IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 24-609

BOHNERT INTERNATIONAL, INC.,
NORVIN RAQUE, and
DAVID GRAESER,

Plaintiffs below, Petitioners,

v.

MOTORISTS MUTUAL INSURANCE COMPANY,

Defendant below, Respondent.

RESPONDENT'S RESPONSE BRIEF

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INTRODUCTION

This insurance coverage dispute was properly resolved by the circuit court and Intermediate Court of Appeals. Both courts correctly reasoned that the insurance policy at issue is governed by Kentucky law and, pursuant to well-settled Kentucky law, the underlying allegations against Petitioners do not fall within the insurance policy's coverage grant. Both courts correctly determined that Respondent owes no duty of defense in an underlying liability action arising from Petitioners' allegedly faulty workmanship under governing Kentucky law.

It was proper to apply Kentucky law because the insurance policy was formed in Kentucky and Kentucky has the most significant relationship to the insurance transaction and the parties. Moreover, Kentucky law does not run counter to West Virginia public policy. The mere fact that the application of Kentucky law removes the claim from coverage does not require the Court to invoke the public policy exception.

Having decided that Kentucky law controls, the lower courts correctly applied the law to the underlying allegations against Petitioners and concluded that they do not trigger coverage. The law in Kentucky is well-settled: faulty workmanship and claims flowing from it do not meet with the definition of "occurrence" so as to come within the coverage grant of a commercial general liability policy, regardless of whether that work was performed by the contractor/insured, or its subcontractor. Petitioners' argument that the Court should skip the "occurrence" analysis and rely on a policy exclusion to artificially create a coverage grant is entirely misguided. In fact, as recently as 2022, the Kentucky Supreme Court characterized a similar argument as a "reverse analysis" which "put the proverbial cart before the horse by determining that claims are subject to the particular exclusionary language of the endorsement without ever discerning whether coverage should exist in the first instance." *Robinson v. Thomas*, 2022 Ky. Unpub. LEXIS 37, 2022 WL

3641184, *14-15 (Ky. 2022). Stated simply, policy exclusions do not grant coverage and, therefore, are only to be considered after the threshold "occurrence" determination. No "occurrence" has been alleged here and there is no duty to defend. Respondent requests that the Court affirm the holding of the Intermediate Court of Appeals.

RESPONDENT'S STATEMENT OF THE CASE

I. The Policy

The policy of insurance in question is a renewal of a policy issued to Bohnert on March 23, 2016, bearing Policy No. 33-30233310E ("the Policy"). (J.A. Vol. I, p. 93-94; J.A. Vol. II, p. 145-148.) Bohnert was a Kentucky corporation with its principal office in Louisville, Kentucky. (J.A. Vol. I, p. 94.) Bohnert's two officers/directors/shareholders—David Greaser and Norvin Raque (collectively with Bohnert, "Petitioners")—are Kentucky residents. *Id*. The Policy was solicited and issued through NFP Property & Casualty Services, Inc., in Lexington, Kentucky. (J.A. Vol. II, p. 143-144.) The Policy includes Kentucky surcharges and Kentucky endorsements. *Id*. at 145, 158, 220. The risks insured—including the premises, equipment, and vehicles—are registered and located in Kentucky. *Id*. at 145-148, 179. There is no reference to West Virginia property, structures, equipment, vehicles, pricing, or endorsements. *See generally*, J.A. Vols. II-III, at pp. 142-402.

II. The Underlying Lawsuit

More than four years after the initial issuance of the Policy, Petitioners were named as defendants in a lawsuit ("the Underlying Liability Action") filed by WV Great Barrel Company, LLC and WVGBC Real Estate Holdings, LLC (collectively, "Barrel"). The Underlying Liability Action stemmed from Barrel's founding of a cooperage in White Sulphur Springs, Greenbrier County, West Virginia. (J.A. Vol. V, pp. 704-706.)

