 at *8, 2014 US Dist. LEXIS 130752 (S.D. W. Va. Sept. 18, 2014), *aff'd*, 614 Fed. Appx. 622 (4th Cir. 2015) (quoting *Tennant v. Smallwood*, 211 W. Va. 703, 706, 568 S.E.2d 10, 13 (2002)). "[W]here the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended." *Id.* (citing *Keffer v. Prudential Ins. Co.*, 153 W.Va. 813, 815–16,

172 S.E.2d 714, 716 (1970)); *U.S. Life Ins. Co. v. Wilson*, 198 Md. App. 452, 18 A.3d 110 (Md. Ct. Spec. App. 2011) (providing that an insurance policy is a contract, and its terms must be give their plain and ordinary meaning). West Virginia follows the "eight-corners" rule, meaning that an insurance company must assess the underlying complaint and the applicable policy when determining whether it must provide a defense or coverage. *See Ohio Sec. Ins. Co. v. K R Enter., Inc.*, No. 1:15-16264, 2017 US Dist. LEXIS 205530, at *3 n.4 (S.D. W. Va. Dec. 14, 2017).

On appeal, the Court may "affirm the judgment of the lower court when it appears that such judgment is correct on any legal ground disclosed by the record, regardless of the ground, reason, or theory assigned by the lower court as the basis for its judgment." Syl. Pt. 2, *Milmoe v. Paramount Senior Living at Ona, LLC*, 247 W. Va. 68, 875 S.E.2d 206 (2022).

II. The trial court correctly ruled that there were no genuine issues of material fact and Evanston was entitled to judgment as a matter of law it has no duty to defend or indemnify DRB for the damages claimed in this litigation.

As a threshold matter, the trial court was correct that Evanston's potential duty, if any, to defend or indemnify has not yet been implicated because DRB failed to satisfy a condition precedent to coverage in the Evanston Policies—actual payment of the self-insured retention. *See Camden-Clark Mem. Hosp Ass'n v. St. Paul Fire & Marine Ins. Co.*, 224 W. Va. 228, 236, 682 S.E.2d 566, 574 (2009) (explaining that insured must establish prima facie case of coverage); *White Pine Ins. Co. v. Taylor*, 233 Md. App. 479, 497, 165 A.3d 624, 633 (Md. Ct. Spec. App. 2017) (providing that insured has burden of establishing that claim falls within scope of coverage). Even if

DRB could surmount this obstacle, Evanston would not have a duty to defend because Travelers continues to defend, and the policy limits have not been exhausted. This Court should agree with the trial court that coverage is not implicated because there can be no "occurrence" of "property damage" or "bodily injury" when damage is foreseen by the insured, which is indisputably the case here.

This Court could affirm the trial court's ruling on any of these grounds without proceeding further. But even if DRB were able to overcome these threshold issues, the Evanston Policies' exclusions preclude coverage. Chief among them, the Subsidence/Earth-Movement Exclusion is a complete bar to coverage because all of Plaintiffs' claims were caused or aggravated by, or arise out of, relate to, result from, or contribute to earth movement. And as the trial court correctly concluded, the Expected or Intended Injury Exclusion, the Breach of Contract Exclusion, the Impaired Property Exclusion, the "Your Work" Exclusion, and the Owned Property Exclusion would also preclude coverage for some of Plaintiffs' claims. By failing to raise them on appeal, DRB waived any argument as to the Mold and Microbial Contamination Exclusion and the Exemplary Damages Exclusion.

A. The trial court correctly ruled that DRB has not satisfied the self-insured retention ("SIR").

DRB's duty to provide its own defense persists until it has exhausted the SIR, and Evanston's obligation to provide coverage to DRB is not triggered until DRB "makes actual payment for the full Self-Insured Retention amount." DRB-Appx. 0441. The Evanston Policies specify, "Compliance with this clause is a condition precedent for coverage under this policy. In the event of the failure of the Insured to comply

with this clause, no loss, cost or expense shall be payable by the Company." *Id.* The Evanston Policies further state that Evanston has the right, *but not the duty*, to defend and settle claims, a provision which has been upheld by the Supreme Court of Appeals. DRB-Appx. 0442; *see also Camden-Clark Mem'l Hosp. Ass'n,* 224 W. Va. at 238, 682 S.E.2d at 576 (ruling the explicit disclaimer of the insurer's duty to defend in a SIR provision of an insurance policy valid); *Sherwood Brands, Inc. v. Great Am. Ins. Co.*, 418 Md. 300, 330, 13 A.3d 1268, 1286 (Md. 2011) ("The non-occurrence of a condition precedent does not constitute a breach, it merely relieves the other party from performing under the contract/policy."). Thus, the plain language of the Evanston Policies *does* "empower" Evanston to decline to defend or indemnify DRB.

Although DRB contends that it "authorized" a contribution towards settlement, the Evanston Policies require actual payment of the SIR, and DRB indisputably never made any payment to Evanston as required by the policy language.[12] Pet'rs' Br. at 52. Moreover, because DRB seeks coverage under five separate Evanston Policies, to the extent each policy was potentially implicated, the full SIR could be $500,000 rather than $100,000. *See* DRB-Appx. 0982–83. Regardless, the purported "authorization" would be insufficient to satisfy the SIR, and the condition precedent to Evanston's duty to provide DRB with a defense and indemnity has not been satisfied. *See Pacific Emp's Ins. Co. v. Domino's Pizza*, 144 F.3d 1270, 1276–77 (9th Cir. 1998) ("It is well recognized that self-insurance

[12] Although it relies upon this "authorization" letter in support of its contention that the SIR provision is not a condition precedent to Evanston's defense and indemnification, DRB fails to cite to this letter in the record before this Court.

retentions are the equivalent to primary liability insurance, and that policies which are subject to self-insured retentions are 'excess policies' which have no duty to indemnify until the self-insured retention is exhausted.").

Contrary to DRB's contention that Evanston "never purported to deny coverage for all or even most of the claims" on the ground that DRB had not satisfied the SIR, the record demonstrates otherwise. Pet'rs' Br. at 52. Evanston first reminded DRB that "satisfaction of the SIR is a condition precedent to coverage[]" in the July 22, 2009 coverage disclaimer letter. DRB-Appx. 2543. Evanston continued, "To date, there is no indication that the SIR has been satisfied and therefore, there is no present obligation for Evanston to defend or indemnify you." *Id.* In the August 25, 2016 supplemental declination of coverage letter, Evanston analyzed the Evanston Policies and disclaimed its duty to defend or indemnify based upon DRB's failure to make full payment on the SIR: "[T]he SIR Endorsement precludes Evanston's potential defense and indemnification obligations under the Policy." *Id.* at 2586. Nowhere, as DRB suggests, does Evanston "merely" reserve its right to assert that DRB's failure to comply with the SIR permits Evanston to disclaim its duty to defend and indemnify. The trial court correctly ruled that Evanston has no duty to defend or indemnify DRB pursuant to the plain language of the SIR provision. This Court should affirm the ruling below on this basis alone.

B. The trial court correctly ruled that Evanston's duty to defend DRB was not triggered because the Evanston Policies are excess to the primary Travelers policy.

DRB all but concedes that because the Travelers policy is primary to the Evanston Policies, Evanston has no duty to defend DRB: "[T]here is no dispute that

DRB is being defended by Travelers." Pet'rs' Br. at 52. A primary insurance policy must be entirely exhausted before coverage under any excess policy begins. *Horace Mann Ins. Co. v. Gen. Star Nat. Ins. Co.*, 514 F.3d 327, 334–35 (4th Cir. 2008) (interpreting West Virginia law and holding that insurance that is not providing primary coverage need not be considered by court); *Brickstreet Mut. Ins. Co. v. Zurich Am. Ins. Co.*, 737 Fed. App'x 133, 136 (4th Cir. 2018) (per curiam) (holding that coverage not triggered under excess policy because primary policy not exhausted); *U.S. Fire Ins. Co. v. Md. Cas. Co.*, 52 Md. App. 269, 447 A.2d 896 (Md. Ct. Spec. App. 1982) ("*Excess* or *secondary* coverage is coverage whereby, *under the terms of the policy*, liability attaches only after a predetermined amount of primary coverage has been exhausted."). DRB's coverage counsel conceded that "we believe that Travelers is primary to Evanston[,]" DRB-Appx. 2689. Because the parties agree that DRB is being defended under the primary Travelers policy, the Court need not consider whether Evanston has a duty to defend DRB. This Court should affirm the trial court's ruling that Evanston has no duty to defend DRB in the underlying civil action.

C. The trial court correctly ruled that there is no "occurrence" under the Evanston Policies because the cause of Plaintiffs' damages was foreseen by DRB.

