IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-609

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BOHNERT INTERNATIONAL, INC.,
NORVIN RAQUE, and
DAVID GRAESER,
Plaintiffs below, Petitioners,

v.

MOTORISTS MUTUAL INSURANCE COMPANY,
Defendant below, Respondent.

Appeal from the Intermediate Court
of Appeals of West Virginia
(Case No. 23-ICA-194)

PETITIONERS' JOINT OPENING BRIEF

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INTRODUCTION

Respondent Motorists Mutual has a duty to defend Petitioners (together, "Bohnert") in the underlying case regardless of whether West Virginia or Kentucky law applies, contrary to the lower court's decision. Reaching this conclusion is as straightforward as reading the plain text of the insurance policy. Yet, in denying Bohnert's motion for summary judgment and granting summary judgment to Motorists, the Circuit Court effectively took a blue pencil and scratched out language from the operative policy. On its review, the Intermediate Court ignored Bohnert's plain text argument, opting instead to sanction the Circuit Court's rewriting of the Policy. This Court must reverse.

ASSIGNMENTS OF ERROR

1. Does Motorists Mutual have a duty to defend Bohnert in the underlying case, regardless of whether West Virginia or Kentucky law applies?

2. Did the Intermediate Court of Appeals err by affirming the Circuit Court's determination that Kentucky, rather than West Virginia, applies?

3. Did the Intermediate Court of Appeals err by concluding that, under Kentucky law, Motorists has no duty to defend Bohnert in the underlying case?

4. Did the Intermediate Court of Appeals err by affirming the Circuit Court's premature decision with respect to Motorists' indemnity obligations?

STATEMENT OF THE CASE

I. Underlying case

Bohnert International Inc.,[1] is a Kentucky corporation that, beginning in November of 2017, contracted with WV Great Barrel Company, LLC ("Barrel") to

[1] Petitioners to this matter are Bohnert International, Inc., Norvin Raque and David Graeser. For convenience only, they are collectively referred to as "Bohnert."

design, manufacture, fabricate, ship, and install a material handling system to be incorporated into Barrel's new cooperage.[2] *See* Appx. 405 ¶ 3, 409 ¶17, 412 ¶ 27, 413 ¶ 31. Barrel intended to build its new cooperage in White Sulphur Springs, West Virginia. *Id.* at 413 ¶ 31. Throughout the project, Bohnert provided oversight and operational support for the startup of the material handling system by Barrel employees and supervised various vendors and subcontractors working on the project. *Id.* at 418 ¶ 53 (explaining that "Bohnert was to provide preventative maintenance performed by Bohnert personnel for a six (6) month period after installation"). However, Bohnert also utilized an independent contractor, Erik VanKleef, to "provide[] design, engineering, installation and construction services to Barrel." Appx. at 446 ¶ 188.

On August 28, 2020, Barrel filed an eleven count complaint against Bohnert seeking recovery for alleged damages relating to the performance of the contract (the "underlying case").[3] The Second Amended Complaint filed by Barrel[4] asserts the following causes of action: (1) negligence; (2) breach of contract; (3) breach of express warranty; (4) breach of implied warranty of merchantability; (5) breach of implied warranty: fitness for a particular purpose; (6) implied warranty: design-build; (7) fraud; (8) fraudulent transfers; (9) individual liability pierce the corporate veil; (10)

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[2] The cooperage operation was to manufacture white oak barrels for the bourbon, whiskey and rye distilling industries. *See* Appx. 407-08 ¶¶ 12-14.

[3] Barrel's complaint also names one of Bohnert's independent contractors, Erik Vankleef. *See generally*, Appx. 404–449. Mr. Vankleef is not a party to this appeal.

[4] WV Great Barrel Company, LLC and WVGBC Real Estate Holdings, LLC are plaintiffs in the underlying case. Appx. 404-405 ¶¶ 1–2.

fraudulent inducement to contract; and (11) negligent design, engineering, installation, and construction. *See generally*, Appx. 404-449.

Essentially, the underlying case includes allegations that Bohnert promised installation of new or "Factory Rebuilt Like New Robots" to perform the tasks of positioning barrels and hoops on the manufacturing line but delivered "used or defective" equipment. Appx. 416 ¶ 46, 428 ¶ 100, 431, ¶ 122. The Second Amended complaint goes on to state that Petitioner Raque and *independent contractor*, Erik Vankleef "represented that Tesla Manufacturing had acquired all worldwide supply of new robots and that waiting for new robots to be manufactured would delay the . . . deadline for barrel production." *Id.* at 416, ¶ 46. Barrel claims Bohnert failed to timely produce, deliver, and install equipment by the October 1, 2019 deadline established unilaterally by Barrel. *Id.* at 423-24 ¶ 71.