Beginning on June 8, 2017, Barrel entered into a series of proposals and purchase orders with Petitioners whereby Petitioners agreed to design, fabricate, and install custom cooperage equipment capable of producing 97 barrels per hour. *Id*. at 707-710. Barrel claims that Petitioners repeatedly represented that the custom cooperage equipment would be operational by October 1, 2019. *Id*. at 712. Ultimately, however, Petitioners did not timely deliver and install the equipment as agreed. *Id*. In addition to the delay created by Petitioners, Barrel alleges that the equipment that was actually delivered and installed was used and/or defective. (J.A. Vol. VI., p. 714-715.) Barrel claims that Petitioners had promised installation of new or "like new factory rebuilt" robots to perform the tasks of positioning barrels and hoops on the manufacturing line, but delivered secondhand and malfunctioning robots. *Id*. at 715. Barrel maintains that Petitioners' breach of contractual obligations and faulty workmanship caused it to suffer damages. *Id*. at 718-719. Barrel therefore filed suit against Petitioners, as well as Petitioners' Sr. Manufacturing Engineer, Erik VanKleef.

The salient allegations in Barrel's 11-count Complaint are as follows:

- Petitioners failed to timely produce, deliver, and install the equipment by October 1, 2019; (J.A. Vol. VI, p. 720-721.)
- Petitioners installed used and defective equipment and did not perform work in a good and workmanlike manner; *Id*. 723.
- Petitioners breached the express warranty regarding design and fabrication of the equipment contemplated by the contract; *Id*.
- Petitioners breached the implied warranties of merchantability, fitness for a particular purpose, and design build; *Id*. at 724-728.
- Petitioners made fraudulent representations relating to the efficacy of the equipment and their ability to timely install operational equipment; *Id*. at 729-730.
- Petitioners engaged in fraudulent conduct to induce Barrel into contracting with Petitioners; *Id*. at 734-735.

- Sr. Manufacturing Engineer, Erik VanKleef, failed to properly design, engineer, install, and construct the equipment at issue; *Id*. at 742-743.
- Petitioners fraudulently transferred the company's assets to frustrate any recovery by Barrel. *Id*. at 730-732.

Based on these allegations, Barrel sought to recover damages for the "cost of work to remediate the deficient and defective custom equipment," "increased cost due to additional labor and materials" required to operate the facility as the result of deficient and defective equipment and "Bohnert's breaches . . . and failure to perform[.]" (J.A. Vol. VI, p. 719.)

After suit was filed, Petitioners tendered the Underlying Liability Action to Respondent. Respondent agreed to provide a defense to Petitioners under a full reservation of rights. (J.A. Vol. V, p. 665.)

III. <u>The Declaratory Action</u>

On July 8, 2022, Petitioners instituted the declaratory action giving rise to this appeal.[1] (J.A. Vol. VI, p. 862-863.) Respondent filed a Motion to Dismiss, an Answer, and a Counterclaim for Declaratory Judgment on September 9, 2022. *Id*. Petitioners' Complaint and Respondent's Counterclaim for declaratory relief sought the Circuit Court's determination as to whether: (1) Kentucky or West Virginia law governed the Policy and (2) the allegations made by Barrel constituted an occurrence under the applicable law. *Id*. at 865-866.

The parties filed cross motions for summary judgment setting forth their respective positions regarding the applicable law and Respondent's contractual duties under the Policy.[2] (J.A.

[1] Respondent originally filed a declaratory judgment action on January 13, 2022 in the United States District Court for the Southern District of West Virginia. *Motorists Mut. Ins. Co. v. Bohnert Int'l, et* al, Civil Action No. 5:22-cv-00028 (S.D. W. Va. 2022). That action named Petitioners and Barrel as defendants. The case was dismissed by the District Court on July 8, 2022 based on lack of diversity jurisdiction because certain previously undisclosed sub-members of Barrel were domiciled in Ohio. *Id*. Petitioners instituted the underlying declaratory action the Circuit Court of Greenbrier County immediately after the District Court's dismissal order was entered. *Id*.

[2] With leave of Court, Barrel also submitted briefing as to its position on the application of Kentucky law and Respondent's duty to defend.

Vol. I, pp. 117-119; J.A. Vol. II, pp. 120-140; J.A. Vol. V, pp. 662-681.) By way of Order dated April 19, 2023, the Circuit Court of Greenbrier County granted Respondent's Motion for Summary Judgment and denied Petitioners' Motion for Summary Judgment, concluding that Kentucky law governs the Policy and, under Kentucky law, there is no coverage for faulty or defective workmanship because it does not constitute an occurrence within the meaning of the Policy. (J.A. Vol. II, p. 179-199.)

Petitioners appealed the circuit court's order to the Intermediate Court of Appeals ("ICA").