The trial court correctly ruled that DRB is not entitled to a defense and indemnification under the Evanston Policies because no "occurrence" of "bodily injury" or "property damage" has occurred. *See Camden-Clark Mem. Hosp Ass'n*, 224 W. Va. at 236, 682 S.E.2d at 574 (explaining that insured bears burden of establishing prima facie case of coverage); *White Pine Ins. Co.*, 233 Md. App. at 497, 165 A.3d at 633 (same). The insuring clause within the Evanston Policies obligates Evanston to

"pay those sums that the Insured becomes legally obligated to pay as damages because of "bodily injury"[13] or "property damage"[14] to which this insurance applies." DRB-Appx. 2278. The "bodily injury" or "property damage" must take place in the "coverage territory" during the policy period. *Id.* at 2287.

Bodily injury and property damage liability coverage must be the result of an "occurrence," *id.* at 2287, which is defined in the Evanston Policies as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions[.]" *Id.* at 2289. An "accident" occurs "when a negligent act causes damage that is *unforeseen or unexpected by the insured*." *Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634, 679 A.2d 540, 548 (Md. 1996) (emphasis added). West Virginia courts define "accident" as an act which is not "deliberate, intentional, expected, desired, or *foreseen*" from "the perspective or standpoint of the insured[.]" Syl. Pt. 1, *Columbia Cas. Co. v. Westfield Ins. Co.*, 217 W. Va. 250, 254, 617 S.E.2d 797, 801 (2005) (emphasis added); *Am. Modern Home Ins. Co. v. Corra*, 222 W. Va. 797, 671 S.E.2d 802 (2008) ("[A]n 'occurrence,' in addition to excluding intentional conduct, also excludes conduct that is foreseen and expected."). Thus, both states recognize that

[13] "Bodily injury" is defined as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." DRB-Appx. 2287. Bodily injury does *not* include purely mental and emotional injuries, like stress or anxiety, that lack a physical manifestation. *See, e.g.*, *Cooper v. Westfield Ins. Co.*, 488 F. Supp. 3d 430, 439 (S.D. W. Va. 2020); *see* Pet'rs' Br. at 28 (discussing plaintiffs' fear and anxiety regarding potential earth movement).

[14] "Property damage" includes "[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." DRB-Appx. 2289. Loss of use "shall be deemed to occur at the time of the 'occurrence' that caused it." *Id.*

within the context of insurance coverage, damage that can be *foreseen by the insured* is not an occurrence.

1. The trial court correctly ruled that the claims against DRB do not seek damages for "property damage" or "bodily injury" caused by an "occurrence."

DRB fails to address the trial court's finding that "DRB had foresight and expectation of Plaintiffs' damages," which distinguishes this case from the "*Cherrington* court's ruling that defective workmanship causing . . . property damage constitutes an 'occurrence.'"[15] DRB-Appx. 0058. Instead, DRB compares the instant case with and relies on the Southern District of West Virginia's holding in *Simpson-Littman*. *See* Pet'rs' Br. at 37–40 & *Simpson-Littman Const., Inc. v. Erie Ins. Prop. & Cas. Ins. Co.*, No. CIV.A. 3:09-0240, 2010 US Dist. LEXIS 95378 (S.D. W. Va. Sept. 13, 2010). However, DRB's reliance on *Simpson-Littman* is misplaced. DRB refuses to acknowledge that the result (Plaintiffs' alleged damages) and the means (Lang's alleged negligence) were not unforeseen or unexpected from its perspective. *Id.*

First, the facts in *Simpson-Littman* are different from the instant case because the insured in *Simpson-Littman* did not have material knowledge that the settlement of the soil and fill might be compromised. *See* 2010 US Dist. LEXIS 95378, at *36 ("[T]here is no evidence that either the cause, or the harm to Merlin Bush's home, was expected or intended by [the insured.]"). As the Southern District explained in *Simpson-Littman*, this fact is critical to the outcome. *See id.* at *32–3 (discussing

[15] Instead, DRB myopically focuses on myriad alleged instances of "property damage" while minimizing the requirement that any "property damage" be the result of an "occurrence." Pet'rs' Br. at 38–39; *see* DRB-Appx. 2278 (explaining that insurance only applies to "property damage" if caused by "occurrence" in the "coverage territory").

French v. Assurance Co. of Am., 448 F.3d 693 (4th Cir. 2006), where the Fourth Circuit held no "occurrence" was present when the contractor defectively installed a façade because the contractor's failure was not the result of an accident but from the contractor's failure to satisfy its obligations under the contract).

The record is clear that DRB had "foresight or expectation" of Plaintiffs' alleged damages, which were the result of DRB's conduct. DRB continues to hold tight to its assertion that DRB was merely a homebuilder in the Crystal Ridge Development. Pet'rs' Br. at 41–42.[16] Not so. DRB itself admitted in discovery that it knew full well of the existing subsidence issues and nonetheless chose to "buyout" the rest of the development and complete the development work. DRB-Appx. 2204. It is well established that as of May 2007, DRB became the developer of Crystal Ridge, retaining full control of all operations related to the development. *Id.* at 2204, 2216. Although Lang oversaw the early excavation work, Dan Ryan Builders, Inc. was "there generally while it was occurring." *Id.* at 2217, 235:11–17. DRB took over as developer of Crystal Ridge because DRB knew Lang was having "a lot of trouble with getting work complete in the development." *Id.* at 1024. Lang was "not doing a good job" compacting the soil where homes would be built, and there were specific instances of differential settlement on many of the lots that Lang had purportedly finished slope-filling and -grading. *Id.* at 2215. The contract between Lang and DRB required Lang to provide DRB with compaction reports from an independent contractor, but the relevant tests were not performed and DRB never demanded

[16] DRB does not, because it cannot, support this contention by citing to the extensive record. The Court should thus disregard DRB's blanket disavowal of any development work.

them. DRB-Appx. 2203; *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, No. 1:09CV161, 2013 US Dist. LEXIS 136589, at *5 (N.D. W. Va. Sept. 24, 2013), *aff'd in part*, 783 F.3d 976 (4th Cir. 2015). Instead, DRB moved forward with building the homes that now are the subject of this case. Even if DRB was merely the "homebuilder," it had a duty to ensure that the ground upon which it was building these homes was sound.[17] And although DRB had concerns about the fill of the ground upon which it was building the homes in the Crystal Ridge Development, *see, e.g.*, DRB-Appx. 2215, it turned a blind eye to the issues, did not require testing or remediation, and began building homes. DRB cannot now claim that Plaintiffs' damages were unforeseen or unexpected.

DRB also relies on *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 482, 745 S.E.2d 508, 520 (2013). However, as described above, this case differs from *Cherrington* in an important respect—even using the definitions of "occurrence" and "accident" espoused in *Cherrington*, the facts in this case demonstrate that there was *not* an "occurrence" or "accident":

> In determining whether under a liability insurance policy an occurrence was or was not an "accident"—or was or was not deliberate, intentional, expected, desired, or foreseen—primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue.

[17] As noted above, DRB's continued assertion that it was merely the homebuilder is inaccurate; in mid-2007, DRB became the developer of Crystal Ridge. *See* DRB-Appx. 2216.

Syl Pt. 4, *Cherrington*, 231 W. Va. at 473, 745 S.E.2d at 511. Using this standard, the Supreme Court of Appeals in *Cherrington* determined that the insured—the construction company—did not expect or foresee the property damage. *Id.*

Not so here. As previously explained, Lang contracted with Hornor Brothers to design the infrastructure, which Land then constructed. DRB-Appx. 2202–03. In mid-2005, DRB contracted with Lang to purchase finished, vacant lots on which DRB could construct homes. *Id.* at 2202. Under DRB's direct observation, Lang did "little more than cut soil from the lots to the right of Emerald Drive and place the soil on the lots to the left of Emerald Drive." *Id.* at 2203; 2217. Despite this, DRB deliberately chose to not hire a different excavation company, stop Lang's work once it realized the work wasn't producing the results necessary for safe homebuilding, or remediate the land. *Id.* at 2203; 2216. Instead, it bought out the rest of the development and completed the development work. *Id.* DRB further acknowledged that Lang forewent the contractually required compaction testing for the lots—regardless, DRB proceeded with building homes, without the compaction reports, on lots that it knew were unstable. *Id.* at 2203. Unsurprisingly, this resulted in subsidence issues. *See id.* at 2203 (describing issues with foundation slab of Lot 7). DRB now argues that this was an accident even though it chose to turn a blind eye to development that it *knew* was suspect. *Id.*

Plaintiffs alleged that DRB was in the "business of **planning**, **developing**, marketing, **excavating, constructing,** financing, and selling residential lots and single-family homes in the Crystal Ridge Development." *Id.* at ¶ 16 (emphasis added).