Barrel also alleges that Bohnert's faulty workmanship, including subcontractors' failure to properly design, engineer, install, and construct the equipment at issue, caused Barrel to suffer damages. *See* Appx. 420-21, 422-30. As a result, Barrel claims it has incurred costs in remediating the equipment designed, fabricated and installed by Bohnert. *Id.* at 421-22 ¶ 60.

II. The Coverage Litigation

Bohnert maintained an occurrence-based commercial general liability ("CGL") insurance policy, through Motorists Mutual Insurance Company. Appx. 142-44. After Barrel initiated the underlying case, Bohnert promptly tendered notice to Motorists. *See* Appx. 748-58 (Motorists acknowledging Bohnert's correspondence and receipt of the complaint). Motorists disclaimed coverage, tendered a defense under a reservation of rights, and filed a declaratory judgment action in the United States District Court for the Southern District of West Virginia. *See id.* at 748-58; *see also*, *Motorists Mutual Ins. Co. v. Bohnert Int'l, el at.*, No. 5:22-cv-00028 (S.D. W. Va. 2022). Motorists' federal case was dismissed for lack of diversity jurisdiction on July 8, 2022. *Id*. Bohnert then filed this declaratory judgment action, concerning Motorists' duty to defend and indemnify its insureds, in the Circuit Court of Greenbrier County.

The Policy provides, in pertinent part:

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

CGL policy 33-302333-10E, at Appx. 683–701, 685. The Policy then goes on to define "occurrence" as "mean[ing] an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 699. Thereafter, the Policy contains exclusions along with exceptions to those exclusions:

> 2. Exclusions
>
> This insurance does not apply to:
>
> . . .
>
> l. 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."[5]
>
> 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.

Appx. at 689.

III. The Lower Courts' decisions

In the Circuit Court, Bohnert and Motorists filed cross-motions for summary judgment as to Motorists' duty to defend and indemnify. Motorists argued that Kentucky law applied as the Policy was formed in Kentucky and Kentucky had the more significant relationship with the insurance transaction. Appx. at 124-32. Motorists went on to argue it had no duty to defend or indemnify because the claims alleged in the underlying case do not constitute an "occurrence" (under either West Virginia or Kentucky law) and therefore are not covered by the Policy. Appx. at 133-37.

[5] "Products-completed operations hazard" is defined, in pertinent part, to include "'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work.'" App. at 699.

Bohnert argued that choice of law favored West Virginia as this state has the most significant relationship—based in large part—on the parties' justified expectations, as well as public policy considerations. Appx. at 666-72. Bohnert further argued that, regardless of which state's law applied, Motorists has a duty to defend and indemnify based upon the clear language of the Policy. Appx. at 662-80. Finally, Bohnert argued that, given the nature of the claims in the underlying suit, Motorists' duty to defend was triggered based upon the "accidental" nature of the claims made.[6] Appx. at 672-77.

In evaluating choice of law, the Circuit Court found that, as the Policy was formed in Kentucky, Kentucky (rather than West Virginia) law must govern the contract unless one of two exceptions applied. Appx. at 98. The Circuit Court found that Kentucky had the more significant relationship to the transaction and the parties, and that applying Kentucky law would not violate West Virginia's public policy. Appx. at 98-105. Thereafter, the Circuit Court found that there was no "occurrence" under Kentucky law and thus Motorists has no duty to defend or indemnify Petitioners. Appx. at 106-09. The Circuit Court granted Motorists' motion for summary judgment, concomitantly denying Petitioners' motion. Appx. at 113.

On appeal, the Intermediate Court of Appeals of West Virginia affirmed each of the Circuit Court's findings and conclusions above. *See* Appx. at 3-12. In doing so, the ICA evaluated just two of the seven choice of law factors outlined in *Liberty*

[6] Barrel was permitted to submit a brief in the underlying case wherein it argued that West Virginia had a more significant relationship with the case and that Barrel's claims constituted an "occurrence" as defined within the Policy. Barrel did not file any brief before the ICA. However, Barrel has sought leave, and submitted, an Amicus Brief before this Court.

Mutual Ins. Co. v. Triangle Indus., Inc., 182 W. Va. 580, 390 S.E.2d 562 (1990) (quoting Restatement (Second) of Conflict of Laws § 6)). *See* Appx. at 8. The ICA went on to affirm the application of Kentucky law, finding that neither exception applied. Appx. at 8-9. Finally, the ICA held that, under Kentucky law, the underlying case did not allege an "occurrence" for which the Policy provides coverage. Appx. at 9-11. In reaching this conclusion, the ICA ignored Petitioners' "plain language" argument. It is from this decision that Petitioners' appeal.