IV. <u>The ICA Appeal</u>

On appeal to the ICA, Petitioners advanced three assignments of error. (J.A. Vol. I, p. 19). They claimed that the circuit court should not have applied Kentucky law because West Virginia has a "more significant relationship" with the transaction and parties. *Id*. They further claimed that Respondent owed a duty to defend regardless of whether Kentucky or West Virginia law governed. *Id*. Petitioners' final assignment of error contended that the circuit court prematurely found that there was no duty to indemnify. *Id*. The ICA disagreed with each assignment of error and affirmed the circuit court's decision. *Id*. at 6-11.

The ICA first held that Kentucky law controls because: (1) the contract was formed in Kentucky; (2) Kentucky has the "most significant relationship to the insurance transaction and the parties to the policy"; and (3) the application of Kentucky law did not run afoul of West Virginia public policy considerations. *Id*. After finding that the Policy was governed by Kentucky law, the ICA next determined that there was no duty to defend:

> [W]e find no allegations that satisfy the definition of "occurrence" in the Policy . . . because Bohnert exercised control over the workmanship of the project, either directly or indirectly through the subcontractors it selected, any resulting claims were not "chance events" as contemplated by [Kentucky's] fortuity analysis.

Id. at 10-11. The ICA rejected Petitioners' attempt to circumvent the threshold "occurrence" question and evaluate the grant of coverage based on an exclusion, stating "a court need not consider the applicability of an exclusion if there is no initial grant of coverage under the policy." *Id*. at 11.

Having concluded that there was no duty to defend, the ICA dismissed Petitioners' argument that an indemnity determination was premature. *Id*. The ICA stated that the duty to defend is broader than the duty to indemnify and, if no duty to defend exists, there is no duty to indemnify. *Id*.

Petitioners have now appealed the ICA's decision.

SUMMARY OF ARGUMENT

The ICA's rulings should be affirmed. Petitioners have, in effect, advanced the same arguments here as were presented to the ICA. (J.A. Vol I, p. 19.) While now identifying four assignments of error, the same two questions remain dispositive:

(1) Does Kentucky law govern the Policy; and

(2) Does the Underlying Liability Action allege an "occurrence" so as to trigger coverage under the Policy?

Petitioners' Brief aims to obfuscate this Court's review of these two questions through an erroneous reverse analysis which begins with an assessment of the Policy's "Damage to Your Work" exclusion and ends with a conclusion that coverage exists. The Kentucky Supreme Court has repeatedly rejected this argument because "consideration of an exclusion if there is no initial grant of coverage constitutes erroneous "***reverse analysis***." *Robinson*, 2022 Ky. Unpub. LEXIS 37 at *14-15 (emphasis added). When the coverage analysis is appropriately sequenced, the ICA's ruling is in accord with an overwhelming weight of authority. Pursuant to this Court's holdings in

Liberty Mut. Ins. Co. v. Triangle Indus., Inc., 182 W. Va. 580, 585, 390 S.E.2d 562, 567 (W.Va. 1990) and its progeny, Kentucky law controls.

The Kentucky Supreme Court has made its stance clear on claims flowing from faulty workmanship: they do not constitute an "occurrence" within the meaning of a CGL policy. *See e.g.*, *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69 (Ky. 2010); *Martin/Elias Props., LLC v. Acuity*, 544 S.W.3d 639, 643 (Ky. 2018). The allegations in the Underlying Liability Action all flow from faulty workmanship. For this reason, both the circuit court and the ICA concluded that Respondent owes no duty to defend Petitioners in the Underlying Liability Action. This Court should affirm.

STATEMENT REGARDING ORAL ARGUMENT

Respondent states that oral argument is unnecessary pursuant to the criteria set forth in Rule 18(a)(3) of the West Virginia Rules of Appellate Procedure because the dispositive issues have been authoritatively decided.

ARGUMENT

I. The ICA Appropriately Concluded That Kentucky Law Controls.

This choice of law determination is guided by the principles announced in *Triangle*, 182 W. Va. 580, 585, 390 S.E.2d 562. The *Triangle* decision is premised on the following conflicts of law rule:

> [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.

Id. at 567. Stated differently, a choice of law analysis in the interpretation of an insurance contract begins with a presumption that the law of the formation state governs. The presumption can only be overcome if it is demonstrated that another state has a more significant relationship to the transaction and parties, or the law of the other state is contrary to West Virginia public policy. *Id*.

