No.: 24-ICA-481



IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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

DEFENDANTS BELOW, PETITIONERS,

v.

EVANSTON INSURANCE COMPANY,

DEFENDANT BELOW, RESPONDENT.

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

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# PETITIONERS' REPLY TO RESPONDENT'S RESPONSE AND RESPONSE TO RESPONDENT'S CROSS-ASSIGNMENT OF ERROR

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## Counsel for the Petitioners:

Avrum Levicoff, Esquire
W.Va. I.D. #4549
Joseph E. Starkey, Jr., Esquire
W.Va. I.D. #6673
THE LEVICOFF LAW FIRM, P.C.
4 PPG Place, Suite 200
Pittsburgh, PA 15222
(412) 434-5200
(412) 434-5203 - facsimile
ALevicoff@LevicoffLaw.com
JStarkey@LevicoffLaw.com

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### A. Evanston Tacitly Acknowledges that Genuine Issues of Material Fact Exist thus Precluding Summary Judgment in its Favor

What Evanston characterizes in its brief as DRB's "bald attempts to re-write the facts and allegations to suit its whims on appeal" is really its acknowledgement that it disagrees with DRB on the material facts of the case, thus obviously presenting a genuine issue of material fact. (Evanston's Brief, p. 2). *Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints,* 239 W. Va. 428, 455, 801 S.E.2d 443, 470 (2017) (reversing trial court's order granting summary judgment because the parties disagreed on the relevant, material facts and because "[n]early every factual allegation is contested in some fashion, whether by inconsistencies between interviews, depositions, and affidavits . . . or interpretations of the evidence, or the inferences to be drawn from that evidence."). Every single material fact contained in DRB's principal brief is supported by citations to the record, as is every single recitation of the Plaintiffs' numerous allegations against DRB. That Evanston disagrees with them shows either (a) that Evanston's alleged factual disagreements are not genuine or (b) that genuine issues of fact exist, either of which lead to the inescapable conclusion that the trial court erred in granting summary judgment in its favor. *Id.*

### B. The Trial Court Erroneously Concluded on either Disputed Evidence, or the Lack of Evidence, that Plaintiffs' Damages were Foreseen by DRB

Evanston asserts, virtually without a single citation to the record, that DRB clearly had "foresight or expectation" of Plaintiff's alleged damages" as a result of DRB's "conduct." (Evanston's Brief, p. 24). In support, it refers principally to the conduct of DRB's subcontractor, Lang Brothers, and draws the leap of faith that since DRB was "there generally while" Lang was

performing excavation, it knew Lang "was not doing a good job." (*Id.)*. It contends, without any citation to the factual record, that "Instead, DRB moved forward with building the homes that are now the subject of this case." (*Id.* at 25). But as DRB set forth in detail in its principal brief, that simply was not the case. To be sure, DRB did not simply "move forward" with building the homes—and to suggest otherwise is blatant misstatement of the evidence of record. Instead, DRB dismissed Lang and hired additional contractors and experts who evaluated, designed and constructed repairs to the affected sites. (DRB's Brief, pp. 6-8). Indeed, each and every "fault" both Evanston and the trial court relied upon to conclusively determine, in the face of competing evidence, that DRB foresaw or expected the Plaintiffs' damages affected only a very small portion of the development, only a few homes, and was satisfactorily remediated very early on in the project. Everyone involved in the project from DRB to the contractors and experts it retained to conduct the repairs, expected and foresaw that the repairs would work, and they did! Those fully-occupied homes and lots are still in virtually the same condition today as they were in over seventeen years ago.[1] This, of course, begs the question, "How could a contractor expect or foresee injury to party when the contractor recognized the issues, employed experts to evaluate and design plans to address the issues, relied upon those experts in conducting the remediation, and successfully remediated the issues in accordance with the experts' design plans?" Neither Evanston's argument, nor the trial court's findings, comport with the evidence, thus necessitating reversal of the trial court's order granting summary judgment in Evanston's favor. As our

[1] Evanston's argument that DRB "turned a blind eye to the issues" simply does not square with the objective evidence and Plaintiffs' allegations against DRB. (Evanston's Brief, p. 25,26). Indeed, neither Evanston, nor the trial court, made any reference to the mountain of evidence showing that all of those purported issues were remediated by DRB long before the bulk of the Crystal Ridge Development was constructed. Indeed, the bulk of Plaintiffs' claims against DRB have nothing to do with issues upon which Evanston and the trial court relied to find that DRB "expected or foresaw" Plaintiffs' damages.