SUMMARY OF THE ARGUMENT

In both the Circuit Court and the ICA, Petitioners' arguments have been the same: under West Virginia or Kentucky law, Petitioners are entitled to indemnity and a defense in the underlying case, paid for by their insurer.

Regardless of whether West Virginia or Kentucky law applies, the four corners of the insurance policy clearly provide that the "Damage to Your Work" "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*." Appx. at 689 (emphasis supplied). This provision would be rendered superfluous under Motorists' reading of the contract. Under well-settled law governing insurance contracts, words are read to have meaning. In interpreting a contract—just like reading a statute—no portion can be read to be without meaning or effect. For this reason alone, coverage is contemplated for the claims at issue in the underlying case.

Here, Bohnert is entitled to application of West Virginia law based upon the parties' reasonable expectations, the significant relationship with the forum state, or public policy considerations. This Court's precedent confirms Motorists' duty to defend and indemnify its insured pursuant to West Virginia law. Yet even under Kentucky law, the purported damages in the underlying case were fortuitous, i.e., accidental, therefore, Bohnert is entitled to indemnity and a defense paid for by its insurer—Motorists Mutual.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument will assist this Court in the clarification of issues concerning conflicts of law and insurance contract interpretation. Oral argument is appropriate under Rule 19 because this appeal involves assignments of error in the application of settled law and presents narrow issues of law for decision. For these same reasons, a memorandum decision is not appropriate in this matter.

ARGUMENT

In affirming the Circuit Court's grant of summary judgment to Motorists Mutual—concomitantly denying Bohnert's cross-motion—the Intermediate Court of Appeals ignored West Virginia's significant relationship to the parties and the injuries, disregarded the reasonable expectations of the parties, discounted the public policy concerns, and incorrectly applied Kentucky law, ultimately disregarding the plain language of the insurance policy. *See* W. Va. R. Civ. P. 56(c). Accordingly, this Court's review of the decision below is *de novo*. *See Elk Run Coal Co. v. Canopius U.S. Ins., Inc.*, 235 W. Va. 513, 517, 775 S.E.2d 65, 69 (2015).

Additionally, review of the parties' rights and obligations under an insurance contract are also reviewed *de novo*. *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 482, 509 S.E.2d 1, 6 (1998). Relevant here, "[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination that, like a lower court's grant of summary judgment, shall be reviewed *de novo* on appeal." *Elk Run Coal Co.,* 235 W. Va. at 518, 70 (quoting Syl. pt. 2, *Riffe v. Home Finders Assocs., Inc.*, 205 W.Va. 216, 517 S.E.2d 313 (1999) (alternation in original)). Moreover, the "[d]etermination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.*" Elk Run Coal Co*., 235 W. Va. at 518, 70 (quoting Syl. pt. 1, *Tennant v. Smallwood*, 211 W.Va. 703, 568 S.E.2d 10 (2002)).

I. The ICA erred in concluding that, under choice of law analysis, West Virginia law did not govern the interpretation of the Policy.

Under both West Virginia and Kentucky law, the interpretation of an insurance policy is a contract question. Where the parties to a contract themselves have not determined which law is to control, or where the "place of contract and the place of the insured risk are different,"[7] the court "applies the law of the jurisdiction with the 'most significant relationship' to the transaction in dispute." *Lee v. Saliga*, 179 W. Va. 762, 767, 373 S.E.2d 345, 35pt0 (1988). "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 formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, *or* the law of the other state is contrary to the public policy of this state." Syl. pt. 4, *State Farm Fire & Cas. Co. v. Nathaniel Realty, LLC*, 246 W. Va. 676, 874 S.E.2d 788 (2022). Therefore,

[7] *Liberty Mut. Ins. Co. v. Triangle Indus., Inc.*, 182 W. Va. 580, 584, 390 S.E.2d 562, 566 (1990).

West Virginia law must apply if either (1) West Virginia has the most significant relationship to the transaction or the parties; *or* (2) the law of Kentucky is contrary to the public policy of West Virginia.

A. As West Virginia has the most significant relationship, the Policy must be interpretated according to West Virginia law.

To determine which state has a more significant relationship to a transaction, courts look to the Restatement (Second) of Conflict of Laws [for a series of] several nonexclusive factors:

> a. the needs of the interstate and international systems,
> b. the relevant policies of the forum,
> c. the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
> d. the protection of justified expectation,
> e. the basic policies underlying the particular field of law,
> f. certainty, predictability and uniformity of result, and
> g. ease in the determination and application of the law to be applied.

Triangle Indus., Inc., 182 W. Va. at 585, 567 (quoting Restatement (Second) of Conflict of Laws § 6)).