Here, the contract was formed in Kentucky. Thus, the analysis begins with the presumption that Kentucky law governs the contract between Bohnert and Respondent.

A. The ICA Properly Found That Kentucky Has the Most Significant Relationship to the Insurance Transaction and the Parties to the Insurance Contract.

When assessing whether one state has a "more significant relationship" with an insurance contract, this Court has examined a series of factors. These factors include:

> (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 expectations,
>
> (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.

See Triangle, 182 W. Va. 580, 585, 390 S.E.2d at 567.

Triangle involved a commercial general liability insurance policy issued in New Jersey for the purpose of insuring a New Jersey company with a number of processing plants located in several states, including one in West Virginia. *Id*. at 563. A coverage dispute arose after a lawsuit was filed as the result of the West Virginia plant's shipment of toxic sludge to an Ohio landfill. *Id*. at 566. The coverage dispute turned on a choice of law issue relating to interpretation of the insurance policy. After considering the seven factors set forth above, the Court concluded that the law of the state of contract, New Jersey, should apply. *Id*.

The Court placed great emphasis on uniformity and predictability, holding that "certainty, predictability and uniformity of result," as well as "ease in the determination and application of the law to be applied" were essential to the interpretation of an insurance policy when the law is not otherwise chosen by the parties. *Id.* at 567. The Court further noted there was no indication that "*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 West Virginia law." *Id.* (Emphasis added). Finally, the Court concluded "that, absent a specific provision to the contrary, ***it is infinitely more practicable*** to permit one policy to cover the numerous contracts rather than to require both . . . [the insured] and the insurance companies to negotiate individual policies based upon each state where an insured risk is located." *Id*. (Emphasis added).

The principles underlying *Triangle* have been repeatedly reinforced by this Court and Federal Courts analyzing West Virginia conflicts of law questions. *See, e.g.*, *Nadler v. Liberty Mut. Fire Ins. Co.*, 188 W. Va. 329, 424 S.E.2d 256, 262 (1992); *Howe v. Howe*, 218 W. Va. 638, 625 S.E.2d 716, 723 (2005); *Johnson v. Neal*, 187 W. Va. 239, 418 S.E.2d 349, 351 (1992) (*per curiam*). *See also*, *Mulvey Constr., Inc. v. Bituminous Cas. Corp*., 571 Fed. Appx. 150 (4th Cir. 2014); *St. Paul Mercury Ins. Co. v. Nat'l Sur. Corp.*, 2015 U.S. Dist. LEXIS 4363 (N.D. W. Va. Jan. 14, 2015). In fact, the reasoning adopted by the *Triangle* Court was thoroughly examined and applied by Judge Irene Keeley in *Scottsdale Ins. Co. v. Harleysville Ins. Co*., 2013 U.S. Dist. LEXIS 180146; 2013 WL 6813905 (N.D. W. Va. Dec. 24, 2013) (memorandum decision). Although this Court is not bound by the rulings of the United States District Court for the Northern District of

West Virginia, *Harleysville* is instructive insofar as the "more significant relationship" test was analyzed on facts closely resembling those at issue here.

Harleysville involved the construction of a private hotel in Granville, West Virginia. *Id*. at *2. Certain out-of-state contractors were retained to perform construction activities for the hotel. *Id*. A liability suit was ultimately filed as the result of a contractor's "failure to perform its contractual duties in a workmanlike manner," including "numerous examples of improperly completed, non-code installation [of] room air handling, plumbing, electrical, HVAC, and sanitary sewer lines and fire code requirements." *Id*. at *9. A coverage dispute arose out of the liability suit. To resolve the coverage dispute, Judge Keeley was required to determine whether West Virginia or Pennsylvania law governed the insurance coverage questions. *Id*. at *19. One litigant argued West Virginia law should apply because the work was performed in West Virginia, while the other litigant argued that Pennsylvania law should apply because the policy was issued in Pennsylvania. *Id*.

