**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

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**BOHNERT INTERNATIONAL, INC., NORVIN RAQUE &**
**DAVID GRAESER,**

Petitioners,

v.

**MOTORISTS MUTUAL INSURANCE COMPANY,**

Respondent

No. 24-609

(An Appeal of a Decision by the Intermediate Court of Appeals, No. 23-ICA-194)

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**AMICUS CURIAE BRIEF OF WV GREAT BARREL COMPANY, LLC and WVGBC REAL ESTATE HOLDING COMPANY, LLC IN SUPPORT OF PETITIONERS**

***Seeking reversal of the decision by the West Virginia Intermediate Court of Appeals***

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## INTERESTS OF THE AMICUS CURIAE

WV Great Barrel Company, LLC and WVGBC Real Estate Holding Company, LLC (hereinafter referred to collectively as "Barrel") submits this Amicus Curiae brief pursuant to Rule 30 of the West Virginia Rules of Appellate Procedure. Barrel has unique interest in the outcome of this appeal because they are the plaintiffs in the action styled *WV Great Barrel Company, LLC, et al v. Bohnert International, Inc., Norvin Raque and David Graeser, Civil Action No. 20-C-84,* ("the underlying action"). As set forth in more detail in Barrel's Second Amended Complaint, Barrel retained the Petitioners to design, fabricate, ship and install a material handling system to be utilized in a state-of-the art cooperage located in Caldwell, West Virginia[1]. (APPX000409-410, *Second Amended Complaint*, ¶¶ 18-19).

Barrel intended the cooperage to, among other things, create new jobs and operate as an economic stimulus for residents of West Virginia. (APPX000522-524). Site work and buildings were built by West Virginia construction firms. Barrel hired local residents to operate the facility after it was completed, and the white oak logs used to construct the barrels are, when practicable, acquired within a 200-mile radius of White Sulphur Springs, West Virginia. (APPX000410, at ¶ 20). As of the date of the Second Amended Complaint, Barrel had expended approximately Thirty-Eight Million Dollars ($38,000,000.00) in construction of the cooperage facility which included Eight Million, Nine Hundred Fifty-Five Thousand, Six Hundred Ten Dollars and Thirty-Seven Cents ($8,955,610.37) paid to Bohnert on the project. (APPX000419-420, at ¶¶ 56-58).

The damages suffered by Barrel in the underlying case include property damage and loss caused by the work of Petitioners' subcontractors. Recovery in the underlying case is dependent

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[1] For the Court's convenience, Barrel adopts and incorporates by reference the Joint Appendix cited throughout this brief. Barrel has only one document in supplement to the Joint Appendix which is identified as AMICUS000001-2).

upon the outcome of this appeal because, upon information and belief, the Petitioner Bohnert has been depleted of assets and is essentially, "judgment proof."

Among other things, Erick VanKleef testified below, that Bohnert in his words "blew up" and could no longer operate or pay its bills.

Q: Tell me about the company blowing up. When did it happen?

A: So I think it would have been in the first part of 2020, first half of 2020.

Q: Ok. What happened there?

A: Yeah. It went away.

Q: The company went away?

A: It looked like it stopped paying its bills and it stopped paying me and it stopped – taking care of the customer and just went away.

Q: Who decided to do that, stop paying bills and stop paying you and stop paying – taking care of the customer?

A: You would have to ask maybe Raque who would control that. I don't control the money.

(AMICUS000002).

The insurance policy at issue is believed to be the only viable asset to satisfy a potential recovery.[2]

## STATEMENT REGARDING NONINVOLVEMENT OF PETITIONERS' COUNSEL

Barrel states pursuant to Rule 30(e)(5) of the West Virginia Rules of Appellate Procedure that no counsel for Petitioners authored this brief in whole or in part, nor have Petitioners or any

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[2] Bohnert operated as Bohnert Equipment Company, Inc. at the time of contracting with Barrel. On or about December 19, 2019, the corporation changed its name to Bohnert International, Inc. and sold substantial corporate assets, including the right to use the name Bohnert Equipment, Inc., to a third-party. Petitioners Norvin Raque and David Graeser participated in the sale but did not inform Barrel (Plaintiff below) of the sale. (APPX000405-06, *Second Amended Complaint* at ¶¶ 4-5).

of their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

## ARGUMENT

### I. The Lower Court Misapplied Its Choice of Law Analysis.

West Virginia substantive law should be applied to decide the declaratory judgment action. West Virginia has the most significant relationship to the Commercial General Liability ("CGL") insurance contract (the "Policy"), and West Virginia law more accurately satisfies the expectations created under the contract language. The Policy should not be decided by Kentucky law simply because Bohnert International, Inc. ("Bohnert") was a Kentucky company, or because the policy was mailed to Bohnert at a Kentucky address. This is especially true in the case at bar, where the law of Kentucky presents a distinct minority position that is in conflict with the vast majority of states, including West Virginia, all of which recognize that damage to property caused by a subcontractor's work is an "occurrence" for purposes of a CGL policy[3].

West Virginia has long recognized exceptions to the rule that every action taken under a contract is to be governed by the law of the place where it was made. Thus, the relevant West Virginia choice of law rule applicable to contracts, including insurance policies, provides that

> [i]n 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.**

[3] *See, K&L Homes, Inc. v. Am. Family Mut. Ins. Co.,* 829 N.W.2d 724, 729 (N.D. 2013). At the time of this brief, only Kentucky, Ohio, Pennsylvania, and Oregon fail to clearly recognize property damage caused by a subcontractor's work as an "occurrence". Kentucky has however recognized exceptions to a blanket rule prohibiting recovery for property damage under a CGL. *See, Westfield Ins. Co. v. B.H. Green & Son, Inc.*, Civil Action No. 5:11-CV-00010-R (W.D. Ky. Sep. 17, 2013), discussed *infra.*

Syl., *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 182 W. Va. 580, 390 S.E.2d 562 (1990) (emphasis added).

The lower courts correctly acknowledged that *Triangle Industries* governs the choice of law. (APPX000007). However, the lower courts erred in failing to recognize that West Virginia has the prevailing state interest in performance of the contract, and similarly erred in failing to recognize that application of Kentucky law would be contrary to the public policy of West Virginia.