Discovery confirmed this fact. *Id.* at 2202–11; 2214–16. DRB was hands-on for the entirety of the project and knew that the work done by Lang was questionable, at best. *See id.* It strains credulity for DRB to now assert that Plaintiffs' damages were not foreseeable or expected; DRB took over the development because it knew Lang was "not doing a good job," but DRB took no steps to fix the issues. *Id.* at 2215.

2. The trial court correctly ruled that the Evanston Policies do not provide coverage for the intentional torts alleged against DRB.

Plaintiffs allege multiple intentional torts against DRB, including trespass, nuisance, fraudulent misrepresentation, and outrage and infliction of emotional distress. *Id.* at 0164–70. There is no coverage under the Evanston Policies for these claims, which can only be based on intentional acts and thus cannot constitute an "occurrence" under the Evanston Policies.[18] *See State ex rel. Nationwide Mut. Ins. Co. v. Wilson*, 236 W. Va. 228, 235, 778 S.E.2d 677, 684 (2015) (ruling that breach of contract claim and intentional tort claims, including fraud and conversion, were not an "occurrence" and thus did not trigger coverage); *Cooper v. Westfield Ins. Co.*, 488 F. Supp. 3d at 438 ("[B]ecause the claims asserted in the [complaint] are intentional

[18] Plaintiffs have also alleged the tort of outrage and infliction of emotional distress, thereby suggesting that they have triggered an "occurrence" because they suffered "bodily injury." *Id.* at 0169–70. Of course, the tort of outrage, which includes intentional conduct, is not an "occurrence" under the Evanston Policies. *Accord W. Va. Fire & Cas. Ins. Co. v. Stanley*, 216 W. Va. 40, 49, 602 S.E.2d 483, 492 (2004). Similarly, Plaintiffs' claim of "infliction of emotional distress," in addition to being deficiently pleaded, does not qualify as covered "bodily injury" under the Evanston Policies. *See* Ex. 4 at 60; *Daley v. United Servs. Auto Ass'n*, 312 Md. 550, 541 A.2d 632, 636–37 (Md. 1988) (ruling that parents of child killed in automobile accident did not suffer covered "bodily injury" under automobile liability policy where they did not witness the accident and yet brought claims for emotional distress); *see also Cherrington* at 484, 745 S.E.2d at 522 ("In an insurance liability policy, purely mental or emotional harm that ... lacks physical manifestation does not fall within a definition of 'bodily injury' which is limited to 'bodily injury, sickness, or disease.'").

in nature, they are not 'reasonably susceptible of an interpretation' of coverage.").[19] The trial court thus correctly ruled that Plaintiffs' intentional tort claims fail to trigger coverage. DRB-Appx. 0058.

D. The trial court correctly ruled that even if the claims asserted involved an "occurrence," the Subsidence/Earth-Movement Exclusion in the Evanston Policies would preclude any duty to defend or indemnify because all of Plaintiffs' claims relate to earth movement.

Notwithstanding the conditions precedent to Evanston's duty to defend and indemnify—including that DRB failed to make full payment of the SIR, DRB is being defended under the Traveler's primary policy, and there was no "occurrence"—the trial court also correctly held that numerous exclusions preclude coverage of Plaintiffs' claims against DRB under the Evanston Policies. Evanston acknowledges that exclusions "will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated." Syl. Pt. 5, *Nat'l Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734, 356 S.E.2d 488 (1987), *overruled on other grounds by Parsons v. Halliburton Energy Servs., Inc.*, 237 W. Va. 138, 785 S.E.2d 844 (2016). Thus, an insurer "seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that

[19] As discussed *infra*, many courts have upheld the exclusion of coverage under intentional act exclusion provisions within insurance policies. *W. World Ins. Co. v. Hartford Mut. Ins. Co.*, 600 F.Supp 313 (D. Md. 1984) (finding that insurance coverage did not extend to injury caused by intentional act of police officer when policy had intentional act exclusion); *State Farm Mut. Auto Ins. Co. v. Treas*, 254 Md. 615, 255 A.2 296 (Md. 1969) (ruling that driving over women standing in front of his car was not an accident covered under liability policy); *see also Horace Mann Ins. Co. v. Leeber*, 180 W. Va. 375, 376 S.E.2d 581 (1988) (upholding intentional act exclusion when allegations of intentional sexual misconduct were made under homeowner's liability policy).

exclusion." *Id.* at Syl. Pt. 7. The trial court correctly ruled that Evanston met its burden in proving the undisputed material facts as to each exclusion.

The trial court correctly ruled that DRB is not entitled to a defense or indemnification from Evanston because all of Plaintiffs' alleged claims and damages fall within the unambiguous Subsidence/Earth-Movement Exclusion in the Evanston Policies.[20] DRB-Appx. 2254. This exclusion precludes coverage for "bodily injury" or "property damage" that is "caused by, arising out of, relating to, resulting from, contributing to, or aggravated by any actual or alleged 'movement of land or earth.'" *Id.* "Movement of land or earth" is defined as "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." *Id.*

The Subsidence/Earth-Movement Exclusion plainly states that all *causes* of earth movement are excluded, whether the causes set forth are manmade or natural. Because all causes of action alleged against DRB and as supported by facts developed through discovery are based on damages (whether improper excavation, soil movement in conjunction with alteration of the flow of water, ground instability, slope slippage, foundation/basement/wall cracks, etc.) solely caused by earth movement, there simply is no coverage under the Evanston Policies for Plaintiffs' claims. As such, the trial court correctly ruled that Evanston has no duty to defend or indemnify DRB.

[20] Even if Evanston were estopped from raising other grounds for disclaiming coverage, the Subsidence/Earth-Movement Exclusion completely precludes coverage for Plaintiffs' claims.

DRB states that "one focus [of Plaintiffs' claims] was admittedly a large landslide that affected a few homes in a relatively isolated part of the development." Pet'rs' Br. at 21. However, the citation used by DRB in support of that statement, Plaintiffs' Initial Complaint, paints a different picture: "[a]s a direct and proximate result of such acts and omissions, the soil, subsoils, land and earth beneath, under and around the land of the Plaintiffs ***and the Crystal Ridge Development as a whole*** washed away, fell away, slipped, or otherwise subsided." DRB-App. 0159 at ¶ 23 (emphasis added). And regardless of whether some of the slope and soil issues have since been repaired, Plaintiffs still allege that "[s]ince Plaintiffs first discovered the aforementioned slippage, the land and soil in the Crystal Ridge Development continued to subside, slip and fall away, and will continue to do so in the future." DRB-App. 0160 at ¶ 24. Plaintiffs continue and allege that DRB "embarked on an improperly planned and designed attempt to abate the subsidence causing further damage to the lots and homes therein and to the Development as a whole," which resulted in "damages to the Plaintiffs and the Crystal Ridge Development." *Id.* at ¶ 25. This case has not simply "morphed" from a landslide. Instead, the large landslide to which DRB refers was just the beginning of Plaintiffs' subsidence claims.

In two instances in its brief, DRB takes issue with both Evanston's and the trial court's purported failure to look beyond the four corners of the complaint, stating the "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." Pet'rs' Br. at 20, 28. Ironically, DRB then cites self-serving passages from Plaintiffs' Third Amended Complaint. *Id.* at 23 ("Most of the "property damage" for which 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 [earth movement] exclusion.").[21] However, the trial court correctly rejected DRB's flaccid attempts to create coverage by re-characterizing Plaintiffs' claims as being not caused by or relating to earth movement even though the evidentiary record demonstrates otherwise. *See Horace Mann Ins. Co.*, 180 W. Va. at 381, 376 S.E.2d at 587 (holding that a "transparent attempt" to trigger insurance coverage by mis-characterizing claims subject to exclusions under the guise of covered claims does not create an insurer's duty to defend). As described below, the written discovery responses, deposition testimony, and expert testimony supports Plaintiffs' allegations regarding earth movement, which are thus barred from coverage.

1. Plaintiffs' deposition testimony and written discovery responses demonstrate that the trial court correctly ruled that Plaintiffs' alleged damages were caused by or relate to earth movement.