Judge Keeley began her analysis with reference to *Triangle* and its "more significant relationship" test. *Id*. at *12. She explicitly rejected the argument that West Virginia had the more significant relationship as the state in which the work had been performed. *Id*. at *18. The Court noted that "CGL policies usually insure risks in multiple states. Thus, were courts to adopt a rule uniformly applying the law of the state of the insured risk to CGL policies, especially policies issued to large companies, the laws of as many as fifty different states might apply." *Id*. at *21. Judge Keeley continued, "such a result would confound all of the relevant factors under [the Restatement (Second) of Conflict of Law]." *Id*. It would defy expectations of insurers and insureds and "undermine the predictability and uniformity of the law, which does not presume that parties to a CGL policy reasonably expect that the law of any state where litigation commences will apply to their policy." *Id.*

In this case, like in *Harleysville*, Petitioners contend that West Virginia has the "more significant relationship" to the transaction and parties. (Pet'rs Br. at 10.) Aside from the fact that the alleged faulty workmanship occurred in West Virginia, West Virginia has virtually no relationship to the Policy. The Policy was formed in Kentucky. (J.A. Vol. I, p. 57-58.) It includes Kentucky surcharges and Kentucky endorsements. *Id.* at 59, 72, 134. The risks insured—including the premises, equipment, and vehicles—are registered and located in Kentucky. *Id.* at 59-62. There is no reference to West Virginia property, structures, equipment, vehicles, pricing, or endorsements. What is more, Petitioners did not contract with Barrel for development of a cooperage in West Virginia until November 2017—more than a full year *after* the Policy was first issued to Bohnert. (J.A. Vol I, p. 3, 93, Vol II, at p. 149.) Thus, at the time the insurance contract was entered, there was absolutely no indication that it would be governed by any law other than that of Kentucky.

Nevertheless, Petitioners claim that they maintained a "justified expectation" that "Kentucky law would *not* apply." (Pet'rs Br. at 12.) In support of this argument, they claim that they "reasonably expected" Kentucky law would not apply based on the "Damage to Your Work" exclusion. *Id.* at 10-12. Petitioners conflate the "reasonable expectations" doctrine with the "justified expectations" consideration in a choice of law analysis. They argue that "the doctrine of reasonable expectations" entitles them to "all the coverage [they] may reasonably expect to be provided under the policy." *Id.* at 11.

In arguing the reasonable expectations doctrine, Petitioners overlook the fact that it can only be invoked when a policy is determined to be ambiguous. This is true under both Kentucky and West Virginia law. *See Thomas v. State Farm Fire & Cas. Co.*, 626 S.W.3d 504, 509 (Ky. 2021) ("the reasonable expectations doctrine applies only to policies with ambiguous terms"); Syl. pt. 2, *Robertson v. Fowler*, 197 W. Va. 116, 475 S.E.2d 116 (1996) ("[b]efore the doctrine of reasonable expectations is applicable to an insurance contract, there must be an ambiguity regarding the terms of that contract"). There is no argument that the Policy in this case is ambiguous. To the contrary, Petitioners explicitly state that they "reasonably expected" that Kentucky law would not apply "based on the ***unambiguous*** terms of the Policy[.]" (Pet'rs Br. at 12.) (Emphasis added). By Petitioners' own admission, the doctrine of reasonable expectations has no place here.

Beyond the flawed "reasonable expectations" argument, Petitioners ignore the *Triangle* factors governing the more significant relationship test. Under Petitioners' rationale, there is no consideration of certainty, predictability, uniformity of result, ease of application of the law, or the needs of the interstate judicial system.[3]

Presumably because Petitioners cannot meaningfully address the *Triangle* factors, they rely on *Joy Techn., Inc. v. Liberty Mutual Ins. Co.*, 187 W. Va. 742, 421 S.E.2d 493 (W. Va. 1992), and encourage the Court to base its choice of law decision on the location of injury and instrumentality of injury. In *Joy Technologies*, a company that cleaned and repaired mining machinery in West Virginia was alleged to have introduced toxic pollutants into West Virginia property. *Id.* at 494. The company was sued for property damage and personal injuries. *Id.* Its insurer argued that there was no coverage for those claims based upon a policy exclusion. *Id.* at

[3] Petitioners criticize the ICA's reliance on certainty, predictability, and uniformity of result, as well as the ease in the determination and application of the law to be applied. (Pet'rs. Br. at 10.) Petitioners fail to acknowledge, however, that this Court has instructed the lower courts that these factors are the "essential" considerations when interpreting an insurance policy. *See Triangle*, 182 W. Va. 580, 585, 390 S.E.2d at 567. ("We believe that 'certainty, predictability and uniformity of result,' as well as 'ease in the determination and application of the law to be applied' is essential to the interpretation of an insurance policy when the law is not otherwise chosen by the parties.")