In evaluating these choice of law factors, the ICA erred by giving undue weight to just two of the seven. *See* Appx. at 8. In its decision, the ICA looked solely to factors (f)-(g). *See* Appx. at 8. In doing so, the ICA ignored the remaining five factors—including the parties' justified expectations. *See* Appx. 8-9. This was error.

1. The contracting parties' justified expectations weigh in favor of applying West Virginia law.

As set forth above, courts closely examine the parties' justified expectations when determining whether "the insurance company demonstrated any reasonable expectation at the time the contracts were entered into that any litigation over the policy would be based upon [a certain state's] law." *Triangle Indus., Inc.*, 182 W. Va. at 585, 567. The doctrine of reasonable expectations is considered by both West Virginia and Kentucky courts in analyzing choice of law. *See Id. at* 585, 567; *see also, James Graham Brown Found. Inc., v. St. Paul Fire & Marine Ins. Co.*, 814 S.W.2d 273, 279–80 (Ky. 1991) (analyzing and giving deference to the reasonable expectations created by the insurance policy). The doctrine is well-settled:

> The gist of the doctrine [of reasonable expectations] is that the insured is entitled to all the coverage he may reasonably expect to be provided under the policy. Only an unequivocally conspicuous, plain, and clear manifestation of the company's intent to exclude coverage will defeat that expectation.

Brown v. Indiana Ins. Co., 184 S.W.3d 528, 540 (Ky. 2005) (quoting *Simon v. Cont'l Ins. Co.*, 724 S.W.2d 210, 212–13 (Ky. 1986)); *see also* Syl. pt. 6 *New Hampshire Ins. Co. v. RRK, Inc.*, 230 W. Va. 52, 736 S.E.2d 52 (2012). This doctrine is a corollary to strictly construing ambiguities *against* the insurer.

Here, Motorists included a policy exclusion wherein coverage would not be provided for "Damage to Your Work." However, that exclusion likewise has an exception.

The relevant exclusionary language reads as follows:

2. Exclusions

    This insurance does not apply to:

    . . .

    m. 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."[8]
>
> 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*.

Appx. at 689 (emphasis supplied).

Motorists claims that damage for work performed by a subcontractor cannot constitute an "occurrence" under Kentucky law, thus the exception can never apply. Therefore, Motorists' inclusion of the "Damage to Your Work" exclusion, and its subcontractor exception, plainly communicated to Bohnert petitioners, as the insureds, (as well as any other potential insured) that Kentucky law would *not* apply. Thus, Bohnert reasonably expected—based on the unambiguous terms of the Policy, specifically the "Damage to Your Work" exclusion and its subcontractor exception—that coverage (and a defense) would be provided for any faulty work performed by Bohnert's subcontractors.

In fact, the very existence of the "Your Work" exclusion and subcontractor exception within the Policy provides confirmation that coverage is *not* excluded for faulty workmanship when the faulty work is performed by a subcontractor. *See French v. Assurance Co., of America*, 448 F.3d 693, 707 (4th Cir. 2006) (recognizing that the policy at issue—which is identical to the Policy here—provides liability coverage for the cost to remedy unexpected and unintentional property damage

[8] "Products-completed operations hazard" is defined, in pertinent part, to include "'property damage' occurring away from premises you own or rent and arising out of 'your product' or 'your work.'" App. at 699.

caused by the subcontractor's defective workmanship); *but see McBride v. Acuity*, 510 F. App'x 451 (6th Cir. 2013) (declining to extend coverage under subcontractor exception).

Courts have likewise held that any construction of the insuring agreement that precludes recovery for a subcontractor's faulty workmanship—despite the existence of an exclusion and exception for the same—would render the "product-completed operation hazard" and "Your Work" exclusions meaningless. *See, e.g., Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.*, 137 P.3d 486, 494 (Kan. 2006) (holding that the "Damage to Your Work" business risk exclusion supports the determination of an occurrence because, if there can be no occurrence, the exclusion—and its exception—appear to be superfluous); *Lennar Corp. v. Great Am. Ins. Co.*, 200 S.W.3d 651, 673 (Tex. App. 2006) (finding no occurrence for faulty workmanship would render the exclusion and exception unnecessary and confusing to the insured).

Rather than read the plain language of the contract, Motorists urges the court to apply Kentucky law[9] and effectively invalidate the textual provisions of its own policy. Motorists contends that, under Kentucky law, Barrel's "workmanship" claims against Bohnert (including Bohnert's subcontractors) would not constitute an occurrence covered under a CGL policy. But why would Motorists Mutual knowingly and intentionally include the "Your Work" exclusion and a subcontractor exception if those provisions are irrelevant and void under the law that purportedly governs the

[9] Bohnert disputes that Kentucky law precludes coverage. But if it does, a state law invalidating a contract provision and ignoring the expectations of the parties weighs in favor of applying West Virginia law.

contract? The answer is simple: to induce Bohnert into purchasing the policy and paying premiums to Motorists Mutual.