Supreme Court cautioned in *Cherrington v. Erie Ins. Property & Cas. Co.,* 231 W.Va. 470, 745 S.E.2d 508 (2013), holding otherwise "would suggest that [the contractor] deliberately sabotaged the very same construction project it worked so diligently to obtain at the risk of jeopardizing its professional name and business reputation in the process." *Id.* In short, there is simply no evidence, and Evanston has cited none, that even remotely suggests that DRB sabotaged its own project, and it was manifest error for the trial court to hold otherwise. Indeed, Plaintiffs' claims clearly involve "property damage" arising out of an "occurrence."[2]

Perhaps more alarming is that it is unprecedented in West Virginia that a trial court would weigh competing evidence and conclude from that evidence, without even the aid of expert testimony, that, without a shadow of a doubt, a contractor expected or intended an injury to occur simply because they were engaged in their business; especially at the summary judgment stage. West Virginia jurisprudence is replete with caselaw cautioning trial courts against granting summary judgment when the issue is one of intent.

> *Kelley v. City of Williamson,* 221 W. Va. 506, 510, 655 S.E.2d 528, 532 (2007) (stating, "Particularly in 'complex cases . . . where issues involving motive and intent are present,' summary judgment should not be utilized as a method of resolution.")
>
> *Farmers Mut. Ins. Co. v. Tucker*, 213 W. Va. 16, 576 S.E.2d 261 (2002) (reversing the trial court's order granting summary judgment in plaintiff's favor, holding that the issue of intent is typically a question of fact that cannot be determined through a motion for summary judgment)

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[2] The trial court's findings make dangerous precedent. For the trial court to find that a contractor expected or intended damage to occur simply because that contractor built a development on a mountainous site is not only plain wrong, it is simply not the case. Developments built at locations similar to Crystal Ridge exist throughout the state of West Virginia because West Virginia is obviously a very mountainous state. Certainly the hundreds, if not thousands, of contractors who built homes on those sites did not expect or intend the sites to fail. Taken to its logical conclusion, could an at-fault driver in a motor vehicle accident be found to have expected or intended damage merely because she got behind the wheel of the car? Certainly not.

> *Prudential Ins. Co. v. Couch*, 180 W. Va. 210, 213-14, 376 S.E.2d 104, 107-08 (1988) (finding the trial court erred in granting summary judgment on the issue of intent, stating, "We cautioned against summary judgment in cases 'where issues involving motive and intent are present . . . Consequently, summary judgment should not have been granted.'")
>
> *Karnell v. Nutting*, 166 W. Va. 269, 273, 273 S.E.2d 93, 96 (1980) (Trial court erred in granting summary judgment where issues of motive and intent were present, stating, "Summary judgment should not be utilized in complex cases, particularly where issues involving motive and intent are present.")

Yet this is exactly what the trial court did here. (DRB-Appx. p. 58 ¶36).

In its brief, Evanston has no real answer to this glaring error except to reiterate its skewed version of the facts and make colorful argument void of any legal authority whatsoever. First, Evanston's argument notwithstanding, it is not the trial court's duty at the summary judgment stage to make factual determinations; that is, to conclusively determine whether DRB expected or intended damage to occur. The trial court's only duty is to determine whether a genuine issue of material fact exists. *Prudential v. Couch,* 180 W. Va. at 213; 376 S.E.2d at 105. Its making of factual determinations constitutes reversible error.

Second, Evanston characterizes DRB's argument that the trial court should not have made factual determinations as "grasping at straws" because DRB, too, sought summary judgment in its favor and, in so doing, argued that no genuine issues of material fact existed. (Evanston's Brief, p. 48). Yet again, Evanston fails to support its argument with any authority whatsoever. Indeed, the law is directly contrary:

> Notwithstanding the fact that both parties moved for summary judgment, the material issue of fact regarding the intent of the appellee to abandon, the very essence of an abandonment claim, precluded a proper determination of this aspect of these actions. The parties may not, by filing cross-motions, use summary judgment to try a cause of action which turns upon a genuinely disputed factual issue. Likewise, the trial judge should resist the temptation to try cases in

> advance on motions for summary judgment, even where the evidence indicates a directed verdict will likely result.

*Warner v. Haught, Inc.*, 174 W. Va. 722, 730, 329 S.E.2d 88, 97 (1985) (citing *Masinter v. Webco Company*, 164 W. Va. 241, 262 S.E.2d 433, syl. pt. 1 (W. Va. 1980). Accordingly, the trial court clearly erred in making the factual determination that DRB expected or intended damage to occur. Its ruling, therefore, must be reversed.