## A. West Virginia Has The More Significant Relationship To The Contract.

The record shows that West Virginia has the most significant interest in the Policy. Bohnert was actively marketing work with Barrel, in West Virginia, prior to any negotiations that might have been had regarding renewal of the Policy. As early as March 15, 2017, Bohnert invited Barrel to a business presentation regarding its expertise and capabilities in designing, building and installing custom cooperage equipment. (APPX000407-08 at ¶ 14). On March 20, 2017, Bohnert submitted a written proposal to Barrel in West Virginia, for the design-build project, to be located in West Virginia. (APPX000409 at ¶ 17, APPX000536). This was three days prior to the Policy renewing on March 23, 2017. (APPX000144). Barrel ultimately accepted Bohnert's proposal, in West Virginia, for work to be performed primarily in West Virginia, on or about June 8, 2017. (APPX000411 at ¶ 23, APPX000561-563).[4]

The lower courts thus erred in concluding that the risks contemplated under the Policy were exclusive to Kentucky. It was undisputed that Bohnert conducted business in multiple states. There was no evidence of Bohnert ever representing that its business activities were limited to Kentucky. Moreover, Bohnert was actively marketing itself in West Virginia at the time the Policy

[4] Bohnert forayed into West Virginia multiple times during its marketing to Barrel, as set forth in the affidavit of J. Phillip Cornett. (APPX000527-531).

was issued. The record reveals that prior to the inception of the Policy on March 23, 2017, Bohnert had done substantial work in Ohio, nearly identical to the work it was to do for Barrel at the White Sulphur Springs facility. It is inconceivable that Respondent could have entered into the Policy without knowing that Bohnert would be subject to risks outside of Kentucky. That finding by the lower court was contrary to the facts contained in the record.

The lower court's finding that the Policy "was issued two years before Bohnert's contractual relationship with Barrel was formed" is also incorrect. Bohnert was fully aware that it was marketing to Barrel in West Virginia at the time it entered the Policy. Motorists knew that Bohnert performed work outside of Kentucky and also knew or should have known that this included West Virginia. The work Bohnert was to provide in West Virginia was substantial. The total consideration payable to Bohnert under its proposal was Ten Million, Four Hundred Fifty-Seven Thousand, Five Hundred Nine Dollars ($10,457,509.00)

Even if Motorists now claims that it was unaware of the significant work to be performed by its insured in West Virginia, this provides no basis to deny coverage. West Virginia recognizes that an insurer has a duty to ascertain the insured interest prior to contracting. *See, Filiatreau v. Allstate Ins. Co.*, 178 W. Va. 268, 271, 358 S.E.2d 829, 832 (W. Va. 1987).[5] Even if mistakes are

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[5] *Filatreau* was a case dealing with the valuation of a property and the time of contracting. In that case the Court *recognized:*

> An insurer has an obligation to attempt to ascertain the basis of the insured's interest in property prior to issuing a contract to insure the property. The insurer cannot issue a policy and collect premiums thereunder and later complain that the insured's interest was overvalued due to an omission by the insured if the insurer never attempted to ascertain that interest through reasonable inquiry. *See DeWitt v. American Family Mut. Ins. Co.*, 667 S.W.2d 700, 708 (Mo. 1984); 6 J. Appleman, *Insurance Law and Practice*, § 3828 (1972). Thus, even if it is found that the insured innocently misrepresented the extent of his insurable interest, the insured may still recover if it is found that the insurance company did not make a reasonable investigation as to the extent of the interest.

*Filiatreau at* 271-72, 832-33.

made at the time of contracting, the insured will still recover if the insurance company did not make a reasonable investigation prior to contracting. *Id.*

With respect to Bohnert's work, which is central to the allegations in the underlying action, there is no dispute that the bulk of that work was performed in West Virginia. In other words, the risk insured for which liability insurance coverage is sought in this case was principally located in West Virginia. Thus, West Virginia has the more significant relationship with the transaction and the parties.

Kentucky's relationship to the transaction and the parties in this case is so tenuous as to be almost nonexistent. Kentucky's only interest in this case is the fact that Bohnert's offices were located in Kentucky, and so that is where Motorists sent the subject policy when it was issued. Considering its relationship to the transaction and the parties and the overall effects of Bohnert's faulty workmanship in this state, West Virginia certainly has the greater interest in the outcome of this declaratory judgment action. The Intermediate Court's opinion provides no analysis of these factors and instead focuses almost exclusively on the fact that Bohnert was a Kentucky company.

The Intermediate Court's opinion also fails to properly consider the case of *Joy Technologies v. Liberty Mut. Ins. Co.,* 187 W. Va. 742, 421 S.E.2d 493 (1992), decided two years after *Triangle Industries*. Similar to the facts in this case, *Joy Technologies* addressed the availability of coverage under a general liability policy issued to an insured in Pennsylvania to indemnify it for certain pollution claims that had arisen in West Virginia. *Id.* at 743. The insurer declined coverage on the basis of a policy exclusion that had been upheld by Pennsylvania courts, and which eliminated coverage for pollution claims unless the pollution occurred suddenly and accidentally. *Id.*

*Joy Technologies* acknowledged that Pennsylvania courts carefully examined the pollution exclusion and concluded that it excluded coverage for pollution dispersed over time. The West Virginia Supreme Court had not addressed this exclusion prior to its decision in *Joy Technologies*. *Id.* at 745, 496. When faced with the choice of law between the two states, the Court applied the rule from *Triangle Industries* and determined it should apply the law of West Virginia, where the underlying claims arose, rather than the state where the contract was formed.

The court placed great emphasis on the fact that "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," *Id.,* at 746, 497. The Court thus concluded that West Virginia had the more significant relationship to the transaction and to the parties. *Id.* Consequently the Court applied West Virginia law to the coverage issues presented, notwithstanding the general rule favoring application of the law of the state where the policy was issued. *Id.*

*Joy Technologies* is instructive in this case, and should not have been so easily dismissed by the lower courts. Just as in *Joy Technologies,* in this case West Virginia, rather than Kentucky, has the more significant relationship with the transaction and with the parties. Litigation of the underlying claim is pending in West Virginia; the injury at issue in the underlying case occurred in West Virginia; and Petitioner's defective work was performed in West Virginia. As demonstrated above, Bohnert had very substantial contact with this State – more so than with Kentucky – in the course of marketing their services, engaging in pre-proposal discussions relating to the prospective cooperage project, negotiating the terms of the proposal that were accepted by Barrel, and in performing under its proposal. Bohnert's performance in West Virginia ultimately led to damages suffered in West Virginia. The damaged plaintiffs in the underlying action are West Virginia entities, and collateral damage also occurred to other West Virginia residents in the form of unrealized West Virginia jobs and tax revenue.