493-96. The insurer maintained that Pennsylvania law governed because the insurance policy was issued in Pennsylvania. *Id*. at 495-96. Conversely, the insured company argued that West Virginia had a more significant relationship and, resultingly, its law should apply. *Id*.

Although the *Joy Technologies* Court identified factors relevant to a significant relationship, it ultimately based its decision on the public policy exception because of representations made before the West Virginia Insurance Commissioner at the time that the Liberty Mutual policy exclusion was submitted and approved. The *Joy Technologies* Court noted:

> As will hereinafter be discussed, this Court believes that Liberty Mutual Insurance Company, in studied, affirmative and official communications with a regulatory authority of the State of West Virginia, prior to the institution of this action, took the position that the exclusion in question in the present case would have a meaning and effect different from that attributed to it by the State of Pennsylvania. In view of this, if this Court held that Pennsylvania law applied to the questions in issue, it would allow Liberty Mutual Insurance Company to take a position, and act in a manner, inconsistent with Liberty Mutual's studied, unambiguous, official and affirmative representations. Such, in this Court's view, would be inconsistent with, and contrary to, the public policy of this State.

Id. at 497.

The Court explained that Liberty Mutual had submitted its proposed exclusionary language to the West Virginia Insurance Commissioner, who held a hearing to consider the proposed language. *Id*. at 499. In connection with the hearing, Liberty Mutual submitted an explanation of the exclusion which provided, "coverage is continued for pollution or contamination caused injuries when the pollution or contamination results from an accident." *Id*. at 500. An affidavit submitted by the West Virginia Insurance Commissioner further confirmed that the insurers had represented that the proposed forms did not limit and were not intended to limit coverage. *Id*. These representations were confirmed in a written order approving the exclusion. *Id*.

The *Joy Technologies* Court based its choice of law decision on the patent inconsistency between Liberty Mutual's earlier representations and its position with regard to coverage for Joy Technologies. West Virginia public policy, per the Court, prohibited an insurance carrier from acting in a manner inconsistent with its prior representations to this state:

> The public policy of the State of West Virginia is that the law of the State should be administered in such a way as to insure that corporations which seek to do business in West Virginia act in a manner consistent with their studied, unambiguous, official, affirmative representations to the State, its subdivisions, or its regulatory bodies.

Syl. Pt. 2, *id.*

Thus, contrary to Petitioners' contention, *Joy Technologies* did not turn on the location of injury and instrumentality of injury. In fact, just two years later, the Court in *Cannelton Indus. v. Aetna Casualty & Sur. Co. of Am.*, 194 W. Va. 186, 460 S.E.2d 1, 10 (1994) confirmed that it had based its choice of law decision in *Joy Technologies* on the public policy exception and not the significant relationship test. ("On an appeal in *Joy Technologies, supra*, we used the second exception [public policy] of the Syllabus of *Triangle Industries*, and we applied the law of West Virginia rather than the law of Pennsylvania which is where the insurance contracts were formed.")

Plainly, *Joy Technologies* has no precedential value when analyzing the more significant relationship test. Judge Keeley's opinion in *Harleysville* is instructive on this point, as well. In that case, Judge Keeley was confronted with the argument that *Joy Technologies* should govern the choice of law decision based on location of injury and instrumentality of injury. *Harleysville*, 2013 U.S. Dist. LEXIS 180146, at *22-23. She rejected this argument because the *Joy Technologies* Court based its decision on "public policy grounds[.]" *Id*. at *23 (citing *Cannelton*, 194 W. Va. 186, 460 S.E. 2d 1, 10 (the Court "did not find it necessary to base or decision on the [more significant relationship] exception to conclude the law of West Virginia applied").

Additionally, Judge Keeley distinguished *Joy Technologies* by explaining that the environmental public policy concerns at issue in that case were not at issue in a hotel construction project. *Id*. at *24. She wrote:

> The pollution issues presented in that case differ significantly from the building construction issues in dispute here. Pollution causes far-reaching, long-lasting harm to both the land and individual citizens of a state; thus, the state where the pollution occurs clearly has an interest in applying its own law to resolve such dispute. That compelling interest does not exist here, where the injury is the alleged faulty construction of a private hotel.