### C. Evanston's Assertion, and the Trial Court's Ruling, that All of Plaintiffs' Claims Were Caused by Earth Movement is Erroneously Premised on Their Pretension that All Claims Relate to the 2007 Landslide

It has long been the law in West Virginia that when examining whether coverage exists for a loss under an insurance policy when the loss is caused by a combination of covered and specifically excluded risks, the loss is covered if the covered risk was the efficient proximate cause of the loss. *Murray v. State Farm Fire & Cas. Co..,* 203 W. Va. 477, syl. pt. 8, 509 S.E.2d 1, syl. pt. 8 (1998). Coverage is excluded only where the covered risk was only a remote cause of the loss, or conversely, if the excluded risk was the efficient proximate cause of the loss. *Id.* The efficient proximate cause is the risk that sets others in motion. It is not necessarily the last act in a chain of events, nor is it the triggering cause. The efficient proximate cause doctrine looks to the quality of the links in the chain of causation. The efficient proximate cause is the predominating cause of the loss. *Id.* The question of which event was the efficient proximate cause of the loss is generally a jury question for the finder of fact. *Id.*

In arguing that all of Plaintiffs' claims are excluded from coverage because they were all caused by earth movement, Evanston pretends that the world stopped in 2007 when the area around Lot 7 slid. Quite frankly, it is easy to divert attention away from the multitude of claims and causes covered by Evanston's policies by focusing on a gigantic landslide that occurred at a

snapshot in time at a relatively remote location and declaring, "See! The earth moved!" But as shown above and in DRB's principal brief, a tremendous amount of work occurred following that 2007 slide which remediated the issue, *most* of the named Plaintiffs' homes are located far beyond the area impacted by the slide, and at a minimum, portions of their claims have nothing to do with earth movement. For example, Plaintiffs allege quite clearly that their damages were caused by the Development's deficient storm water and drainage systems, not earth movement, which caused water to intrude onto their properties. Further, Plaintiffs allege that they have sustained damage caused not by earth movement, but by deficiently planned and constructed water and utility lines, roads, and water drainage systems.[3] As set forth in DRB's principal brief and before the trial court, many of the Plaintiffs who either testified at deposition or responded to written discovery disclosed, under oath, that they allegedly sustained damage not as a result of earth movement, but because of water intrusion. (DRB's Brief, pp. 10-11).

The issue of causation in this case is a complex and technical one far beyond the common knowledge of the average lay juror and, thus, requiring the opinion of an expert. *J.C. v. Pfizer, Inc.*, 240 W. Va. 571, syl. pt. 8, 814 S.E.2d 234, syl. pt. 8 (2018) ("The determination of whether expert testimony is necessary to sustain the burden of proof in complex cases involving matters of science, medicine, engineering, technology and the like is made on a case-by-case basis. When issues involved are beyond the common knowledge and experience of the average juror, expert testimony shall be required.") While Plaintiffs have disclosed a causation expert, his testimony has not yet been taken.[4] Moreover, and significantly, Evanston has neither disclosed, nor has it offered a single expert opinion from a qualified causation expert. Instead, Evanston

[3] DRB-Appx. at pp. 961-962 at ¶43

[4] The evidentiary deposition of Plaintiff's causation expert is currently scheduled for June 24, 2025.

convinced the trial court to accept its own speculative opinion on causation to the exclusion of all others, and now expects this Court to do the same, by (a) merely positing in conclusory fashion, for example, that the Weng's wet and swampy back yard "was caused by earth movement around their home;" (b) accepting Evanston's biased and unqualified opinion that water entering the Williams' home was proximately and exclusively caused by earth movement merely because the Williams' testified that water was "settling outside our son's bedroom;" or (c) accepting Plaintiffs' lay testimony that their damages are the result of subsidence or settlement, and not the allegedly defective drainage systems, utility systems, water management systems, and so forth as alleged in their complaints. (Evanston's Brief, p. 32).[5] Quite simply, the trial court erred in finding that all of Plaintiffs' damages were caused by earth movement and subject to the earth movement exclusion, thus resolving the issue in Evanston's favor as a matter of law.[6] Accordingly, its ruling should be reversed and summary judgment should be entered in DRB's favor.[7]

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[5] Instead, Evanston points to a remark made by Plaintiffs' counsel during a deposition taken over a decade ago that only damage related to soil instability are at issue in the case. (Evanston's Brief, p. 32)

[6] It is not without moment that under West Virginia law, policy exclusions are not to be applied in the abstract without reference to their factual context. On the contrary, West Virginia law requires that exclusions be closely analyzed within the specific factual context of the entire insurance policy, the operations that the policy was purchased to insure, and the claims at issue. *See, e.g., Ayersman v. W. Va. Div. of Envtl. Prot.*, 542 S.E.2d 58, 60 n.2 (W. Va. 2000) (Supreme Court of Appeals is "skeptical of any policy language that purports to exclude a primary function of the insured"); *Silk v. Flat Top Constr., Inc.*, 453 S.E.2d 356, 359 (W. Va. 1994) (insurer must prove the facts necessary to show the operation of any exclusion).