Motorists argued below, and the Intermediate Court appears to accept, that the location and instrumentality of injury are irrelevant to determining which State has the more significant relationship with the transaction and the parties. However, *Joy Technologies* instructs that those factors are entirely relevant and among the most important factors to be considered. *Joy Technologies*, 187 W. Va. at 746, 421 S.E.2d at 497. *See also, Johnson v. Neal*, 187 W. Va. 239, 418 S.E.2d 349 (1992) (recognizing that "the situs of the accident" is relevant to assessing which State has a more significant relationship to the transaction and the parties). Contrary to the lower court's decision, nowhere in the *Joy Technologies* opinion did the court rely on or even address the relationship between the insurer and the insured or where or how the policy was procured.

The Trial Court purported to distinguish *Joy Technologies* because 1) it found the instrument of harm in that case, pollution, to somehow be different from that alleged in the case at bar; and 2) because the case involved misrepresentations regarding the scope of the policy and the operation of the exclusions therein. (APPX000102). Neither rationale provides a basis to reach a contrary conclusion under the facts of this case.

First, there is no reason why the mechanism inflicting harm in this case is any less worthy of redress than that which was present in *Joy Technologies*. As of the date of the Second Amended Complaint, Barrel had expended approximately Thirty-Eight Million Dollars ($38,000,000.00) in construction of the cooperage facility which included Eight Million, Nine Hundred Fifty-Five Thousand, Six Hundred Ten Dollars and Thirty-Seven Cents ($8,955,610.37) paid to Bohnert on the project. APPX000419-420). The economic cost involved in constructing the cooperage, by itself, demonstrates an overwhelming West Virginia interest. The mechanism of injury should not matter, be it pollution, damage to property through the work of subcontractors, or something else. This is especially true when the Policy at issue appears to be the only viable asset to potentially support a recovery.

Second, as set forth in more detail below, the case at bar also involves what Bohnert contends were misrepresentations regarding the operation of the Policy's exclusions. Bohnert's position in this case is, among other things, that Motorists inserted a policy exclusion that caused it to believe that it would be indemnified for the work of its subcontractors, irrespective of what state's laws were applied. Just like the insurer in *Joy Technologies*, Motorists is responsible for the misrepresentation it is now using as a basis to deny coverage.

### B. The Lower Court Ignored Key Facts To Find That Kentucky Had The Most Significant Interests.

To find that Kentucky had the most significant interest, the proceedings below placed inordinate weight on the proposition that the Policy was "bargained for, created, and agreed to in Kentucky by Bohnert and Motorists Mutual." (APPX000008). To reach this conclusion, the lower court overlooked important facts. Among other things, the Intermediate Court found that the "Policy includes Kentucky endorsements and surcharges and the risks it insured are **all located in Kentucky."** *Id.* (emphasis added). This was factually incorrect and led the Intermediate Court to conclude that the parties did <u>not</u> contemplate the possibility that Bohnert would be performing work outside of Kentucky.

Contrary to the facts stated in the Intermediate Court's decision, Bohnert held itself out as performing work in multiple states outside of Kentucky, including in Virginia, Ohio, Pennsylvania and Indiana. (APPX000527). The endorsements, surcharges and risks insured in the Policy were <u>not</u> **"all located in Kentucky."** For example, the Policy contains an endorsement for naming lessors of leased equipment as additional insureds. This endorsement identifies a company located in Minnesota as an additional insured. (APPX000269). Another endorsement adds companies located in Wayne, Pennsylvania and Jasper, Indianna as additional loss payees. The Commercial Umbrella Coverage Form which stands on top of the CGL Policy includes a "Kentucky and Pennsylvania Amendment". (APPX000272).

None of this is to suggest that the laws of Minnesota, Pennsylvania, Ohio, Indiana, or Virginia are more appropriate to decide this case. But this language does eviscerate the proposition that Bohnert and Motorists entered into the Policy under an expectation that the risks would be exclusively confined to Kentucky. Such intent is not reflected in the four corners of the Policy and provides no basis for deeming Kentucky to have the most significant interest in the Policy.

## C. Application of Kentucky Law In This Case Would Be Contrary To Public Policy.

In *Joy Technologies,* the court could have stopped after determining that West Virginia had the more significant relationship with the transaction and the parties. However, the court found public policy concerns so important that it went on to consider whether application of Pennsylvania law regarding the exclusion at issue was contrary to West Virginia public policy.[6] Following this guidance, the Court should find that the application of Kentucky law in the case at bar would also contravene the public policy of West Virginia.

The law that Motorists asks the Court is found in *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.,* 306 S.W.3d 69 (Ky. 2010), among other cases. In that case, the Kentucky Supreme Court addressed the fundamental coverage issue that is also presented in this case, as follows:

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6 In *Joy Technologies*, the court based its public policy determination on misrepresentations of insurers to the Insurance Commissioner as to the meaning of the then recently amended pollution exclusion. *Id.,* 187 W. Va. at 747-49, 421 S.E.2d at 498-500. Because of the misrepresentations, the court concluded that Pennsylvania law, which apparently disregarded those misrepresentations, was contrary to West Virginia public policy.

> Although this precise issue of whether faulty construction workmanship may be an "occurrence" under a CGL policy appears to be a matter of first impression in Kentucky, many other courts have already addressed it; and they have come to differing conclusions. … After careful analysis, we agree with the Supreme Court of Nebraska's characterization of this as a "difficult question ... ." … The majority viewpoint, however, appears to be that claims of faulty workmanship, standing alone, are not "occurrences" under CGL policies. … Because we believe the majority viewpoint is correct, we adopt it.

*Id.* at 73 (footnotes omitted).