Yet Bohnert reasonably relied on the precise language of the Policy, which includes exclusions and exceptions that Motorists—and now the ICA—have claimed to be meaningless or worthless under Kentucky law. By including the "Damage to Your Work" exclusion and the subcontractor exception, Motorists created a reasonable expectation at the time the insurance agreement was executed, that the policy would provide coverage where, as here, "the damaged work or the work out of which the damage arises was performed on [Bohnert's] behalf *by a* subcontractor." Appx. at 689 (emphasis supplied). Thus, to protect the justified expectations of the parties, this Court should find that—based on Motorists' own written representations—Kentucky law does not apply.

2. The remaining factors do not support application of Kentucky law.

When viewing the parties' justified expectations, along with the remaining *Triangle* factors, it is clear the ICA erred in applying Kentucky law. *See* Appx. at 8.

Petitioners do not dispute that Bohnert is a Kentucky corporation or that the individually named Petitioners are Kentucky residents. Further, Petitioners agree the Policy was executed in Kentucky. But importantly, the risk for which the insurance contract was purchased by Bohnert was to take place—at least in large part—in West Virginia. Appx. 408. Meetings between Bohnert and Barrel took place in West Virginia. Appx. 409. The underlying case arises out of damages purportedly suffered by Barrel as a result of Bohnert's design, fabrication, and installation of equipment *in West Virginia*. Appx. 408.

On these facts, this Court's analysis in *Joy Technologies, Inc. v. Liberty Mutual Ins. Co.*, is instructive. 187 W. Va. 742, 421 S.E.2d 493 (1992). In *Joy,* this Court focused on the lawsuit's close link to location, noting that the injury occurred in West Virginia, the instrumentality of injury was located in West Virginia, and the forum selected to try the issue was West Virginia. *Id. at* 496-497. Much like in *Joy,* here the alleged injury occurred in West Virginia—where Bohnert and its various subcontractors delivered and installed, for sale, a material handling system (i.e., the instrumentality of injury). Additionally, the underlying case arises from damages purportedly suffered by Barrel as a result of Bohnert's design, fabrication, and installation of certain equipment *in West Virginia*. And at least a portion of Barrel's purported injuries arose from operations conducted *solely* in West Virginia at a facility located in West Virginia.

As stated above, Motorists even selected West Virginia as the forum for its declaratory judgment action, which was filed in (and dismissed by) the United States District Court for the Southern District of West Virginia.

Therefore, West Virginia has a more significant relationship to the Policy, the underlying case, the transaction, and the parties—particularly in light of the parties' justified expectations.

B. The ICA erred by finding that public policy considerations do not favor application of West Virginia Law.

If Motorists is correct—that Kentucky law does not consider the acts of a subcontractor to constitute an occurrence—then even if this court finds that Kentucky has a more significant relationship, West Virginia law must still be applied because "the law of [Kentucky] is contrary to the public policy of this state." Syl. pt. 4 *State Farm Fire & Cas. Co. v. Nathaniel Realty, LLC*, 246 W. Va. 676, 874 S.E.2d 788 (2022). Here, the ICA erroneously concluded that Kentucky law did not violate West Virginia public policy. *See* Appx. at 9.

"Most courts . . . agree that the mere fact that the substantive law of another jurisdiction differs from or is less favorable than the law of the forum state does not, by itself, demonstrate that application of the foreign law . . . is contrary to the public policy of the forum state." *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W. Va. 329, 336, 424 S.E.2d 256, 263 (1992). However, where the law of another jurisdiction is not only less favorable but would eliminate coverage that is plainly provided by the text of the Policy, and otherwise circumvents the parties' expectations, the law of the forum state must control. To find otherwise would be "contrary to pure morals or abstract justice, [and] . . . enforcement would be of evil example and harmful to [the state's] own people." *Howe v. Howe*, 218 W. Va. 638, 646–47, 625 S.E.2d 716, 724–25 (2005) (quoting *Nadler*, 188 W. Va. at 338, 265).