The allegations in Plaintiffs' Initial Complaint, inclusive of the allegations listed in DRB's Brief as Nos. 1–5 and their subparts, point to issues that caused or were caused by subsidence and earth movement, which in turn resulted in Plaintiffs'

[21] Perhaps most telling is Plaintiffs' prayer for relief in their Initial Complaint, which requests compensatory damages for "all costs of repair, restoration, and stabilization necessary to return" Plaintiffs' lots and homes and the Crystal Ridge Development to their/its "intended appearance and condition prior to any subsidence[.]" DRB-Appx. 0171. The second and third amended complaints purportedly supplement, rather than supplant, the initial complaint.

damages. Although DRB drafted a laundry list of purported damages, it fails to address whether each was "caused by, arising out of, relating to, resulting from, contributing to, or aggravated by any actual or alleged 'movement of land or earth." Pet'rs' Br. at 23–24. But the *cause* of each of Plaintiffs' alleged damages is earth movement. This flaw in DRB's argument is apparent if the Court looks at the same discovery responses and deposition testimony that DRB relies upon:

Helen and Zhen Weng — DRB included *some* of the damages alleged by the Weng Plaintiffs and suspiciously left out the alleged causes of the damages, as reported by way of Plaintiffs' discovery answers: "In December 2007, the Wengs noticed that the ground between Lot Nos. 4 and 5 has big cracks in them." DRB-Appx. 1146. "By January 2008, the soil started to slip away." *Id.* Moreover, as excerpted below during the deposition of Plaintiff Helen Weng, while the Weng Plaintiffs may have experienced a swampy backyard, that condition was caused by earth movement under or around their home. "[T]he house started sliding not too soon after we moved in." *Id.* at 2653 at 38:23–24. Indeed, counsel for Plaintiffs admitted that Plaintiffs only seek damages for issues related to "soil instability" and dispelled DRB's position that any damages claimed by Plaintiffs are not related to subsidence/earth movement:

> Q. Have you expended any money in an attempt to repair the sink top?
>
> A. Not at this moment.
>
> MR. ROMANO: Now if I can help clarify the — whatever the problem is with the sink top, **unless it's related to the soil instability, would not be a damage in this case**. She doesn't know that.

Id. at 2653 at 51:18–24. (emphasis added).

Jason and Alison Ross — "The backyard has slipped and subsided over time and has diminished due to increased slope." *Id.* at 1149.

Shanon and Heather Pitsenbarger — "There are still obvious signs of earth movement. . . . First noticed earth movement in the slope in their first six months or so of residency." *Id.* at 1158.

Michael and Maribeth Beckner — "The Beckners requested the drainage ditch be moved further away from their home and paid to have underground drainage from down spouts to mitigate the subsidence." *Id.* at 1163.

Randall and Lisa Zirkle — "The Zirkles have problems with the bank moving behind their house. . . . The hill beside the Zirkle's house appears to be moving." *Id.* at 1164–65.

Frank Williams — While discussing the cause of the hairline crack in his basement, Mr. Williams confirmed the crack was caused by settlement:

> Q. You said above the area that slipped?
>
> A. Above the area whether the slab had to slip for the wall to crack. There was a—there was a settlement there.

Id. at 2758–59 at 42:23–43:2.

Diana Williams —Mrs. Williams confirmed that water was entering her basement due to settlement:

> A. We came home from church one afternoon and water was settling outside of our son's bedroom.

Id. at 2764 at 17:5–6.

Richard Alix — Although Mr. Alix complained of issues with the plumbing and finishes in his home, relief for these issues was not requested by Plaintiffs. *See id.* at 0171 (seeking relief from for "all costs of repair, restoration, and stabilization necessary to return" Plaintiffs' lots and homes and the Crystal Ridge Development to their/its "intended appearance and condition prior to any subsidence"). Because Mr. Alix's complaints of unfinished trim and failure to glue the plumbing in his home were not claims that, when repaired, would return to their "intended appearance and condition prior to any subsidence," the issues discussed in Mr. Alix's deposition have no bearing on the underlying lawsuit. Further, DRB failed to mention that Mr. Alix complained of "slippage on the slope behind the house [that] needs fixed and addressed[.]" *Id.* at 5–6. Mr. Alix described the chronic earth movement issues:

> Q. When did you observe the issues that you currently have with the soils around your home that are not within the slope behind your home?
>
> A. Over time, after everything was completed with erosion and the way the soil would start to sink in spots where they had put containment units or ditches that they dig that they didn't completely fill in. So over periods of time, it continues to have problems.

Id. at 2961 at 106:13–20. Mr. Alix also described extreme measures he had to take to get his vehicle into his garage:

> A. After moving into the house in January or February—I don't remember the exact date—but the driveway at the entrance of the garage dropped almost two feet—excuse me—maybe a foot and a half. When it dropped it literally sunk to where I had to put railroad ties and other things just to get a car that I own up into the garage.

> And around that same time, the sidewalk in the front of the house did the same thing. It buckled and twisted and was pulling away from the house. There was a lot of subsidence. There was things just disappearing around the house, shrubs, but the driveway itself had absolutely dropped. It was pooling full of water and mud.

Id. at 2964 at 156:2–15.

Jeff Wright — Neither the leaky basement window nor the gas line leak are the subject of the underlying lawsuit. Additionally, each of these items was repaired by Dan Ryan Builders pursuant to a warranty. *See id.* at 2795–97. In discussing a conversation he had with DRB regarding the hill behind his home, Mr. Wright testified that, "[t]hey just said it's going to slip. The hill is going to fall eventually. It's going to slip like it did up above." *Id.* at 2997 at 61:20–22.

Jean Haught — Although Ms. Haught discussed issues related to plywood, carpet on the stairs, and her sump pump, Plaintiffs did not seek relief for those issues. Instead, the issues for which Mrs. Haught is seeking damages include mud that "slid":

> Q. Can you tell me what issues did you have with the slope behind your home in Crystal Ridge?
>
> A. The first time that it slid, the mud actually came down and rippled and it just—I can't imagine—well, I can't explain to you how it—I mean, it just actually just fell and slid down. . . . But so it would slide. They came in. They patched it all up. They promised to put some kind of footing—some kind of—I can't think of the word. It's like a ground cover on the bank to hold the dirt in and they never did that.

Id. at 2801–02 at 50:13–19; 51:20–24.

Charles Dunn — Issues Mr. Dunn experienced with not having a sump pump installed in his home, electrical conduit, and broken garage flooring are not issues as

to which Plaintiffs made claims in this lawsuit. Instead, the issues as to which Mr. Dunn filed suit include soil erosion and settlement, which led to large cracks in his basement foundation:

> A. And I don't remember when it was specifically but our driveway subsided pretty significantly against the garage and you could see—you know, of course the lot wasn't seeded but there was areas where you could see erosion around our home. So again, I don't remember at what point but [it] settled significantly around our front of our house under the sidewalk.
>
> . . .
>
> Well, a few years ago, we had to repair cracks and repaint the foundation because of the settlement left the black waterproofing exposed and there was several cracks that were unappealing, so we repaired those, you know, the best we could and repainted.

Id. at 2822–23 at 23:3–9; 25:8–12. Mr. Dunn also described a large ditch that he had to continually refill due to continued subsidence. *See id.* at 2977 at 23:3–9.

William Finch — The issues with Mr. Finch's sidewalk, and why it would collect water, is because "it's gradually over time kind of sank." *Id.* at 2834 at 23:2–3.

As demonstrated above, for each of Plaintiffs' claims, the *cause* of such damages was earth movement of some kind, including 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.

2. Expert testimony demonstrates that the trial court correctly ruled that all damages alleged by Plaintiffs were caused by earth movement.

In Plaintiffs' initial expert witness disclosure, they disclosed that Lawrence Rine will testify as to "Defendants' failure to consider the soils and formation underlying the Development prior to excavation and construction of residences, groundwater management, the storm water drainage system for the Development, and other deficiencies which **caused or contributed to soil movement** at the Development," and "other deficiencies which **caused or contributed to soil movement** at the Development among other deficiencies in the engineering, planning and construction of the Development." *Id.* at 1169 (emphasis added). Plaintiff's supplemental expert witness disclosure stated, "Mr. Rine is expected to testify that a proper ground water intercept collection and transport system must be installed at the Development to prevent future soil/slope movement resulting from the stormwater collection system currently in place," and added that

> Mr. Rine is expected to testify that the current stormwater collection and drainage system was inadequate **given the soils underlying the Development** and, therefore, requires upgrade, repair and/or replacement including, but not limited to, lined and grassed surface swales, drop inlets, subsurface pipe collection system with outlets to stable areas. Mr. Rine is expected to further opine that the current system installed by the Defendants is inadequate and not properly functioning **resulting in the history of soil/slope movement** prior to construction of the development which continues today.

Id. at 1170 (emphasis added). Although DRB insists that Plaintiffs' damages were not all caused by earth movement, it fails to point to any evidence in support thereof. Plaintiffs have disclosed no expert, for example, to opine as to the standard of care

regarding the fixtures and finishes within their homes. Instead, Plaintiffs focus on recovering their damages caused by earth movement, and their own expert unequivocally agrees that the cause of Plaintiffs' damages is earth movement.

3. The trial court did not consider Plaintiffs' Sixth Supplemental Disclosure of Experts because it was not in the summary judgment record.