Kentucky stands with a distinct minority in failing to recognize faulty workmanship as an "occurrence" under a CGL policy. Ohio, Pennsylvania, and Oregon are the only other outliers to maintain this position[7]. Every other state to decide this issue, as well as the District of Columbia, all find in some form or other that faulty workmanship may be an "occurrence."[8] West Virginia is

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[7] *See, Ohio N. Univ. v. Charles Constr. Servs., Inc.*, 155 Ohio St. 3d 197, 2018-Ohio-4057; *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A. 2d 888 (Pa. 2006); *Oak Crest Constr. Co. v. Austin Mut. Ins. Co.*, 998 P. 2d 1254 (Or. 2000);

[8] *See, Owners Ins. Co. v. Jim Carr Homebuilder, LLC,* 157 So. 3d 148 (Ala. 2014) (citing *Town & Country Prop., LLC v. Amerisure Ins. Co.*, 111 So. 3d 699 (Ala. 2011)); *Desert Mt. Props. Ltd. P'ship v. Liberty Mut. Fire Ins. Co.*, 236 P. 3d 421 (Ariz. Ct. App. 2010); Ark. Code Ann. § 23-79-155(a); *Landmark Am. Ins. Co. v. Colony Ins. Co.*, 2:24-cv-06445-CAS-KSx (C.D. Cal. Jan. 13, 2025); *Liberty Surplus Ins. Corp, v. Ledesma & Meyer Constr. Co.,* 5 Cal. 5th 216, 222 (Cal. 2018); Colo. Rev. Stat. § 13-20-808( 3); *Greystone Constr. Inc. v. Nat'l Fire & Marine Ins. Co.*, 661 F. 3d 1272 (10th Cir. 2011); *Capstone Bldg. Corp. v. Am. Motorists Inc. Co.*, 67 A. 3d 961 (Conn. 2013); *Pa. Nat'l Mut. Cas. Ins. Co. v. Zonko Builders, Inc.*, Civil Action 21-437-MAK (D. Del. Sep. 7, 2021); *AE-Newark Assoc. v. CNA Insurance*, C.A. No. 00C-05-186 JEB (Del. Super. Ct. Oct. 2, 2001); *Commonwealth Lloyds Ins. Co. v. Marshall, Neil & Pauley, Inc.*, 32 F. Supp. 2d 14 (D.D.C. 1998); *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871 (Fla. 2007); *Taylor Morisson Servs. v. HDI-Gerling Am. Ins. Co.*, 746 S.E. 2d 587 (Ga. 2013); *McDonald Constrt. Co., Inc. v. Bituminous Cas. Corp.*, 632 S.E. 2d 420 (Ga. Ct. App. 2006); Haw. Rev. Stat. § 431: 1-217 (2011); *Group Builders v. Admiral Ins. Co.*, 231 P. 2d 67 (Haw. Ct. App. 2010); *Illinois Stoneridge Dev. Co. v. Essex Ins. Co.*, 888 N.E. 2d 633 (Ill. App. 2008); *Westfield Ins. Co. v. Nat'l Decorating Service, Inc.*, 863 F. 3d 690 (7th Cir. 2017); *Sheehan Constr. Co., Inc. v. Cont'l Cas. Co.*, 935 N.E. 2d 160 (Ind. 2010); *Nat'l Sur. Corp. v. Westlake Invs, LLC,* 880 N.W. 2d 724 (Iowa 2016); *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P. 3d 486 (Kan. 2006); *Iberia Parish School Bd. v. Sandifer & Son Constr. Co.*, 721 So. 2d 1021 (La. Ct. App. 1998); *State Auto Mut. Ins. Co. v. Old Republic Ins. Co.*, 115 F. Supp. 3d 615 (D. Md. 2015); *Capitol Specialty Ins. Corp. v. Dello Russo Enters.*, Civil Action 21-10939-FDS (D. Mass. Jan. 24, 2023); *Steel Supply & Eng'g Co. v. Illinois Nat. Ins. Co.*, 620 Fed. Appx. 442 (6th Cir. 2015); *Ohio Cas. Ins. Co. v. Terrace Enterprises, Inc.*, 260 N.W. 2d 450 (Minn. 1977); *Achitex Ass'n v. Scottsdale Ins. Co.*, 27 So. 3d 1148 (Miss. 2010); *D.R. Sherry Constr., Ltd. v. Am. Family Mut. Ins. Co.*, 316 S.W. 3d 899 (Mo. 2010); *Revelation Indus., Inc. v. St. Paul Fire & Marine Ins. Co.*, 206 P. 3d 919 (Mont. 2009); *Auto-Owners Ins. v. Home Pride Cos.,* 684 N.W. 2d 571 (Neb. 2004); *Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.*, 459 F. Supp. 2d 1039 (D. Nev. 2006); *EnergyNorth Natural Gas, Inc. v. Underwriters at Lloyd's,* 848

included within this majority view. *See, Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 745 S.E.2d 508 (2013).

Our court recognizes that public policy may be found in constitutional, statutory, or regulatory provisions, as well as in prior judicial decisions. *Tiernan v. Charleston Area Med. Ctr., Inc.*, 203 W. Va. 135, 141, 506 S.E.2d 578, 584 (1998). The *Cherrington* case reflects a sound statement of public policy.

When the Kentucky court decided *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.,* the majority view at the time was that faulty workmanship was not an occurrence. West Virginia was one of those jurisdictions included in the former majority. *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.* at n.9. However, the majority of the country moved forward, and West Virginia moved with it.

Three years after the Kentucky court decided *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, the West Virginia Supreme Court issued its decision in *Cherrington v. Erie Ins. Prop. & Cas. Co.,* where the court held that:

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A. 2d 715 (N.H. 2004); *High County Assocs. v. New Hampshire Ins. Co.,* 648 A. 2d 474 (N.H. 1994); *Cypress Point Condo Ass'n, Inc. v. Adria Towers LLC*, 143 A. 3d 273 (N.J. 2016); *Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.,* 367 P. 3d 869 (N.M. Ct. App. 2015); *George A. Fuller Co. v. U.S. Fid. & Guar. Co.,* 613 N.Y.S. 2d 152 (N.Y. App. Div. 1994); *Production Systems, Inc. v. Amerisure Ins. Co.,* 605 S.E. 2d 663 (N.C. Ct. App. 2004); *Certain Underwriters at Lloyds v. Stock Bldg. Supply,* 5:14-CV-367-BO (E.D.N.C. Aug. 25, 2021); *K&L Homes, Inc. v. Am. Family Mut. Ins. Co.,* 829 N.W. 2d 724 (N.D. 2013); *Oklahoma Emp'rs Mut. Cas. Co. v. Grayson,* 2008 U.S. Dist. LEXIS 43255, 2008 WL 2278593 (W.D. Okla. May 30, 2008); *Dodson v. St. Paul Ins. Co,* 812 P. 2d 372 (Okla. 1991); *Furey Roofing & Constr. Co. v. Employers Mut. Cas. Co.,* 2010 R.I. Super. LEXIS 24 (Super. Ct. R.I. 2010); S.C. Ann. §38-61-70( B); *Crossman Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.,* 717 S.E. 2d 589 (S.C. 2011); *Corner Constr. Co. v. U.S. Fid. & Guar. Co,* 638 N.W. 2d 887 (S.D. 2002); *Travelers Indem. Co. of Am. v. Moore & Assocs.,* 216 S.W. 3d 302 (Tenn. 2007); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.,* 242 S.W. 3d 1 (Tex. 2007); *Cincinnati Ins. Co. v. AMSCO Windows,* 593 Fed. Appx. 802 (11th Cir. 2014); *H.E. Davis & Sons, Inc. v. N. Pac. Ins. Co.,* 248 F. Supp. 2d 1275 (D. Utah 2002); *Peerless Ins. Co. v. Wells,* 580 A. 2d 485 (Vt. 1990); *Stanley Martin Cos. v. Ohio Cas. Group,* 313 Fed. Appx. 609 (4th Cir. 2009); *Yakima Cement Prods. Co. v. Great Am. Ins. Co.,* 608 P. 2d 254 (Wash. 1980); *Cherrington v. Erie Ins. Prop. & Cas. Co.,* 745 S.E. 2d 508 (W.Va. 2013); *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.,* 673 N.W. 2d 65 (Wis. 2004); *Kalchthaler v. Keller Const. Co.*, 224 Wis. 2d 387, 591 N.W.2d 169 (Wis. Ct. App. 1999); *Shoshone First Bank v. Pacific Emp'rs Ins. Co.,* 2 P. 3d 510 (Wyo. 2000).