Both West Virginia and Kentucky recognize an insurer's duty of good faith and fair dealing to its insured. *See Shamblin v. Nationwide Mut. Ins. Co.*, 183 W. Va. 585, 396 S.E.2d 766 (1990); *Knotts v. Zurich Ins. Co.*, 197 S.W.3d 512, 515 (Ky. 2006). Likewise, both states statutorily prohibit unfair actions by an insurer when inducing a potential client to consent to coverage. *See* Ky. Rev. Stat. Ann. § 304.12-230; W. Va. Code § 33-11-1, *et seq*. It is an unfair practice, and a material breach of the duty of good faith and fair dealing, for an insurer to "misrepresent[] pertinent facts or insurance policy provisions relating to coverage." *Knotts*, 197 S.W. 3d at 515 (citing Ky. Rev. Stat. Ann. § 304.12-230 (West 2008)). This is precisely what Motorists Mutual has done by including the "Damage to Your Work" and "Damage to Property" exclusions, along with the subcontractor exception, while simultaneously disavowing coverage under the law Motorists Mutual seeks to invoke. Permitting Motorists Mutual to invoke Kentucky law as both a sword and shield permits Motorists to escape responsibility from its assurances and the plain language of its contractual obligations.

Motorists has consistently offered the same policy—verbatim—to its insureds, resulting in continuous litigation over the exact language at issue here. All it would take is issuance of an endorsement to the policy removing the "Your Work" exclusion and subcontractor exception for policies written in Kentucky. But Motorists has not done so. Presumably for the same reasons outlined and set forth above—inclusion of this language acts as an enticement to potential insureds yet, according to Motorists, does nothing more than offer an illusory promise of coverage which could never exist. For these reasons, the Court should find that public policy considerations favor application of West Virginia law.

C. Under West Virginia law, Motorists Mutual has a clear duty to defend.

While the Circuit Court and the ICA declined to address whether Motorists is obligated to provide Bohnert with a defense under West Virginia law, this Court may do so now. *See* Appx. at 9, 93-116. In 2013, this Court evaluated the precise policy language at issue here and concluded that the insurer had a duty to defend. In *Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 745 S.E.2d 508 (2013), this Court upheld the validity of a "your-work" exclusion and its subcontractor exception, which were identical to the provisions contained within the subject CGL policy. In *Cherrington*, this Court held that "[d]efective workmanship causing bodily injury or property damage is an 'occurrence' under a policy of commercial general liability [(CGL)] insurance." *Id.* at Syl. pt. 6. Therefore, to the extent choice of law favors West Virginia, Motorists Mutual has a duty to defend Bohnert in the underlying case. This is true *even if* the only claims against Bohnert were faulty workmanship—which they are not.

II. Even if Kentucky law applies, the ICA erred by concluding that Motorists does not owe Bohnert a duty to defend.

In finding that Motorists owed no duty to defend, the ICA committed separate, reversable errors, by (1) failing to follow the plain language of the Policy and subsequently concluding that Motorists' owes no duty to defend Bohnert in the underlying case; and (2) concluding that the allegations of the operative complaint do not allege damages as a result of an "accident." Appx. at 10. The ICA was incorrect on both fronts. To begin, under the plain language of the applicable insurance contract, Motorists Mutual has a duty to defend Bohnert in the underlying case. Moreover, the claims within the underlying case allege damages which are the result of an accident. For these reasons, and irrespective of choice of law, Bohnert is entitled to coverage in the underlying case.

A. The plain language of the insurance Policy triggers coverage under Kentucky law.[10]

Although the Kentucky Supreme Court has previously held that a CGL policy does not insure against poor workmanship claims, this holding is not absolute. To conclude otherwise would render entire provisions of the Policy—including the "Your Work" exception—surplusage and thus meaningless. Any argument that claims against an insured are barred, based on the actions or omissions of their subcontractors, *contradicts* the plain language found within the four corners of the insurance contract.

As always, we begin with the text of the contract—here the insurance policy. The court's "review [of a contract] must begin with an examination of the plain language of the instrument." *Salyersville Nat'l Bank v. Russell*, 629 S.W.3d 820, 825 (Ky. 2021) (quoting *Kentucky Shakespeare Festival, Inc. v. Dunaway*, 490 S.W.3d 691, 694–95 (Ky. 2016)); *see also Motorists Mutual Ins. Co. v. Zukoff*, 244 W. Va. 33, 37, 851 S.E.2d 112, 116 (W. Va. 2020) ("We recognize the well-settled principle of law that this [c]ourt will apply, and not interpret, the plain and ordinary meaning of an insurance contract in the absence of ambiguity or some other compelling reason."). Therefore, "[i]n the absence of ambiguity, a written instrument will be enforced strictly according to its terms." *Salyersville Nat'l Bank*, 629 S.W.3d at 825 (quotation marks omitted).

[10] As set forth above, this argument holds true under West Virginia law as well.

Motorists Mutual argued below that the "Your Work" exception is irrelevant because there had been no occurrence, and thus no need to review the exclusions and subsequent exceptions. Appx. at 109, ¶¶ 75–78. Petitioners' brief to the ICA focused in on this issue. *See* Appx. at 25-27. However, the ICA did not mention or otherwise review the plain language of the insurance policy. *See* Appx. at 3-12. This was error.