[7] It is important to note that while Plaintiffs' principal expert, Lawrence Rine, has offered opinions that certain deficiencies in the work caused or contributed to soil movement (as cited in Evanston's Brief), he has also offered opinions that certain of Plaintiffs' alleged damages have nothing to do with earth movement (as cited in DRB's Brief). Significantly, for Evanston to validly disclaim coverage, it bears the burden of proving its earth movement applies to all of Plaintiffs' claims. If some claims are not the result of earth movement, then Evanston has, at a minimum, the duty to defend. *Aetna Cas. & Sur. Co. v. Pitrolo*, 342 S.E.2d 156, 160 (W. Va. 1986).

## D. Evanston's Assertion that Plaintiff's Sixth Supplemental Disclosure of Expert was not in the Summary Judgment Record is Demonstrably Wrong

Evanston's assertion that the trial court did not err when it failed to consider Plaintiff's Sixth Supplemental Disclosure of Expert Witnesses when making its ruling, which disclosed additional items of property damage caused by an occurrence (i.e., water intrusion), is simply wrong. First, on March 18, 2024, DRB brought the new opinions to the Court's attention, and made it part of the summary judgment record, when it filed *DRB Defendants' Supplemental Brief in Support of Their Motion for Summary Judgment and in Opposition to Evanston Insurance Company's Motion for Summary Judgment.*[8] Second, on April 11, 2024, Evanston filed a response in opposition to DRB's Supplemental Brief.[9] Finally, Evanston itself made Plaintiffs' Sixth Supplemental Disclosure of Experts part of the summary judgment record, thus making its argument incredulous.[10] The trial court's failure to consider it when making its ruling is, therefore, clearly in error.

## E. Evanston's Steadfast Adherence to a Single Exclusion—the Earth Movement Exclusion, is Sufficient to Justify a Finding of Estoppel

In its brief, Evanston holds steadfast to the fallacy that all of Plaintiffs' claims arise out of the 2007 landslide and are, therefore, excluded by the Earth Movement Exclusion as indicated in its July 22, 2009 declination letter. (Evanston's Brief, p. 53). In fact, Evanston goes further and asserts that estoppel is "irrelevant in this case" because the Earth Movement exclusion excludes everything the Plaintiffs have ever claimed against DRB, thus making it unnecessary to consider the laundry list of exclusions it cited seven years later. Evanston's position is clearly an attempt to avoid the elephant in the room; that is, it *must* convince the Court that everything Plaintiffs

[8] DRB-Appx. at pp. 3377-3383
[9] DRB-Appx. at pp. 3384-3391
[10] DRB-Appx. at pp. 3392-3397

have every claimed relates to earth movement because, despite its repeated promises to the contrary, it never sought, reviewed, analyzed, considered, or re-evaluated anything that happened in the case vis-à-vis its coverage position for seven years until it was sued. Indeed, Evanston made that promise in every letter it ever provided to DRB, yet obviously did not fulfill that promise because it still asserts, to this day, that Plaintiffs have alleged nothing but earth movement claims.

DRB is mindful of the West Virginia Supreme Court of Appeals opinion in *Potesta v. USF&G,* 202 W. Va. 308, 504 S.E.2d 135 (1998). Indeed, DRB carefully analyzed the case in its principal brief and presented evidence showing it fulfilled the elements the decision requires such that Evanston should be estopped from relying on anything other than the Earth Movement Exclusion. Nonetheless, DRB makes the following observation.