> [d]efective workmanship causing bodily injury or property damage is an "occurrence" under a policy of commercial general liability insurance. To the extent our prior pronouncements in Syllabus point 3 of *Webster County Solid Waste Authority v. Brackenrich and Associates, Inc.*, 217 W. Va. 304, 617 S.E.2d 851 (2005); Syllabus point 2 of *Corder v. William W. Smith Excavating Co.*, 210 W. Va. 110, 556 S.E.2d 77 (2001); Syllabus point 2 of *Erie Insurance Property and Casualty Co. v. Pioneer Home Improvement, Inc.*, 206 W. Va. 506, 526 S.E.2d 28 (1999); and Syllabus point 2 of *McGann v. Hobbs Lumber Co.*, 150 W. Va. 364, 145 S.E.2d 476 (1965), and their progeny are inconsistent with this opinion, they are expressly overruled.

*Id.* at Syl. Pt. 6.

*Cherrington* represented a drastic change in West Virginia insurance law, rejecting a line of West Virginia cases going back nearly fifty years.[9] The opinion should be rightfully viewed as a strong statement of public policy.

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[9] In reaching the decision to establish a new rule, the court explained:

> "Although we fully understand that the doctrine of *stare decisis* is a guide for maintaining stability in the law, we will part ways with precedent that is not legally sound." *State v. Sutherland*, 213 W. Va. 410, 417, 745 S.E.2d 448, 455, 2013 W. Va. LEXIS 605, *22 (No. 11-0799 June 5, 2013). Thus, "when it clearly is apparent that an error has been made or that the application of an outmoded rule, due to changing conditions, results in injustice, deviation from that policy is warranted." *Woodrum v. Johnson*, 210 W. Va. 762, 766 n.8, 559 S.E.2d 908, 912 n.8 (2001) (internal quotations and citations omitted). See also Syl. pt. 2, in part, *Dailey v. Bechtel Corp.*, 157 W. Va. 1023, 207 S.E.2d 169 (1974) ("An appellate court should not overrule a previous decision . . . without evidence of changing conditions or serious judicial error in interpretation sufficient to compel deviation from the basic policy of the doctrine of stare decisis, which is to promote certainty, stability, and uniformity in the law."). We recognize that a definite trend in the law has emerged since we rendered our determinative decision in *Corder* sufficient to warrant this Court's reconsideration of the issues decided therein and that, if warranted, a departure from this Court's prior opinions would be consistent with this Court's steadfast resolve to follow the law to achieve just, fair, and equitable results. *See, e.g.*, *State v. Sutherland*, 231 W. Va. 410, 745 S.E.2d 448, 2013 W. Va. LEXIS 605 (No. 11-0799 June 5, 2013) (overruling Court's prior precedent to adopt view in line with majority of jurisdictions addressing issue); *State of West Virginia ex rel. Discover Fin. Servs., Inc. v. Nibert*, 231 W. Va. 227, 744 S.E.2d 625, 2013 W. Va. LEXIS 603 (Nos. 13-0086 & 13-0102 June 4, 2013) (overruling Court's prior precedent to correct "serious judicial error" therein (internal quotations and citation omitted)).

*Id.*, 231 W. Va. at 479-80, 745 S.E.2d at 517-18.

West Virginia has a well-established public policy of construing insurance policies in favor of coverage. For example, “An insurance policy which requires construction must be construed liberally in favor of the insured." Syl. pt. 3, *Polan v. Travelers Ins. Co.,* 156 W. Va. 250, 192 S.E.2d 481 (1972). “[A]ny ambiguity in the language of an insurance policy is to be construed liberally in favor of the insured, as the policy was prepared exclusively by the insurer. This principle applies to policy language on the insurer’s duty to defend the insured, as well as to policy language on the insurer’s duty to pay." *Horace Mann Ins. Co. v. Leeber,* 180 W. Va. 375, 378, 376 S.E.2d 581, 584 (1988). *See also, Pitrolo,* 176 W. Va. at 194, 342 S.E.2d at 160 ("We have long recognized that since insurance policies are prepared solely by insurers, any ambiguities in the language of insurance policies must be construed liberally in favor of the insured.").

West Virginia has adhered to public policy and construed the “occurrence” provision of a CGL policy to favor coverage not only in *Cherrington,* but also in subsequent cases. *Westfield Ins. Co. v. Sistersville Tank Works, Inc.,* 895 S.E.2d 142 (W. Va. 2023) is a recent case involving long term chemical exposure spanning multiple years, multiple CGL policies and multiple coverage periods. The insurance company’s position was that the “occurrence” took place at the time of initial exposure, triggering coverage for the policy in place at that time. The single policy would in turn be responsible for the entirety of the harm, subject to the limits of that single policy. *Id.* at 148-149. The Court rejected this position to instead favor the “continuous-trigger” theory which recognized that exposure over time resulted in an occurrence triggering coverage for every policy in place at the time of each such exposure. *Id.* at Syl. Pt. 7.