It is well-established that portions of a contract cannot be read in isolation as "[a]ny contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible." *City of Louisa v. Newland, Ky.*, 705 S.W.2d 916, 919 (Ky. 1986). "A basic rule of contract interpretation requires that preference be given to the 'interpretation which gives a reasonable, lawful, and effective meaning to all the terms' over a reading 'which leaves a part unreasonable, unlawful, *or of no effect*.'" *Maze v. Bd. of Dirs. for Commonwealth Postsecondary Educ. Prepaid Tuition Trust Fund, et al*, 559 S.W.3d 354, 363 (Ky 2018) (emphasis supplied) (quoting *Comstock & Co., Inc. v. Becon Const. Co.*, 932 F. Supp. 948, 967 (E.D. Ky. 1994)).

Critically, at no point within the four corners of the policy is there any indication that faulty workmanship cannot be considered an "occurrence" triggering coverage. In fact, the "Your Work" exception within the CGL policy plainly provides that the insured *will be covered* when "damaged work or the work out of which the damage ar[ose] was performed on [Bohnert's] behalf by a subcontractor." Appx. at 689.

Therefore, to conclude that Kentucky law *never* provides the insured in a CGL policy with coverage for work performed by a subcontractor would require the court to strikethrough with a blue pen the exclusions and exception language which unambiguously extend coverage to damaged work arising out of performance by a subcontractor. To give this provision of the contract meaning, either Motorists Mutual's reading of Kentucky law must be wrong, or Kentucky law cannot be applied to this contract.[11]

B. The alleged damages within the underlying case are fortuitous and therefore constitute an occurrence under Kentucky law.

Naturally, the Policy here provides Bohnert with coverage for property damage caused by an occurrence. Occurrence is defined by the Policy as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." Appx. at 699. However, the Policy fails to define the term "accident." Where the term "accident" is not defined within an insurance policy, it is defined by its ordinary meaning, as "accident" has not acquired a technical meaning within the law. *See Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 74 (Ky. 2010). "Inherent in the plain meaning of 'accident' is the doctrine of fortuity." *Id.*

The Kentucky Supreme Court has held that "a claim for faulty workmanship, *in and of itself*, is not an 'occurrence' under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident." *Id.* at 79–80 (emphasis supplied). Importantly, however, courts applying Kentucky law *must* assess the insured's intent and control. In an instance where a

[11] This is an argument Bohnert previously advanced, but to which Motorists Mutual never responded in the Circuit Court. *See* Appx. 667–670; 808–909. Moreover, the argument was not addressed by the ICA.

subcontractor's defective workmanship is "thoroughly beyond [the insured's] control, the resultant damage . . . is properly characterized as a fortuitous event *and ultimately an 'accident.'*" *Arrowood Indem. Co. v. Drees Co.*, No. 14-169-DLB-CJS, 2015 WL 136107, at *5 (E.D. Ky. Jan. 9, 2015) (citing *Westfield Ins. Co. v. B.H. Green & Son, Inc.*, No. 5:11-cv-00010-R, 2013 WL 5278243, at * 5 (W.D. Ky. Sept. 18, 2013)) (alteration in original) (emphasis supplied).

In *Arrowood*, the court explained that "the holding in *Cincinnati* is far too narrow to settle th[e] controversy [at issue] as a matter of law" as "the claim [here,] against [the insured] for faulty workmanship[,] does not 'stand alone.'" 2015 WL 136107, *at 5. Instead, the faulty workmanship claim against the insured was only "one of four separate claims." *Id.* And the court went on to state "the allegation that [the insured] used defective materials in constructing" requires the court to "understand [the insured's] level of control over the events that caused the materials to become impaired." *Id.* "At a minimum, this . . . require[d] factual findings as to who supplied the materials and whether they were properly inspected; what the nature of the impairment was; and whether [the insured] used the materials based on its own discretion, or pursuant to the . . . specifications [of another]." *Id.*

For support, the *Arrowood* court looked to a decision from the Western District of Kentucky, *Westfield Ins. Co.*, 2013 WL 5278243. In *Westfield*, the insured sought coverage for a latent manifestation of alkali carbonate reaction (ACR) in concrete. The court, acknowledging that defective workmanship standing alone was not a covered occurrence, held that the facts were distinguishable from those in *Cincinnati*.