DRB suggests that the trial court erred when it did not consider Plaintiffs' sixth supplemental expert disclosure[22] "when making its ruling that 'all damages alleged and claimed by Plaintiffs fall within the unambiguous Subsidence/Earth Movement exclusion.'" Pet'rs' Br. at 29–30. DRB fails to provide a citation in the joint appendix in support of its contention. And critically, the trial court did not consider Plaintiffs' Sixth Supplemental Disclosure of Experts because it was served on March 18, 2024—*after* DRB and Evanston filed their cross motions for summary judgment, responses, and replies. *See* DRB-Appx. 0050 at ¶ 36. The Sixth Supplemental Disclosure thus was not before the trial court on summary judgment.

Even if the trial court had considered Plaintiffs' latest supplemental expert disclosure, it would not have changed the trial court's ruling because any damage caused by or resulting from earth movement is excluded under the Evanston Policies—including damage from water that infiltrates as a result of soil movement. *See* Pet'rs' Br. at 27. Because Plaintiffs' alleged damages were unquestionably caused by, arise out of, relate to, result from, were contributed to, or were aggravated by the

[22] Although not included in the Appendix Record—because it was not before the trial court on summary judgment—Plaintiff's latest supplemental expert disclosure describes damage to Plaintiffs' basements, including wet areas and faulty compaction of soil beneath the homes.

movement of land or earth, the trial court correctly ruled as a matter of law that the Subsidence/Earth-Movement Exclusion applies, and that DRB is not entitled to coverage under the Evanston Policies. If this Court agrees that the Subsidence/Earth-Movement Exclusion applies, it need not assess the remaining exclusions.

E. The trial court correctly ruled that additional exclusions in the Evanston Policies would also completely preclude coverage.

1. Expected or Intended Injury Exclusion

DRB argues that the Expected or Intended Injury exclusion does not apply to bar coverage for most of Plaintiffs' claims, without clearly articulating which of Plaintiffs' claims DRB is addressing. Pet'rs' Br. at 45. DRB halfheartedly tries to distinguish a case that the trial court did not even mention in its order.[23] *Id.* (citing *Gen. Cas. Co. of Wisconsin v. Image Builders Inc.*, No. 1:09cv159, 2010 US Dist LEXIS 115631 (W.D.N.C. Oct. 29, 2010)).[24] However, as the trial court correctly concluded, the Expected or Intended Injury exclusion bars coverage for Plaintiffs' claims for trespass, fraud, intentional misrepresentation, breach of contract, breach of warranty, and the tort of outrage. *Id.* at 65–6.

The Evanston Policies exclude coverage for "'bodily injury' or 'property damage' expected or intended from the standpoint of any insured."[25] *Id.* at 2278. An insured

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[23] As discussed *infra*, this is just another example of how the trial court's order deviated from the one provided by Evanston. *Compare* DRB-Appx. 0033–34 *with id.* at 3368–69.

[24] As Evanston explained in the summary judgment briefing, the Western District of North Carolina correctly concluded that no coverage existed for a claim involving allegedly inadequate slope construction because there was no "occurrence"—"[s]lope failure is the natural consequence of faulty site preparation." *Id.* at 2190.

[25] The expected or intended injury exclusion "does not apply to 'bodily injury' resulting from the use of reasonable force to protect persons or property." DRB-Appx. 2278. This exception to the exclusion is clearly inapplicable in this case.

may be denied coverage under this exclusion if the insured committed an intentional act and expected or intended the resulting damage. Syl. Pt. 7, *Farmers & Mech's Mut. Ins. Co. of W. Va. v. Cook*, 210 W. Va. 394, 557 S.E.2d 801 (2001); *see also Harleysville Mut. Cas. Co. v. Harris & Brooks, Inc.*, 248 Md. 148, 235 A.2d 556, 557 (Md. 1967) (ruling that insurer not obligated to provide coverage to insured if "accident" in question and resulting damage was "not 'an event that takes place without one's foresight or expectation'"). Thus, under either West Virginia or Maryland law, the inquiry is whether the insured's action was intentional, and the result expected or intended.

As discussed in the trial court's order regarding "occurrence," DRB's actions were intentional—they negotiated for, purchased, constructed, and developed the subdivision. DRB-Appx. 0066. Recognizing this fact, Plaintiffs alleged claims that require an element of intentional conduct with foreseeable resulting harm. *Id.* Counts IV through VIII of Plaintiffs' Third Amended Complaint—trespass, fraud, intentional misrepresentation, breach of contract, breach of warranty, and the tort of outrage—all fall in this category and are therefore precluded from coverage.

2. Breach of Contract Exclusion

The trial court correctly held that Plaintiffs' claims for breach of contract and/or breach of warranty would also be excluded from coverage under the Evanston Policies by the Breach of Contract Exclusion. The language of the Breach of Contract Exclusion could not be any clearer: Evanston has no duty to defend or indemnify DRB against Plaintiffs' claims of breach of contract and/or breach of warranty. DRB-Appx. 0510. DRB even acknowledges in its brief that "DRB is a homebuilder that *contracted*

with Plaintiffs." Pet'rs' Br. at 45. Moreover, each Plaintiff that purchased a lot and had a home built by DRB was given a home warranty. The trial court correctly ruled that the Breach of Contract Exclusion applies to Plaintiffs' claims of breach of contract and/or breach of warranty.

3. Impaired Property Exclusion

The trial court correctly held that Plaintiffs' claims for purely economic damages, including the loss of value or loss of use of their properties, are also excluded from coverage by the Impaired Property Exclusion. The Evanston Policies exclude coverage for "property damage" to "impaired property"[26] or property that has not been physically injured if that damage arises from "[a] defect, deficiency, inadequacy or dangerous condition in 'your product' or 'your work'" or "[a] delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms." DRB-Appx. 2280. The Impaired Property Exclusion applies to property, other than the insured's work or product, that is either not physically injured or that is impaired. Property is impaired only if it can be restored to use by repair, replacement, adjustment or removal of the insured's work. Therefore, a plaintiff's purely economic damages, including loss of use of the property, are not recoverable under a policy containing an impaired property exclusion. *M Consulting & Export, LLC v. Travelers Cas. Ins. Co. of Am.*, 2 F. Supp. 3d 730, 736–37 (D. Md. 2014).

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[26] "'Impaired property' means tangible property, other than . . . 'your work', that cannot be used or is less useful because: a. It incorporates . . . 'your work' that is known or thought to be defective, deficient, inadequate or dangerous; or b. You have failed to fulfill the terms of a contract or agreement, if such property can be restored to use by: a. The repair, replacement adjustment or removal of . . . 'your work'; or b. Your fulfilling the terms of the contract or agreement." DRB-Appx. 2287.

Thus, as to each of Plaintiffs' claims that DRB's actions caused loss of value and loss of use of Plaintiffs' homes, and their homes or the lots upon which they built their homes are not physically damaged by the earth movement of the ground and/or adjoining slope(s) but can allegedly be restored to use by repair, replacement, adjustment or removal of the insured's work, the trial court correctly held that such claims are not covered under the Evanston Policies.

4. The "Your Work" Exclusion

The trial court also correctly held that Plaintiffs' claims related to planning, developing, marketing, excavating, constructing, financing, and selling lots and homes in the Crystal Ridge Development are also excluded from coverage under the Evanston Policies by the "Your Work" Exclusion. The Evanston Policies exclude coverage for ""property damage" to "Your Work" that arises out of "Your Work" and is included in the "products-completed operations hazard[,]" but does not include damaged work performed by a subcontractor. DRB-Appx. 2280. "Your Work" includes "[w]ork or operations performed by you or on your behalf" and "[m]aterials, parts, or equipment used in connection with" that work. *Id.* at 2290.

DRB's repeated contention that it was merely the "homebuilder" is inaccurate. Plaintiffs allege issues with the conditions of their homes and properties, and DRB performed extensive planning, permitting, excavating, and developing. Therefore, to the extent that Plaintiffs complain of any "property damage" that is the result of deficient or defective work within the development, the trial court correctly ruled that the "Your Work" exclusion in the Evanston Policies applies and precludes coverage of

the same. *See Wilson*, 236 W. Va. at 236–7, 778 S.E.2d at 685–6 (ruling that "Your Work" exclusion precluded coverage for contractor's allegedly defective work).

5. The Owned Property Exclusion

The trial court correctly held that Plaintiffs' claims related to any property in the Crystal Ridge Development that was owned by DRB are excluded from coverage under the Evanston Policies by the "Owned Property" Exclusion. The Evanston Policies exclude coverage for "property damage" to "[p]roperty you own, rent, or occupy." DRB-Appx. 2280. DRB does not deny that it owned property at the Crystal Ridge Development. Pet'rs' Br. 51. Instead, DRB vaguely states that the damages sought by Plaintiffs "are for property damage that occurred while they and not DRB owned the properties." *Id.* However, the Initial Complaint is replete with examples of DRB's ownership of property within the Crystal Ridge Development. DRB-Appx. 0154–72 at ¶ 17 ("[T]he Dan Ryan Defendants, or their predecessors in interest, acquired an undeveloped tract or parcel of land where the Crystal Ridge Development was to be located."); *id.* at ¶ 55 ("The Dan Ryan Defendants . . . created and permitted to exist dangerous and hazardous conditions on Plaintiffs' lots and/or within the common areas of Crystal Ridge Development[.]"). Thus, Plaintiffs alleged that DRB acquired land in the Development and complained of dangerous conditions on Plaintiffs' lots *and* within the common areas of the Development.