To reach its conclusion, the Court considered several factors that are instructive in the case at bar. Among them, the Court traced West Virginia’s history of construing policies in favor of coverage. *Id.* at 149-50. The Court also took note that the vast majority of jurisdictions to consider this issue applied the continuous-trigger theory. *Id.* at 154-55.[10] Finally, the Court noted a benefit to distributing the risk of loss as broadly as possible. "Spreading the risk is conceptually more efficient because insurance companies can spread costs throughout an industry and thus achieve cost efficiency. *Id.* at 156 (citations omitted).

Consideration of these same factors shows that it is repugnant to the public policy of West Virginia to use Kentucky law to interpret the occurrence provision in this case. First, the lower court's decision is contrary to West Virginia's long history of construing insurance contracts against the insurer and in favor of coverage. Here, the Policy is ambiguous because the term "accident" was left undefined by the insurer. Kentucky would have this ambiguity, created by the insurer, resolved contrary to the insured and contrary to a finding of coverage.

Second, West Virginia public policy is to adhere to the majority position when practicable. In *Cherrington*, West Virginia abandoned its former position to follow the interpretation of occurrence applied in what became the new majority position. West Virginia looked to the majority again when interpreting the occurrence provision in *Westfield Ins. Co. v. Sistersville Tank Works, Inc.* There is sound rationale in this public policy because this is a form insurance policy utilized in every state.[11] Therefore, when there is a clear majority of opinion, adopting its interpretation

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[10] The Court noted in this regard:

> We have analyzed five decades of case law from our sister state courts and federal courts that have examined the precise question before us today. We find that the majority of jurisdictions that have considered the question - sixteen by our count - have concluded that occurrence-based CGL policies incorporate a continuous trigger of coverage in the context of bodily injuries. To the contrary, we have found no court that currently follows the manifestation trigger in the context of a bodily injury, sickness, or disease.

*Id.* 54-55.

[11] The Policy at issue is a standard form policy developed by the Insurance Services Office, Inc. ("ISO"). ISO is the industry organization responsible for drafting the industry-wide standard forms used by insurers throughout the United States. *See, Lamar Homes, Inc. v. Mid-Continent Cas. Co,* 242 S.W.3d 1, 5 n.1 (Tex. 2007).

provides for greater consistency and predictability in application of the Policy. Conversely, when there is such a dramatic outlier as Kentucky, adopting its position promotes inconsistent and anomalous outcomes.

Finally, applying Kentucky law would contravene West Virginia's public policy of spreading risk as efficiently and broadly as possible. West Virginia's interpretation of occurrence allows the risk of property loss to be spread amongst all members of the mutual insurance company so that the risk is not borne exclusive by any one insured or injured party. The insurer can efficiently respond to this risk by raising its premiums. However, Kentucky law would not spread the risk in this instance and would instead focus it squarely on the insured. In this case, because the insured is believed to be "judgment proof", it is likely the loss will fall entirely on the injured third-party.

Spreading the risk of loss is of unique importance in West Virginia. In the past, the Court has analogized products liability law to the concept of insurance. *See, Blankenship v. General Motors Corp.*, 185 W. Va. 350, 353 (W. Va. 1991).[12] *Blankenship* reached the Court as a certified question to determine the plaintiff's burden of proof in a crashworthiness case. In that case, the Court held that whenever there should be a split of authority in crashworthiness cases, West Virginia shall adopt the rule most favorable to the plaintiff. "[F]or the guidance of both the state and federal trial courts, we *hold* today that in any crashworthiness case where there is a split of authority on any issue, as for example the plaintiff's burden of proof discussed above, we adopt the rule that is most liberal to the plaintiff." *Id.* The Court explained that its rationale was designed

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[12] "[P]roduct liability is concerned with *spreading the cost of inevitable accidents*. Inherent in this cost-spreading function is the collection of what amounts to insurance premiums from all the purchasers of products, and the purchase by manufacturers of commercial insurance or the creation of self-insurance funds." *Blankenship v. General Motors Corp.*, 185 W. Va. 350, 353 (W. Va. 1991).

to remove the risk of loss from the individual, and place it where it could be more widely distributed.

> The defendant before us, General Motors, is the largest producer of automobiles in the world. In light of the fact that all of our sister states have adopted a cause of action for lack of crashworthiness, General Motors is *already* collecting a product liability premium every time it sells a car anywhere in the world, including West Virginia. *See* "Product Liability: The Corporate Response," *op. cit. supra* note 4. West Virginians, then, are already paying the product liability insurance premium when they buy a General Motors car, so this Court would be both foolish and irresponsible if we held that while West Virginians must pay the premiums, West Virginians can't collect the insurance after they're injured.

*Id.* at 353-54 (W. Va. 1991).

Though it is a crashworthiness case, *Blankenship* dramatically illustrates the public policy concerns at issue. Kentucky law would not distribute the risk for property loss caused by a subcontractor among all insureds paying a premium, but rather one single insured that would find itself without coverage. Furthermore, application of Kentucky law in this case will have an adverse impact on a citizen of West Virginia by depriving Barrel of any recovery in the underlying action.[13]

To be certain, this is not a situation where application of West Virginia law simply leads to a different result. Application of Kentucky law would contravene fifty years of West Virginia jurisprudence designed to efficiently and fairly manage risks for residents of West Virginia and those doing business here. More importantly, application of Kentucky law would lead to an interpretation of the form policy that is inconsistent with nearly every other state to consider this policy provision. Kentucky is currently within a dwindling minority of only four states that construe the occurrence provision to exclude losses caused by a subcontractor's work. West

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[13] Bohnert, as it existed at the time of the events giving rise to the underlying action, no longer exists. Barrel is advised that, aside from the Motorists insurance policy, Bohnert has no assets.

Virginia should not strain itself looking backwards to deny coverage for a loss suffered in West Virginia by a West Virginia resident.