An insurance company should not be rewarded—particularly in a lengthy, complex case such as this—for essentially ignoring the requirements of W.Va.C.S.R. §114-14-6 by asserting a single defense to coverage, reciting boilerplate language reserving its right to rely upon other, yet unspecified provisions for noncoverage, and then sitting on its laurels and doing nothing for seven years while its insured scrambles to find coverage. Indeed, W.Va.C.S.R. §114-14-6 requires that insurers "promptly conduct and ***diligently pursue*** a thorough, fair and objective investigation" and alert their insureds, in writing, of ***specific policy grounds*** for noncoverage. (emphasis added). If the insurer determines that additional factual investigation may change its coverage position, it is obligated to provide its insured with status updates at forty-five-day increments until its investigation is complete. W.Va.C.S.R. § 114-14-6.7. As the record below reflects, Evanston did none of this. This begs the question, "How long can an insurance

company rely upon a self-serving, boilerplate 'we reserve our right to rely on anything else in the policy to deny you coverage' while it essentially closes its file and forces its insured to fend for itself?" While DRB and, in fact, Evanston, are fortunate to have another insurer providing DRB's defense, this Court should not further reward Evanston for its persistent inattention and delay by permitting it to disclaim ***indemnity coverage*** on any basis but the earth movement exclusion.

The West Virginia Supreme Court of Appeals has not, heretofore, examined the details of an effective reservation of rights letter or the extent to which a boilerplate reservation is effective to reserve the right to assert additional policy defenses ***seven years*** after the initial complaint was filed, although W.Va. Code §33-11-4(9)(n) requires that such communications be "prompt." *See, e.g., Courtland Co. v. Ohio Farmers Ins. Co.*, 2024 U.S. Dist. LEXIS 73749, 2024 WL 1745102 (S.D. W.Va. 2024). Seven years is hardly prompt. The Pennsylvania Superior Court's opinion in *Selective Way Ins. Co. v. MAK Servs.,* 232 A.2d 762 (Pa. Super. Ct. 2019) is persuasive. In that case, the plaintiff issued a general liability insurance policy to the defendant who, *inter alia,* was in the business of providing snow removal services. The policy excluded various types of coverage, including coverage for injuries or damages arising out of snow and ice removal activities. When a customer of one of defendant's clients slipped and fell on snow and ice, he sued defendant for damages. Defendant tendered the case to plaintiff for coverage and a defense.

Within a few weeks, plaintiff undertook defendant's defense under a reservation of rights. However, plaintiff's letter did not identify the "snow and ice removal" exclusion as a basis for its reservation. Eighteen months later, plaintiff filed a declaratory judgment action against

defendant seeking to disclaim coverage. In this action the plaintiff, for the first time, relied upon the "snow and ice removal" exclusion as its basis for noncoverage. After a period of approximately four years, defendant filed a motion for summary judgment arguing that the language of plaintiff's reservation of rights letter, which purported to reserve all policy defenses, was insufficient to properly preserve the potential coverage defense of the "snow and ice removal" exclusion. Plaintiff filed a cross motion for summary judgment arguing the opposite. The trial court granted plaintiff's motion and the defendant appealed.

The Pennsylvania Superior Court began its analysis by reciting general principles of law governing an insurer's duties and obligations to its insured which, for all intents and purposes, is virtually identical to West Virginia's principles. It stressed that, much like the "promptness" requirement of W.Va. Code §33-11-4(9)(n) and W.Va.C.S.R. §114-14-6.5's requirement that the insurer identify the specific policy provision upon which it is relying to disclaim coverage, a reservation of rights letter must be timely and "fairly inform" the insured of the insurer's position. While the court found plaintiff's letter timely, it questioned whether it was specific enough to reserve an exclusion that was known to plaintiff since the outset of the claim. It noted that (much like in West Virginia), insurers have the duty to conduct an appropriate investigation to preserve defenses to coverage, and where prejudice results from the insurer's delayed and tardy assertion of non-coverage, the insurer will be estopped from challenging coverage. As in the present case, the court especially focused on the fact that the exclusion upon which plaintiff sought to rely appeared "on the face of the Policy" and "any complete review of the Policy would have immediately revealed the existence of the exclusion" which would have "vitiated any obligation that [plaintiff] had to defend or indemnify [defendant] with equal speed." *Id.* at

770. Instead, plaintiff sought to rely upon "boilerplate language" which "obfuscated this absolute defense to coverage" and caused defendant "to reach the reasonable conclusion that there was no pressing need to secure back-up counsel." *Id.* The court stressed that plaintiff's actions bespoke of a "deficient investigation" evidenced by the fact that while plaintiff was patently aware of the exclusion, it nonetheless "waited eighteen months to raise the policy exclusion, and provided no further intervening notice to [plaintiff] that it would have to mount a defense to the [underlying] civil action on its own." *Id.* at 771.