Discovery confirmed Plaintiffs' suspicions that DRB owned property in the development. *See, e.g.*, DRB-Appx. 2202 (explaining that under June 30, 2005 Lot Purchase Agreement, DRB would purchase finished, vacant lots for construction of single-family homes); *id.* at 2204 (reflecting 2007 buyout of remaining lots within

development and DRB's completion of development work). Some of this property was clearly owned by DRB prior to Plaintiffs' purchase. *See id.*; *see also Dan Ryan Builders, Inc.*, 239 W. Va. at 552–53, 803 S.E.2d at 522–23. Thus, the trial court did not err when it ruled that the owned property exclusion bars coverage.

6. DRB has waived any argument on appeal as to the Mold and Microbial Contamination Exclusion and Punitive or Exemplary Damages Exclusion.

In paragraphs 95–102 of its *Amended Order*, the trial court granted Evanston's motion for summary judgment regarding the Mold and Microbial Contamination Exclusion and the Punitive or Exemplary Damages Exclusion. DRB-Appx. 0071–72. The trial court ruled that "Plaintiffs' claim for damages resulting from mold, fungus, or mildew infiltration are barred by the Mold and Microbial Contamination Exclusion" and "any potential award of punitive damages to Plaintiffs is excluded from coverage under the Evanston Policies." *Id.* However, DRB failed to raise any issue in its brief pertaining to these rulings. Therefore, DRB has unequivocally waived any arguments as to these exclusions. *See* Syl. Pt. 6, *Addair v. Bryant*, 168 W. Va. 306, 284 S.E.2d 374 (1981) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived."); *see also Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W.Va. 135, 140 n. 10, 506 S.E.2d 578, 583 n. 10 (1998) ("Issues not raised on appeal or merely mentioned in passing are deemed waived.").

F. The trial court's findings of fact were not made in error, and DRB waived its right to raise the issue on appeal.

DRB takes issue with the trial court incorporating findings of fact made by the United States District Court for the Northern District of West Virginia following a bench trial in a case brought by DRB against, among others, Lang.[27] But DRB previously conceded the accuracy of the facts in the federal court proceeding. The first sentence of the Fourth Circuit's opinion reads, "We briefly summarize the relevant facts, which are undisputed." *Dan Ryan Builders, Inc.*, 783 F.3d at 978. The sentence is followed by Footnote No. 1, which reads, in part, "Dan Ryan concedes that "[t]he district court's findings of fact are beyond reproach." *Id.* at fn 1. Therefore, DRB has already conceded that it does not take issue with the findings of fact made by the Northern District of West Virginia, inclusive of the facts relied upon the trial court in its order. *See Dan Ryan Builders, Inc.*, 2013 US Dist. LEXIS 136589.

The trial court did not "pull[] facts from a published federal opinion involving *very different parties* and adopt[] them without question[,]" as suggested by DRB. Pet'rs' Br. at 54. Instead, this state-court civil action operates within the same nucleus of operative facts as the federal case—the main difference being the DRB is a defendant, rather than a plaintiff, in the case at hand. It thus begs the question of

[27] As discussed in more detail *supra*, the Supreme Court of Appeals has twice detailed the facts at issue in this case. *See* W. Va. 549, 803 S.E.2d 519 (2017); No. 18-0579, 2020 W. Va. LEXIS 741 (W. Va. Nov. 6, 2020). In its 2017 opinion, the federal-court action was squarely at issue because certain third-party defendants were claiming *res judicata* based upon the ruling in the federal-court issue. *Id.* at 239 W. Va. 549, 803 S.E.2d 519. In holding that *res judicata* applied, the Supreme Court of Appeals found it significant that "both the federal action and the state action rely upon the same facts, and are virtually identical in terms of time, space, and origin." *Id.* at 560, 803 S.E.2d at 530. Thus, any objection by DRB that the federal-court opinion deals with a different case is meritless.

whether (and why) DRB wishes to take issue with the trial court's use of the same facts that DRB relied upon in the federal case.

Even after ratifying the findings of fact made by Northern District of West Virginia, DRB waived this argument by failing to identify with any specificity the facts with which it takes issue, and it did not "direct the court's attention to relevant portions of the record which sustain the propositions [it] raise[s]." *Addair*, 168 W. Va. at 320, 284 S.E.2d at 383; *see also Quackenbush v. Quackenbush*, 159 W. Va. 351, 352, 222 S.E.2d 20, 21 (1976) (ruling arguments in appellant's brief waived where appellant failed to direct the court's attention to the relevant portions of the record wherein the issues raised on appeal arose). And instead of availing itself of the facts in this state-court matter—as it now insists Evanston and the trial court should have done—DRB hypocritically suggested that the trial court adopt testimony from the bench trial in the Northern District of West Virginia. *See* DRB-Appx. 3261–65 at ¶¶ 3, 8, 12–25.

DRB's prior ratification of the district court's findings of fact, failure to identify any findings of fact made in error, and suggested use of trial testimony from the district court all demonstrate that DRB's argument is futile and waived. Therefore, the trial court's findings of fact and conclusions of law were not made in error.

G. The trial court did not err in adopting Evanston's proposed Findings of Fact and Conclusions of Law.

DRB complains that the trial court erroneously adopted verbatim Evanston's proposed findings of fact and conclusions of law. Pet'rs' Br. at 57. DRB's contention is factually inaccurate. The trial court clearly did not adopt Evanston's proposed order

verbatim; if it had, it would have ruled in Evanston's favor on the choice-of-law issue. *See* DRB-Appx. 0051–53; *supra* at 13–16 (cross-assigning as error ruling regarding choice of law). Instead, the trial court's 32-page amended order thoroughly recites the undisputed facts before making conclusions of law. *See id.* at 0042–73.

Even if DRB were correct, the adoption of verbatim proposed findings and conclusions is not reversible error. "[E]ven when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *State ex rel. Cooper v. Caperton*, 196 W. Va. 208, 214, 470 S.E.2d 162, 168 (1996) (internal quotation marks omitted); *see id.* ("As an appellate court, we concern ourselves not with who prepared the findings for the circuit court, but with whether the findings adopted by the circuit court accurately reflect the existing law and the trial record."). Here, as in *Caperton*, the trial court carefully reviewed the parties' proposed orders in light of the extensive record and summary judgment briefing before adopting proposed findings and conclusions. Thus, there was no error. *See id.* ("[W]e note that the circuit judge in this case did not announce a decision prior to the submission of proposed findings of fact and conclusions of law. In this important respect, the circuit judge followed the recommended procedure in federal cases involving proposed findings of fact and conclusions of law. Accordingly, we find no irregularity in the procedure followed by the circuit court." (cleaned up)).

DRB provides no support for its insinuation that the trial court failed to independently make findings of fact and conclusions of law. Instead, it cites *Gross v. Gross*, 196 W. Va. 193, 469 S.E.2d 646 (1996), a per curiam opinion *affirming* a family

law master's decision to adopt one of the parties' proposed findings of fact and conclusions of law. The Supreme Court of Appeals concluded that "[i]f the findings of fact are objectively consistent with the evidence, and if the conclusions of law are appropriate, given the state of the law at the time, the Court must infer that the family law master complied with his duties, even if it outwardly appears that he simply adopted the findings and conclusions of an attorney for one of the parties." *Id.* at 197, 469 S.E.2d at 640.

As both our Supreme Court and this Court have observed, "[a]lthough we liberally construe briefs in determining issues presented for review, issues which are not raised, and those mentioned only in passing but are not supported with pertinent authority, are not considered on appeal." *R & D Towing, Inc. v. Plaza Ins. Co.*, No. 23-ICA-243, at *5, 2024 W. Va. App. LEXIS 188 (W. Va. Ct. App. July 1, 2024); *State v. Lilly*, 194 W. Va. 595, 605 n.16, 461 S.E.2d 101, 111 n.16 (1995) (ruling that cursory treatment of issue insufficient to raise it on appeal). So too here. DRB's complaints that the trial court did not rule in its favor, and its failure to failure to raise the issue and provide the Court with supportive, pertinent authority, does not rise to the level of an issue that should be considered on appeal, let alone a reversible error.