## II. Faulty Workmanship Is An "Occurrence" Under West Virginia Law.

It is clear that Second Amended Complaint presents an "occurrence" under West Virginia law. *Cherrington* recognized that defective workmanship is not the result of deliberate acts. Indeed, the court expressly and unconditionally held that "[d]efective workmanship causing bodily injury or property damage is an 'occurrence' under a policy of commercial general liability insurance." *Id.* at Syl. Pt. 6. The *Cherrington* court did not qualify its holding or otherwise rely on the relationship between the insured and its subcontractors, as Respondent argued below. Faulty workmanship falls squarely within the coverage provided by the policy under West Virginia law. There is an exclusion in the policy. But the exclusion does not apply to harm resulting from the work of subcontractors. [14]

Respondent argued below that the Second Amended Complaint does not allege an "occurrence" because Bohnert's actions and design failures were the direct result of the decisions

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[14] Even if the *Cherrington* court had conditioned its holdings on the use of subcontractors, that holding would still apply in this case, inasmuch as it is undisputed that a very substantial amount of the work done at the White Sulphur Springs facility was completed by Bohnert's subcontractors. *Infra.* Furthermore, coverage for subcontractors' work would not be excluded under Exclusion L, "Damage To Your Work," which provides that

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

The *Cherrington* court addressed Exclusion L and plainly recognized that this exclusion does not exclude coverage for work performed by the insured's subcontractors. *Cherrington*, 231 W. Va. at 486, 745 S.E.2d at 524.

made by Bohnert's principals and Bohnert's senior manufacturing engineer VanKleef – alleged by Motorists to have been an employee of Bohnert. Bohnert asserts that Mr. VanKleef is an independent contractor outside of its control. Considering the court's holding in *Cherrington*, it is not clear how that would eliminate coverage in this case if West Virginia law were applied. Nevertheless, the degree to which Bohnert's own acts or omissions were the proximate cause of the damage for which recovery is being sought in the underlying action, and whether or not VanKleef was an employee of Bohnert, are all questions of fact for the jury. Thus, at a minimum, the grant of summary judgment should be set aside.

## III. The Lower Court Should Have Found An "Occurrence" Even Under Kentucky Law.

### A. Damage caused by work performed outside of Bohnert's control is an "occurrence" under the policy.

The lower courts erred in applying the choice of law. Nevertheless, the facts at bar satisfy the Policy's "occurrence" requirement, even under Kentucky law. *Westfield Ins. Co. v. B.H. Green & Son, Inc.*, Civil Action No. 5:11-CV-00010-R (W.D. Ky. Sep. 17, 2013) was decided after *Cincinnati v. Motorists Mutual* and is directly on point. The *Westfield* case considered the same "occurrence" provision at issue herein and held that a builder was entitled to coverage under its CGL policy for claims arising from the flawed construction of a school building.

The facts in *Westfield* are highly analogous to those at bar. The case involved a construction contractor hired to construct a school building in Kentucky. Cement used in the project later failed, and the owner sued the builder. The builder was insured with a CGL policy containing the same definition of "occurrence" at issue herein. Just as in this case, the insurer sought a declaratory judgment on the grounds that economic losses resulting from the insured's work are not an "occurrence" under Kentucky law. Also like this case, the building design and concrete specifications had been developed by an architect that was not an employee of the construction company. Finally, like this case, the defective building component was obtained from a subcontractor that mixed the concrete offsite and supplied it to the project. *Id.* **2-3.

The lynchpin of the *Westfield* decision was the Court's finding that the insured lacked the ability to observe and control the work of the designer or the subcontractor mixing and supplying the cement.

> *Cincinnati* establishes that an insurer has no duty to indemnify a contractor for faulty workmanship. However, *Cincinnati*'s facts are distinguishable from the ones before this Court. *Cincinnati*'s finding of coverage hinged on the fact that the subcontractors' defective workmanship was both observable and controllable by the insured party throughout construction. *See Cincinnati,* 703 S.W.2d, at 77 (emphasizing the "protracted improper construction" of the home "over a period of weeks"). However, the case at bar involves no faulty performance that Green might have observed or controlled.

*Westfield Ins. Co. v. B.H. Green & Son, Inc.*, Civil Action No. 5:11-CV-00010-R, at *7-8 (W.D. Ky. Sep. 17, 2013). Among other things, the *Westfield* Court instructed that a contractor should not be "required, at its peril, to check and double check all plans given to it." *Id.* *8. Fundamental to the case at bar, the Court found correctly that the inability to control those that designed the project and supplied its building components rendered the flawed completion of the project an "accident" satisfying the "occurrence" provision under Kentucky law. *Id.* at *9.

The case at bar presents facts on par with those in *Westfield.* Bohnert describes itself as an equipment vendor. (APPX000664). The cooperage was designed by Erik VanKleef. According to Bohnert, Mr. VanKleef was an independent contractor outside of its control. (APPX000461). VanKleef testified below that he invoiced Bohnert monthly and they paid him through his company.[15] (APPX000760-761).

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[15] VanKleef testified that he initially invoiced through a d/b/a called Manufacturing Solutions until sometime in 2018, when formed a new company called KTLC.

Additionally, the cooperage incorporated multiple mechanical components that were manufactured, supplied and/or installed by subcontractors outside of its control. (APPX000664). One such company was Steller Technologies, Inc. ("Steller"). Steller is an Indiana company and operated a machine shop in Warrick County, Indiana during the relevant timeframe. Steller manufactured and fabricated a portion of the equipment including components of the Toast Carousel, the Hot Windlass, and Hoop Cassettes in Indiana. Steller shipped these to the site and installed them. *Id.* Steller shipped multiple components and installed the equipment at the project. Steller also sourced, purchased, and commissioned the manufacturing robots incorporated into the system.

Bohnert alleges it did not have meaningful control over VanKleef's design of the project and lacked the expertise required to check and double check his plans. Arguably, Bohnert could not observe or control any of the manufacturing work performed by Steller. It could not oversee or control the sourcing of the robots. Nor could Bohnert exercise control over the manufacturing or performance of various Windlasses, Heating Elements, Meters, Sensors and other componentry, all of which was supplied and installed by subcontractors.

*Westfield* holds that with these facts, the defects constitute an "occurrence" triggering coverage under the Policy. The Intermediate Court should have thus reversed the Trial Court's Summary Judgment.

**B. The policy exclusions show that the insurer intended to cover work performed by subcontractors.**

Motorists acknowledged that the Policy initially granted coverage for damages caused by "your work" when it inserted an Exclusion L into the Policy. The exclusion is a double negative that results in a positive finding of coverage. If there were no possibility of coverage for damages caused by the insured's work, there would be no reason for the insurer to insert Exclusion L into the contract. Plain reading of the contract shows that the policy granted coverage for damages caused by the insured's work. Exclusion L takes that coverage away. However, by creating an exception to the exclusion for subcontractors, Exclusion L restores the coverage, so long as the damages were caused by the work of subcontractors.[16] The lower courts erred in interrupting the Policy in a way that rendered exclusion L to have no effect.