See id. at 4 ("*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."). The claims before the court in *Westfield* did not involve "faulty performance that [the insured] might have observed or controlled" as the "concrete that [the insured] supplied satisfied the specifications of the [contracting party's] architect and all relevant inspectors." *Id*. At issue in *Westfield* was the insured's "ability to control not its own subcontractors, but the owner and its architect . . .." *Id.* at *5. Thus, the district court concluded that the insured in *Westfield* "lacked 'control' over the design function." *Id.*

We are presented with a similar situation here, for several reasons. *First*, the faulty workmanship claims against Bohnert not "stand alone." *See generally* Appx. 404–449 (including claim of negligence). *Second*, the Second Amended Complaint, filed in the underlying action, clearly contains allegations of fault and damage that are outside Bohnert's control. Specifically, Barrel claims that the actions of an independent contractor, Eric Van Kleef, caused damage. *See* Appx. 406, 422-23. Barrel also asserts that Bohnert promised installation of new or "Factory Rebuilt Like New Robots" but delivered "used or defective" equipment. Appx. 416–18. The alleged reason for this substitution was "that Tesla Manufacturing had acquired all worldwide supply of new robots and that waiting for new robots to be manufactured would delay the . . . deadline for barrel production." *Id.* at 416, ¶ 46. Thereafter, Bohnert had *no control* over the decision to substitute used equipment, alleged to be defective. Ultimately, obtaining new robots was "beyond the power of any human being to bring . . . to pass, [or was] . . . within the control of third persons." *Martin/Elias Prop., LLC v. Acuity*, 544 S.W.3d 639, 644 (Ky. 2018) (quoting *Cincinnati*, 306 S.W. 3d at 76 (alteration in original)).

Moreover, the alleged damages here occurred to "something other than the insured's allegedly faulty work product." *Cincinnati Ins. Co.*, 306 S.W.3d at 80 n.45. The Kentucky Supreme Court recognized that "a general rule exists whereby a CGL policy would apply if the faulty workmanship caused bodily injury or property damage to something other than the insured's allegedly faulty work product." *Id*. "In other words, although a commercial general liability policy does not provide coverage for faulty workmanship that damages only the resulting work product, *the policy does provide coverage if the faulty workmanship causes bodily injury or property damage to something other than the insured's work product*." *Id.* (quoting 9A *Couch on Ins.*, Third ed. § 129:4 (2009) (emphasis supplied)).

Contrary to the holding of the ICA, here, the alleged faulty workmanship has purportedly damaged the property of Barrel—i.e., *something other than Bohnert's work product*. *But see* Appx. at 9-10. Additionally—and no less importantly—this reading of Kentucky law is consistent with the policy *as written*. Where the occurrence causes damage to the property of a third party (here Barrel), the subcontractor exception applies and coverage is triggered. The Circuit Court's contrary conclusion was error.

The alleged use of used or defective equipment and any resultant delay or damage is a fortuitous event, i.e., an accident. Bohnert is therefore entitled to coverage under the occurrence-based insurance policy at issue here.

III. Because the ICA erred in denying Bohnert a defense, the Court's determination of duty to indemnify was premature.

"It is . . . well established under our law that an insurer's duty to defend is broader than its duty to indemnify." *Camden-Clark Memorial Hosp. Ass'n v. St. Paul Fire and Marine Ins.*, 224 W. Va. 228, 237, 682 S.E.2d 566, 575 (2009). "As a general rule, an insurer's duty to defend is tested by whether the allegations in the . . . complaint are reasonably susceptible of an interpretation that the claim may be covered by the terms of the insurance policy." *Id.* (quoting *Aetna Cas. v. Pitrolo*, 176 W. Va. 190,194, 342 S.E.2d 156, 160 (1986)); *see also*, *O'Bannon v. Aetna Cas. & Surety Co.*, 678 S.W.2d 390, 392 (Ky. 1984) (determining that the duty to defend arises "if there is *any allegation* in the complaint which potentially, possibly or might come within the coverages of the policy") (emphasis supplied). Only the outcome of the underlying case can determine Motorists Mutual's indemnity obligation.

In its decision, the ICA stated that because it "ha[s] determined that there is no coverage under the Policy for [Barrel's] allegations, there is no duty to defend and no duty to indemnify." Appx. at 10. However, for the reasons set forth above, there are clearly claims made which fall within the coverage purchased and paid for by Bohnert in the insurance Policy issued by Motorists. Accordingly, if this Court reverses the ICA's affirmance of summary judgment as to Motorists' duty to defend, it must also reverse the ICA's judgment with respect to Motorists' obligation to indemnify Petitioners.

CONCLUSION

For these reasons, the judgment of the Intermediate Court of Appeals should be reversed, and the case remanded to the Circuit Court with directions to enter judgment in favor of Petitioners. Alternatively, the judgment should be vacated to the extent it prematurely determined that Motorists Mutual has no duty to indemnify and the case remanded to the Circuit Court for further proceedings.

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CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2025, *Petitioners' Joint Opening Brief* was filed and served via File&ServeXpress on all counsel of record.

/s/ J. Zak Ritchie
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