H. The trial court did not err when it made findings of fact and conclusions of law based upon the evidentiary record.

DRB is grasping at straws with its argument that the trial court erred when it weighed the evidence and made findings of fact in Evanston's favor. *See* Pet'rs' Br.at 59–61. DRB ignores the fact that it too filed for summary judgment and asserted that additional discovery was not needed to determine this coverage question and there

were no genuine issues of material fact. *See generally* DRB-Appx. 0880–945. DRB cited the applicable summary judgment standards,[28] filed a cross motion for summary judgment, and in doing so, indicated that it did not believe there were any genuine issues of material fact to preclude the trial court from granting summary judgment on the coverage issues. *See* DRB-Appx. 0909; Syl. Pt. 1, *Cherrington*, 231 W. Va. 470, 745 S.E.2d 508 (ruling that "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law"). Although DRB now opposes the Court's award of summary judgment, it fails to "present some specific evidence that the facts are in dispute." *Miller v. Hatton*, 184 W. Va. 765, 769, 403 S.E.2d 782, 786 (1991). On appeal, DRB neither identifies specific facts that the trial court improperly "resolved" nor supports its argument with facts in the record demonstrating that the trial court's factual findings are clearly erroneous.

The trial court did not "inexplicably reject DRB's evidence entirely" and instead "accept[] each and every piece of evidence Evanston offered." *See* Pet'rs' Br. at 58. Instead, the trial court did *exactly* what it needed to do—it *viewed and weighed the*

[28] As citied in DRB's *Brief in Support of Motion for Summary Judgment*, Rule 56 of the West Virginia Rules of Civil Procedure states, "judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and [] the moving party is entitled to a judgment as a matter of law." *See* DRB-Appx. 0908 and W. Va. R. C. Pro. 56(c) (1998). DRB continued and stated that "the underlying facts and all inferences are viewed in the light most favorable to the nonmoving party[.]" *See* DRB-Appx. 0909 and *Precision Coil, Inc.*, 194 W. Va. at 60, 459 S.E.2d at 337 . In order to defeat a motion for summary judgment, the nonmoving party "must satisfy the burden of proof by offering more than a mere 'scintilla of evidence' and must produce evidence sufficient for a reasonable jury to find in [the] non-moving party's favor." *Id.* The nonmoving party's evidence "must contradict the showing of the moving party *by pointing to specific facts demonstrating that, indeed, there is a 'trialworthy' issue.*" *Id.* (emphasis added).

evidence in the light most favorable to DRB, the nonmoving party,[29] cited West Virginia caselaw regarding insurance coverage,[30] and made findings of fact and conclusions of law based upon the evidentiary record before it. *Id.*

If DRB has concerns about the complexity of this case and the trial court's ability to assess the evidence and apply it to the law, it should not sought summary judgment. And DRB fails to identify what "motive and intent are present" that might discourage the trial court from granting summary judgment. Pet'rs' Br. at 58 (arguing that "the Court has warned that trial courts must be cautious in granting summary judgment motions in cases dealing with motive and intent"). DRB fails to identify the "conclusory allegations, improbable inferences, and unsupported speculation" that are contrary to the unidentified "mountain of evidence" DRB presented. *Id.* at 58–59. For these reasons, the trial court did not err when it made findings of fact pursuant to the evidentiary record before it.

III. The trial court correctly concluded that Evanston was not estopped from asserting additional reasons it did not have a duty to defend or indemnify DRB.

DRB continues its unfounded, and in the context of this case, ultimately inconsequential,[31] argument that Evanston should be estopped from asserting additional grounds for denying coverage outside of those specifically asserted in its July 22, 2009 initial coverage denial letter. In keeping with well-established law, the

[29] Although both DRB and Evanston moved for summary judgment, DRB was the nonmoving party because it was not the party moving for summary judgment on Evanston's behalf.
[30] DRB, not Evanston, cited the *Cherrington* case as the controlling law on this coverage dispute issue. *See* DRB-Appx. 0882; 0909; 0931; 0934; and 0939.
[31] The trial court correctly ruled that Subsidence/Earth Movement Exclusion in the Evanston Policy completely precludes any duty to defend or indemnify.

trial court correctly rejected DRB's argument "that Evanston should be estopped from raising additional grounds beyond the Subsidence/Earth Movement Exclusion in support of its denial of coverage. . . ." DRB-Appx. 0059. The trial court provided three reasons in support of its ruling: (1) "DRB has provided no evidence that they detrimentally relied upon Evanston's initial denial of coverage[;]" (2) "Evanston continually reserved its rights to revise its coverage position (which remained the same—a denial of coverage)[;]" and (3) Evanston "continually revisited its coverage position as facts were revealed throughout discovery." *Id.* at 60.

Estoppel may only apply if an insurer engages in conduct or acts that "are sufficient to justify a reasonable belief on the part of the insured that the insurer will not insist on a compliance with the provisions of the policy and that the insured in reliance upon such conduct or acts has changed his position to his detriment." Syl. Pt. 2, *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998).[32] "[T]o prevent an insurer who has previously stated one or more reasons for denying coverage, from asserting other, previously unarticulated reasons for denying coverage, the insured must prove that s/he was induced to act or to refrain from acting to her/his detriment because of her/his reasonable reliance on the previously stated grounds for declination." *Id.* at Syl. Pt. 4. Moreover, even if these elements were satisfied, subject to few exceptions, estoppel cannot "extend insurance coverage

[32] DRB's failure to provide a pincite to its conclusory statement that "West Virginia has adhered to the principle that whether estoppel applies requires a fact-intensive inquiry" renders its argument fruitless. Pet'rs' Br. at 31. To the contrary, it is indisputably proper to decide estoppel on summary judgment. *See, e.g.*, *Dye v. Farmers & Mech. Mut. Ins. Co.*, No. 22-ICA-301, 2023 W Va. App. LEXIS 326, at *17–21 (W. Va. Int. Ct. App. Nov. 16, 2023) (affirming trial court's summary judgment ruling that estoppel is inapplicable).

beyond the terms of an insurance contract." *Id.* at Syl. Pt. 5. These exceptions, not present here, are where an insured suffers prejudice due to (1) a misrepresentation made at policy inception resulting in the insured being barred from procuring its desired coverage; (2) an insurer representing the insured without a reservation of rights; and (3) an insurer acting in bad faith. *Id.* at Syl. Pt. 7.

A. DRB failed to demonstrate how it could have "reasonably relied" to its detriment upon representations in Evanston's initial denial of coverage when Evanston specifically reserved its right to assert additional coverage defenses and has continued to disclaim coverage on the same grounds.

As a threshold matter, there is no evidence that Evanston engaged in any conduct or acts that would justify DRB's reliance to its detriment. The trial court correctly ruled that DRB failed to establish that it "reasonably relied" upon Evanston's initial denial of coverage to its detriment. In its initial July 22, 2009 coverage declination letter, Evanston disclaimed coverage on the basis that the Subsidence/Earth-Movement Exclusion "precludes coverage for claims which involve 'bodily injury' or 'property damage' arising out of the movement of land or subsidence." DRB-Appx. 2542–46 (providing that "each count of the Complaint states that the damages arose out of the subsidence of land. Therefore, there is no coverage for this claim under our policy"). And of course, Evanston reserved its right to assert additional grounds for its disclaimer of coverage. *Id.* at 2546 ("We may revise our position and raise any other coverage issues or coverage defenses without prejudice, waiver, or estoppel. Furthermore, this letter does not constitute a waiver of any policy provisions or defenses available to the company. All rights are expressly reserved."). On November 9, 2009, Evanston reiterated that the homeowners' claims did not

constitute an "occurrence" and that several exclusions, including the Subsidence/Earth-Movement Exclusion, applied. *Id.*at 2548–57. In the August 25, 2016 supplemental letter, Evanston "updated its review of coverage for [DRB]" under the policies for the new claims "asserted against DRB in the above-referenced civil action[.]" *Id.* at 2558. Evanston explained that its "coverage decision is based upon the facts known to Evanston at this time" and again reserved its right to revise its position or raise and assert any other coverage defenses. *Id.* at 2582.

Again, the initial reasons Evanston declined any duty to defend or indemnify still stand and still preclude coverage. This alone should prevent estoppel—and make its application irrelevant in this case. Further, there was nothing in Evanston's initial disclaimer indicating it would not rely on or enforce other additional policy terms. That said, to estop an insurer, "who has previously stated one or more reasons for denying coverage, from asserting other, previously unarticulated reasons for declining coverage, the insured must also prove that [it] was induced to act or to refrain from acting to her/his detriment because of [its] reasonable reliance on the previously stated ground(s) for declination." Syl. Pt. 4, *Potesta*, 202 W. Va. at 308, 504 S.E.2d at 135. As counsel for DRB is aware, an insurer cannot be estopped from asserting additional reasons for declining coverage unless the insured can prove that it changed its position to its detriment in reliance on the declination of coverage. *Id.*[33]

[33] *Potesta* itself is an apt example. There, the insurer defended under a reservation of rights and then disclaimed coverage based on certain policy exclusions. 202 W. Va. at 311, 504 S.E.2d at 138. Then, at the summary judgment stage in the ensuing declaratory judgment action, the insurer *conceded* that the previously asserted grounds for disclaiming coverage were invalid and asserted entirely new grounds. *Id.* at 312, 504 S.E.2d at 139. Here, there was no bait-and-switch—Evanston *added*, not substituted, grounds for declining coverage.