Similar to West Virginia, Kentucky requires ambiguity in an insurance policy to be resolved in favor of the insured's reasonable expectations. *See, Aetna Cas. Sur. Co. v. Com.,* 179 S.W.3d 830, 837 (Ky. 2006). "We believe an insurance company should not be allowed to collect premiums by stimulating a reasonable expectation of risk protection in the mind of the consumer, and then hide behind a technical definition to snatch away the protection which induced the premium payment." *Id.* Similarly, "Kentucky law mandates that exclusions in insurance policies should be narrowly construed as to effectuate insurance coverage." *Id.* at 840.

The operative portions of the Policy provide:

**BODILY INJURY AND PROPERTY DAMAGE LIABILITY**

**1. Insuring Agreement**

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to elect to defend the insured against any "Lawsuit" seeking those damages. However, we will have no duty to defend the insured against any "Lawsuit" seeking damages for "bodily injury" or property damage to which this insurance does not apply. We may, at our discretion investigate any "occurrence" and settle any claim or "Lawsuit" that may result. ...

b. This insurance applies to bodily injury and "property damage" only if:

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16 *Lamar Homes, Inc. v. Mid-Continent Cas. Co.,* 242 S.W.3d 1, (Tex. 2007) provides an informative history of the development of Exclusion L. Responding to the demands of their insureds, the insurance industry began specifically providing coverage for claims arising out of faulty work by subcontractors in 1986. The Your Work exclusion in the basic ISO form CGL policy was ultimately amended to include a subcontractor's exception. "With this action, the insurance industry essentially agreed to cover a huge portion of faulty workmanship claims, particular those arising out of home building or other construction." *Id.* at n.8.

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"...

(APPX000224).

**SECTION V – DEFINITIONS**

**[...]**

13. "Occurrence" means an accident including continuous or repeated exposure to substantially the same general harmful conditions.

(APPX000258).

**2. Exclusions**

This insurance does not apply to:

. . .

**1. Damage To Your Work**

"Property Damage" to "your work" arising out of it or any part of it included in the "products-completed operations hazard."

<u>This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.</u>

(APPX000248 underlining not in original).

Bohnert thus had a reasonable expectation of coverage for property damage resulting from work performed by its subcontractors. Motorist's position is in direct conflict with the actions it took when offering the policy. If *Cincinnati v. Motorists Mutual* truly operated as a blanket exclusion where property damage for "your work" could never be an occurrence under the policy, then there was no reason for Motorists to include Exclusion L. In such instance, damage caused by Bohnert's work could never be an "occurrence." The existence of the Exclusion L shows that the Motorists did regard such damage as a covered "occurrence."

This is a standard CGL policy on ISO form that starts with a broad grant of coverage and is then limited in scope by exclusions. Exceptions to the exclusions narrow the scope of the exclusion and add back coverage. *See, Town Country Prop. v. Amerisure Ins. Co.,* 111 So. 3d 699, 703 (Ala. 2011). *Westfield* shows that *Cincinnati's* interpretation of "occurrence" is not absolute, even in Kentucky. Exclusion L is in the Policy because Kentucky recognizes that under facts similar to those at bar, damage caused by "Your work" does in fact operate as an "occurrence" under the Policy.[17] Because the exclusion added back coverage for occurrences caused by the work of subcontractors, the lower courts erred in holding that application of Kentucky law operated to preclude coverage for the claims asserted in Barrel's Second Amended Complaint.

Whether applying Kentucky law, or that of West Virginia, "the words of a contract shall be given their ordinary meaning." *Enerfab, Inc. v. Ky. Power Co.*, 433 S.W.3d 363, 367 (Ky. Ct. App. 2014). *See also Am. Nat'l Prop. & Cas. Co. v. Clendenen*, 793 S.E.2d 899, 907 (W. Va. 2016)("[l]anguage in an insurance policy should be given its plain, ordinary meaning.") Equally axiomatic, the contract should be construed as a whole, giving meaning to each word and phrase so as not to render any provision superfluous. *See, Imhoff v. Lexington Pub. Library Bd. of Trs.*, No. 2017-CA-001427-MR, at *6-7 (Ky. Ct. App. Mar. 29, 2019); *See also, Am. Nat'l Prop. & Cas. Co. v. Clendenen*, 793 S.E.2d 899, 917 (W. Va. 2016). "Our goal in interpreting insurance policy language is to give effect to each provision of the contract." *Id.*

Any ambiguity in the contract should have been resolved in favor of the insured and against the insurance company that drafted the contract. The lower court instead disregarded the rules of construction and rendered the exclusionary language without meaning. Had the contract been correctly construed, even if applying Kentucky law, the lower courts should have found that the

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[17] Numerous courts interpreting the form CGL policy recognize that by inserting the exclusion, the insurer acknowledged that the contract had provided a general grant of coverage. *See, U.S. v. J.S.U.B*, 979 So. 2d 871, 886 (Fla. 2007)("if the insuring provisions do not confer an initial grant of coverage for faulty workmanship, there would be no reason for *U.S. Fire* to exclude damage to "your work".); *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex. 2007)("By incorporating the subcontractor exception into the 'your-work' exclusion, the insurance industry specifically contemplated coverage for property damage caused by a subcontractor's defective performance."); *Am. Fam. Mut. Ins. Co. v. American Girl, Inc.*, 268 Wis. 2d 16, 43 (Wis. 2004)("Why would the insurance industry exclude damage to the insured's own work or product if the damage could never be considered to have arisen from a covered "occurrence" in the first place?").

insurance policy provides indemnity for damages caused by the work of subcontractors. The Court should thus reverse the Intermediate Court's decision.

## CONCLUSION

For the foregoing reasons, the Court should find that West Virginia has the more significant relationship to the transaction and the parties. Additionally, the Court should find that the law of Kentucky as it relates to the issues in this case is contrary to the public policy of West Virginia. On these bases, the Court should reverse the decision of the Intermediate Court and apply West Virginia law to the coverage issues raised by the pleadings in this case and, further, should find, as a matter of law, that the underlying allegations of poor workmanship by Bohnert, through its subcontractors are afforded liability coverage under the CGL and umbrella liability portions of the Bohnert policy.

In the alternative, even if the Court should conclude that Kentucky law applies, the Court should reach the same conclusion. The facts of this case show that Bohnert had no control over the work of designing, manufacturing and fabrication performed by subcontractors. Additionally, the presence of Exclusion L in the policy shows that the insurer knew that the policy covered the work of subcontractors and created an expectation that its insured would be covered for their work.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that on January 29, 2025, the *Amicus Curiae Brief of WV Great Barrel Company, LLC and WVGBC Real Estate Holding Company, LLC in Support of Petitioners* was filed and served via File&ServeXpress on all counsel of record.

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