The court recognized, however, that much like the West Virginia Supreme Court's opinion in *Potesta*, the defendant would still have to demonstrate that it suffered prejudice as a result of its insurer's prolonged delay. To this, the court stated:

> Given [plaintiff's] failure to "clearly communicate" its coverage position and the inherently speculative nature of determining how the case might have unfolded differently had the insurance company acted with appropriate diligence, prejudice can be fairly presumed in this instance. . . [Plaintiff] failed to conduct an adequate investigation following submission of a claim by [defendant] . . . As a consequence of this deficient investigation, [plaintiff's] reservation of rights letter failed to "clearly communicate] the extent of the rights being reserved, which resulted in presumptive prejudice to [defendant]. As a result of this prejudice, [plaintiff] should have been estopped from asserting [the snow and ice removal] exclusion for the first time eighteen months later without sufficient notice to [defendant] regarding [plaintiff's] coverage position.

*Id.* at 771-72. Accordingly, the court reversed the trial court's order and remanded the case for further proceedings.

Evanston's conduct in this case is even more egregious than the plaintiff's in *Selective Way*. For example, in its brief, Evanston argues that "[i]t has been obvious from the beginning of this lawsuit—more than fifteen years ago—that Evanston has no duty to defend or indemnify DRB" because the policy requires an "occurrence" of covered "bodily injury" or "property

damage" to trigger coverage and "contain exclusions that may divest coverage." (Evanston's Brief, p. 1). Yet it took Evanston nearly nine years, ten times longer than the plaintiff in *Selective Way*, to identify many of those provisions. One could only speculate how this case would have progressed had Evanston been timely and specific in its coverage position. As detailed in DRB's principal brief, DRB was obviously prejudiced by Evanston's unreasonable delay, and it is disingenuous for Evanston to argue otherwise. Indeed, this Court should find Evanston's conduct alarming, exactly the type of conduct sufficient to find estoppel, if not by presumed prejudice, by actual prejudice, and reverse the trial court's order with instructions to enter judgment in favor of DRB. In the alternative, the Court should reverse the trial court's ruling and remand the case for trial.

**F. Contrary to Evanston's Assertion, the Trial Court's Order Fails to Reflect the Independent Consideration of the Law and Facts Sufficient to Justify its Wholesale Verbatim Adoption of Evanston's Proposed Findings of Fact and Conclusions of Law**

In its brief, Evanston asserts that "the trial court carefully reviewed the parties' proposed orders in light of the extensive record and summary judgment briefing before adoption proposed findings and conclusions. Thus, there was no error." (Evanston's Brief, p. 47). One must question how Evanston reached this conclusion given the record before this Court and our Supreme Court's dictates in *Gross v. Gross,* 196 W.Va. 193, 469 S.E.2d 646 (1996). There is nothing in the trial court's order that would objectively lead to that conclusion.

Evanston attempts to minimize the effect of *Gross v. Gross* by emphasizing that our Supreme Court affirmed the trial court's adoption of one party's proposed findings of fact and conclusions of law. However, it is not the result in *Gross* that is important here; it is the rule that while a trial court may adopt a party's proposals, it must demonstrate that it "actually,

independently made findings of fact and conclusions of law, and thus appropriately used the assistance and recommendations of counsel" and did not "improperly surrender [its] responsibilities to counsel." *Id.* at 640. This determination is to be made objectively. *Gross v. Gross,* 469 S.E.2d at 640. Evanston makes no effort whatsoever to demonstrate how this rule has been met here. Accordingly, the trial court's order must be reversed.

**G. <u>The Trial Court did not err in Applying West Virginia Law</u>**

The trial court's finding that West Virginia's substantive law applies to this coverage dispute because West Virginia has the more significant contacts to the matter entirely comports with prevailing West Virginia law. (DRB Appx. p. 53, ¶12). West Virginia recognizes that an insurance policy's provisions will be "construed according to the laws of the state where the policy was issued and the risk insured was principally located, *unless another state has a more significant relationship to the transaction and the parties"* or if the laws of the foreign jurisdiction are repugnant to West Virginia public policy. *Nadler v. Liberty Mut. Fire Ins. Co.,* 424 S.E.2d 256, 261-262 (W.Va. 1992) (quoting Syl. Pt. 2, *Lee v. Sagliga*, 373 S.E.2d 345,352 n.19 (W.Va. 1992) (emphasis in original)). In the instant matter, both policies were issued in Maryland; however, it is readily evident that West Virginia has the "more significant relation to the transaction and the parties." At the outset, an insurer that issues a policy to an insured known to conduct business in states other than the state in which the policy was delivered ought to realize that its policy may be looked to for coverage by those who suffer harm in foreign jurisdictions. Where the insured's business has the potential to cause substantial bodily and property damage to residents and land located in a foreign jurisdiction, the insurer should likewise anticipate that the foreign jurisdiction will apply its own law to protect the interests of

its own citizens and property. This is particularly true where the law of the foreign jurisdiction is more favorable to such interests than the laws of the state in which the policy was issued, a state which has only a minimal connection to the parties and the damages they sustained.