DRB bewilderingly argued that upon receiving Evanston's *denial* of coverage letter based on the earth movement exclusion (and reserving rights to deny on other policy provisions or grounds), it "proceeded to litigate with the belief that Evanston would ultimately owe coverage for the loss, since the bulk of Plaintiff's claims do not in fact arise out of earth movement."[34] Pet'rs' Br. at 32. This statement is nonsensical.

DRB also argued that with the 2016 supplemental declination letter, Evanston suddenly changed its coverage position. Pet'rs.' Br. at 32. Quite the opposite, Evanston continued to maintain its position that it had no duty to defend or indemnify DRB and simply provided additional bases for its position as it became aware of developments in the litigation. After Evanston was brought into the lawsuit in 2015 and became aware of the facts that had developed over the six years of litigation since its initial denial—including amended complaints and the discovery of previously unknown facts—it asserted additional grounds for denial of coverage.[35]

An insurance policy provides the coverage explicitly provided for in the policy contract because "an insurance company should not be made to pay for a loss for which it has not charged a premium." *Marlin v. Wetzel Cnty. Bd. of Educ.*, 212 W. Va. 215, 225, 569 S.E.2d 462, 472 (2002); *Rubinstein v. Jefferson Nat'l Life Ins. Co.*, 268 Md. 388, 302 A.2d 49 (Md. 1973) ("[I]f an insurance policy contains a provision for its

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[34] DRB inappropriately presumes that Plaintiffs litigated their claims in a certain manner and joined Evanston in the case for certain reasons, without any citation to the record reflecting as much. *See* Pet'rs' Br. at 34.

[35] Although DRB complains that Evanston asserted "fourteen new grounds" for Evanston's denial of coverage, it is unclear to what DRB refers because it provides a citation to Plaintiff's Third Amended Complaint rather than Evanston's Answer—this assertion is therefore unsupported by the record.[35] *See* Pet'rs' Br. at 32.

forfeiture for nonpayment of premiums, the insurance company may avoid the policy on the insured's failure to pay a premium"). There is no language in the July 22, 2009 disclaimer of coverage letter to reassure DRB that although coverage was denied based upon the Subsidence/Earth-Movement Exclusion, the rest of the policy provisions were no longer applicable to Evanston's consideration of coverage. *See* DRB-Appx. 2542–46. To the contrary, Evanston denied coverage and "expressly reserved" all rights to "revise [its] position and raise any other coverage issues or coverage defenses without prejudice, waiver, or *estoppel*." *Id.* at 2546. (emphasis added). Evanston continued, "if you possess any additional information which you believe[] impacts the coverage position taken herein, please immediately contact the undersigned." *Id.* On August 25, 2016, Evanston issued a supplemental declination letter. *Id.* at 2558–83. Therein, Evanston meticulously outlined the information it possessed, analyzed and applied the information to the policy language, and concluded that Evanston continued to have no duty to defend or indemnify DRB. *Id.*

DRB vaguely suggests that had it been aware that Evanston would assert additional grounds for disclaiming coverage, it "***may*** have pursued vastly different litigation strategies[,]" and "could have sought to fix certain damages at the outset[.]" Pet'rs' Br. at 33 (emphasis added). But this argument ignores the plain language of the 2009 disclaimer letter, which reserved the right to assert additional grounds; as such there was no statement by Evanston that DRB ***could*** have relied on to its detriment. Moreover, DRB's acknowledgement that it ***may*** have, rather than ***would*** have pursued different litigation strategies had it known that Evanston was going to

assert additional reasons for its declination of coverage is dispositive of its position and demonstrates that DRB did not detrimentally rely on Evanston's initial position.

DRB fails to articulate *how* it detrimentally relied upon Evanston's initial declination letter or how the "prejudice to both Plaintiffs and DRB is manifest." Pet'rs' Br. at 32. While DRB states that Plaintiffs and DRB "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[,]" it fails to articulate what specific actions it took, or didn't take, in detrimental reliance on Evanston's initial coverage position. *Id.* DRB asserts that it is prejudicial that Evanston asserted additional grounds to deny coverage six years after the initial denial, and that passage of over six years "significantly prejudices the parties' abilities to *now* gather relevant evidence regarding the inapplicability of the other exclusions." Pet'rs' Br. at 32–33. Of course, the underlying litigation has continued to the present day, such that DRB has had the opportunity to conduct additional discovery, if any was needed. Notably, in seeking summary judgment against Evanston, DRB asserted that additional discovery was not needed to determine this coverage question and that there were no genuine issues of material fact. *See generally* DRB-Appx. 0880–945.

Despite Evanston's position that it had no duty to defend or indemnify DRB, DRB claims it was "lulled into a false sense of security that whatever liability was ultimately established would be covered by Evanston." Pet'rs' Br. at 33. But even if DRB somehow believed there would be coverage, that belief could not have been based on statements in Evanston's 2009 letter, which disclaimed any coverage and reserved

the right to raise additional coverage issues and defenses without waiver or estoppel. DRB's disbelief of Evanston's position as stated, is not reliance on that position. It is the opposite. What, exactly, did DRB believe would be covered when Evanston unequivocally denied coverage?

DRB argues that the parties could have sought to fix certain damages at the outset of the case had Evanston not updated its coverage position. Pet'rs.' Br. at 33. But this makes no sense. Evanston's 2016 letter could not have prevented any of the parties from fixing damages or settling claims in 2009. If DRB was serious about accepting liability for any of Plaintiffs' claims, it could have done so.

B. None of the exceptions to the general rule that estoppel cannot extend coverage beyond the terms of the insurance contract are applicable.

Even if DRB could establish that it "was induced to act or refrain from acting" to its detriment due to its "reasonable reliance" on the 2009 letter, it must surmount the general rule that estoppel cannot "extend insurance coverage beyond the terms of an insurance contract." Syl. Pts. 4 & 5, *Potesta*, 202 W. Va. at 308, 504 S.E.2d at 135. Exceptions to the rule include instances where an insured has been prejudiced because: (1) an insurer's misrepresentation made at policy inception resulted in the insured being prohibited from procuring the coverage it desired; (2) an insurer has represented the insured without a reservation of rights; and (3) the insurer has acted in bad faith. *Potesta*, 202 W. Va. at 323, 504 S.E.2d at 150. All three exceptions are clearly inapplicable.

First, there is nothing in the record to evidence that there was *any* misrepresentation of the coverage made at the Evanston Policies' inception that

resulted in DRB being prevented from having the coverage it desired. Second, Evanston did not represent DRB without a reservation of rights. As discussed above, Evanston did not defend DRB at all—it declined coverage. Finally, the record is devoid of any bad faith on Evanston's part. Neither declining coverage based on the policy terms as applied to the facts and allegations presented, nor defending itself in a coverage litigation would support bad faith. "An insurance company simply defending itself in an action over coverage issues does not amount to bad faith." *See Dye*, 2023 W. Va. App. LEXIS 326; *see also State ex. Rel. Universal Underwriters Ins. Co. v. Wilson*, 239 W. Va. 338, 346 n.18, 801 S.E.2d 216, 224 n.18 (2017) ("An insurer should have the right to defend itself in a plaintiff's declaratory judgment action without risking exposure merely because the strain inherent in litigation discomfits its insured."). Evanston meticulously reviewed the information available to it and the policy terms; and again, once litigation was filed against Evanston, it availed itself of all of the discovery in the case and analyzed the relevant law, allegations, evidence, and the terms of the Evanston Policies to determine that DRB simply was not entitled to a defense and indemnification. Since its initial declination of coverage in 2009, Evanston revisited coverage at least four times, showing its willingness to reassess its coverage position as new information became available.

Whether Evanston is estopped from raising additional coverage defenses should not result in a different outcome here—there is no coverage for the reasons raised in all of Evanston's position letters. Nonetheless, the Court should affirm the

trial court's ruling and reject DRB's attempt to estop Evanston from relying upon the grounds for disclaiming coverage contained in its August 25, 2016 letter.

CONCLUSION

For all of the foregoing reasons, Respondent Evanston Insurance Company requests that the Court affirm the trial court's well-reasoned Order.

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2025, I electronically filed the foregoing "Brief and Cross-Assignment of Error of Respondent Evanston Insurance Company" with the Clerk of Court using File & ServXpress, which will send notification of such filing to counsel of record as follows:

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