Here, all of the instant Plaintiffs were residents of West Virginia at the time the alleged damages were sustained.[11] All of the misconduct attributed to DRB is alleged to have occurred in West Virginia.[12] The relief sought concerns homes and property located in West Virginia.[13] Maryland's sole connection to the instant dispute is the fact that the policies were issued in that state. As the trial court correctly recognized, that happenstantial relationship to Maryland should not overwhelm West Virginia's superior interest in the outcome of this dispute. Indeed, when DRB's coverage counsel wrote Evanston's coverage counsel a letter detailing Maryland law as it relates to the construction of insurance contracts, Evanston's coverage counsel responded: "Also, we noted that you referenced Maryland law in your most recent letter. Rather than debate conflict of law issues, we have analyzed coverage under both Maryland and West Virginia law."[14] Thus, the trial court correctly found that West Virginia law applies to the construction of the instant policies.

Evanston argues that the trial court erred in applying West Virginia law because our Supreme Court's decision in *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.,* 182 W. Va. 580, 390 S.E.2d 562 (1990) makes the "most significant contacts" test inapplicable. (Evanston's Brief, p. 13-15). Rather, Evanston argues, the only test is where the contact was formed. (*Id.*) Evanston is mistaken.

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[11] DRB Appx. p. 0155 at ¶ 2.
[12] DRB Appx. p. 0155-0180, *generally.*
[13] *Id.*
[14] DRB Appx. p. 1477.

First, the Court's decision in *Triangle Industries* clearly maintained West Virginia's long-standing application of the Restatement's "most significant contacts" test in cases where an insurance policy is formed in one state but is performed in another:

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

*Triangle Indus., Inc.,* 182 W. Va. 580, 585, 390 S.E.2d 562, 567. Therefore, contrary to Evanston's belief, the "most significant contacts" analysis remains relevant.

Second, cases following the Court's decision in *Triangle Industries* have continued using the "most significant contacts" analysis in similar cases. For example, in *Joy Technologies v. Lib. Mut. Ins. Co.*, 187 W. Va. 742, 421 S.E.2d 493 (1992), Joy was a Pennsylvania mining machinery manufacturer with executive offices located in Pennsylvania and a manufacturing plant located in West Virginia. *Joy*, 421 S.E.2d at 494. Joy discovered environmental pollution at its West Virginia plant. Pursuant to an order from the Environmental Protection Agency, Joy spent over $6 Million remediating the pollution at its West Virginia plant. *Id*. at 495. Joy was also sued for property damage allegedly sustained by the owners of the property neighboring its West Virginia plant, and also by the individual who had purchased the plant from Joy. *Id*. Finally, several employees at Joy's West Virginia plant sued Joy for bodily injuries allegedly sustained as a result of exposure to pollution. *Id*.

Joy sought a defense and indemnification from its liability insurer, Liberty Mutual Insurance Company ("Liberty Mutual"), which had issued commercial general liability policies to Joy during the time frame in question. *Id*. Liberty Mutual denied coverage on the basis of an

exclusion, and Joy filed suit for breach of contract and declaratory judgment. *Id*. Liberty Mutual moved for summary judgment. Because the policies were issued to Joy at its Pennsylvania executive offices, the circuit court applied Pennsylvania law, and granted Liberty Mutual's motion. *Id*. at 496. Joy appealed on the basis that West Virginia and not Pennsylvania law should have applied to the construction of the insurance policies, which would have dictated a different outcome. *Id*. The West Virginia Supreme Court of Appeals agreed with Joy and reversed the circuit court's decision, determining that although the policies had been issued in Pennsylvania, West Virginia clearly had the more substantial relationship to the issues under the particular facts of the case. *Id*. at 497. Apropos of the instant matter between Evanston and DRB, the West Virginia Supreme Court in *Joy* wrote:

> [I]t is rather clear that the pollution arose from operations which were conducted in West Virginia and involved a facility located in West Virginia. Thus, the injury occurred in West Virginia, the instrumentality of injury was located in West Virginia, and the forum selected to try the issues was West Virginia. These factors suggest that West Virginia has had a very significant relationship to the transaction and the parties. In fact, the relationship would appear to be more substantial than that of Pennsylvania, where the contract was formed.

*Id*.

That precise reasoning could be no more apt here, where every Plaintiff is a resident of West Virginia, all of the misconduct attributed to DRB occurred in West Virginia, the relief that the Plaintiffs seek concerns homes and property located in West Virginia, and the Plaintiffs filed their Complaint in the West Virginia court system. Maryland's sole connection to this case – that the insurance policies were delivered to DRB at its Maryland office – should not overwhelm that totality of other circumstances. As the trial court correctly found, West Virginia plainly has the

more significant relationship to the transaction and the parties and its law should, therefore, control the interpretation of policies.

Similarly, in *Norfolk S. Ry. Co. v. Nat'l Union Fire Ins. of Pittsburgh*, 2013 U.S. Dist. LEXIS 202865 (S.D. W.Va. 2013), Norfolk Southern was a railroad company that was sued for property damage and bodily injuries following a train derailment in West Virginia. The company sought a defense and indemnity as an additional insured under liability insurance policies issued by two different insurers, and Norfolk Southern sued the carriers when they refused to defend or indemnify. *Id*. at *4. Choice-of-law was hotly contested since Norfolk Southern was a Virginia corporation; the named insureds were all incorporated in Pennsylvania, two with principal offices located in the state of New York, and the third with a principal office located in Pennsylvania; and two of the policies were delivered to the named insured in Connecticut. *Id*. at *6 n.5. The district court nonetheless rejected application of any of those states' laws, and instead applied West Virginia law in construing the policies. *Id*. at *12. In concluding that West Virginia had the more significant relationship to the issues, the court observed that "the underlying events, injuries and lawsuits all occurred in West Virginia". *Id*. at *13. The court therefore easily determined that West Virginia "clearly has interests that would be furthered by the application of its laws to this dispute, while Virginia, Pennsylvania, and Connecticut do not." *Id*. The court added that "the insurance contracts did not include a choice-of-law provision, which weakens the expectations that the parties might have had in applying the laws of Virginia, Pennsylvania, or Connecticut to the relevant policy." *Id*. The court finally noted that "'[i]nsurance law is aimed primarily at protecting policyholders,' and Norfolk Southern clearly believes that West Virginia better protects it than the laws of any other states with potential

interest in this litigation." *Id*. As with *Joy Technologies*, the reasoning of *Norfolk* is equally applicable to DRB and Evanston here.

Finally, the Court's conclusion in *Triangle Industries* is quite factually distinguishable from this case. Here, apart from the policies having been incidentally delivered to DRB in a foreign state, all of the other salient connections to the case are exclusively in West Virginia. In contrast, *Triangle* involved multiple states having interests arising out of the same occurrence, to wit: West Virginia, New Jersey, Ohio and, based on the EPA's CERCLA claim, potentially the entirety of the United States. Moreover, unlike *Triangle Industries*, Evanston has neither adduced evidence, nor cited evidence of record, showing where "the policy was bargained for, created, and agreed to." *Triangle Industries,* 390 S.E.2d at 567. Thus, in this case, where every single aspect of the dispute relates solely to West Virginia except Evanston's act of mailing the policy to DRB in Maryland, the trial court was correct in finding that West Virginia law controlled.

## CONCLUSION

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

Dated: June 2, 2025

Respectfully submitted,

By: _____

Avrum Levicoff, Esquire
W.Va. ID #: 4549
Joseph E. Starkey, Jr., Esquire
W.Va. ID #: 6673
The Levicoff Law Firm, P.C.
4 PPG Place, Suite 200
Pittsburgh, PA 15222
412-434-5200

*Counsel for the Petitioners*

## CERTIFICATE OF SERVICE

I hereby certify that on the date indicated below, the foregoing ***Petitioners' Reply to Respondent's Response and Response to Respondent's Cross-Assignment of Error*** was filed electronically and served on the parties indicated below via E-Service:

Shaina L. Richardson, Esquire
*shaina.richardson@steptoe-johnson.com*
Hannah E. Vogt, Esquire
*hannah.vogt@steptoe-johnson.com*
Steptoe & Johnson PLLC
1000 Swiss Pine Way, Suite 200
Morgantown, WV 26501

*Counsel for Respondent*

Respectfully submitted,

Date: June 3, 2025

By: _____

Avrum Levicoff, Esquire
*alevicoff@levicofflaw.com*
W.Va. I.D. #: 4549
Joseph E. Starkey, Jr., Esq.
*jstarkey@levicofflaw.com*
W.Va. I.D. #6673
The Levicoff Law Firm, P.C.
4 PPG Place, Suite 200
Pittsburgh, PA 15222
Phone - 412-434-5200

*Counsel for the Petitioners*