Id. at *25. The same reasoning applies here. Like *Harleysville*, this case involves faulty workmanship. Unlike *Joy Technologies*, the facts here do not involve pollutants or the associated state interest.

Because the facts of *Joy Technologies* are wholly dissimilar from the facts here and it was decided on public policy grounds, Petitioners' reliance on *Joy Technologies* is misplaced. The location of injury and instrumentality of injury do not inform the Court's choice of law analysis. The factors announced in *Triangle* (and, in particular, the "essential" factors of certainty, predictability, uniformity in result, and ease in the determination and application of governing law) support the conclusion that Kentucky has the most significant relationship with the insurance transaction and the parties to that transaction.

B. The ICA Properly Found That Application of Kentucky Law Does Not Violate West Virginia Public Policy.

The public policy exception under conflict of laws principles is not invoked lightly. This Court has cautioned that "[t]he 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." Syl. pt. 3, *Nadler v. Liberty Mut. Fire Ins. Co*., 188 W. Va. 329, 424 S.E.2d 256, 258 (1992). The *Nadler*

Court admonished lower courts to apply foreign law where appropriate "unless the foreign law is contrary to pure morals or abstract justice, or unless enforcement would be of evil example and harmful to [West Virginia's] own people." *Id.* at 265 (quotation marks omitted).

Petitioners ask this Court to invoke the public policy exception for two primary reasons. First, Petitioners claim that application of Kentucky law would eliminate coverage and, therefore, runs counter to public policy. Second, they contend that Respondent offered an illusory promise of coverage where none existed. The former has no basis in law while the latter has no basis in fact or law.

Petitioners contend, without supporting authority, that "the law of the forum state must control" where "the law of another jurisdiction is not only less favorable but would eliminate coverage[.]" (Pet'rs Br. at 16.) Not only is this statement made without a citation to any law, but also it directly contradicts this Court's decision in *Howe*, 218 W. Va. 638, 625 S.E.2d 716. The *Howe* Court refused to invoke the public policy exception because the application of a foreign law "merely precludes coverage . . . under the various policies of insurance." *Id*. at 724. In other words, the *Howe* Court did not view the inability to collect insurance proceeds as a justification to apply the public policy exception to a choice of law determination. Accordingly, the fact that application of Kentucky law would remove this claim from coverage cannot be "contrary to pure morals or abstract justice," or "of evil example ***and*** harmful to state's own people." *Id*. at 724-725 (quoting *Nadler*, 188 W. Va. 329, 424 S.E.2d at 265). Petitioners' argument that this case merits the public policy exception therefore fails.

The argument that Petitioners were somehow misled into purchasing a meaningless policy is similarly unavailing. There is no factual support for the claim that Respondent misrepresented pertinent facts or insurance policy provisions relating to coverage.[4] In fact, the ICA correctly pointed out that the argument is unsupported by the record. (J.A. Vol. I, p. 9.) ("We . . . find this argument unsupported by persuasive authority or the record below.") The argument that Respondent breached its duty of good faith and fair dealing is nothing more than conjecture and, therefore, is insufficient to invoke the narrow public policy exception. This case simply does not present the extraordinary circumstances warranting a finding that Kentucky law violates West Virginia public policy.

II. The ICA Correctly Found That Respondent Owes No Duty To Defend.

Under the Policy's coverage grant, a claim must constitute an "occurrence" to trigger a duty to defend. (J.A. Vol. V, p. 685.) In other words, there is no duty to defend without a qualifying "occurrence." The Policy defines an "occurrence" as an "accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id*. at 689.

Petitioners first argue that the Court should look past the occurrence requirement and, instead, begin its analysis of Respondent's duty to defend by examining the Policy's exclusion for "Damage to Your Work." (Pet'rs Br. at 19-21). Next, Petitioners contend that, even if the Court is to ignore the "plain language" of the "Damage to Your Work" exclusion, the Underlying Liability Action nonetheless alleges an "occurrence."[5] *Id*. at 21-23. Neither argument has merit.

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[4] Petitioners' contention that the Policy is rendered meaningless if Kentucky law is applied erroneously assumes that there are no factual circumstances under which a Kentucky insured would be afforded coverage for work performed by a subcontractor. This supposition neglects to consider nearly innumerable circumstances under which damages arise from acts or omissions other than a subcontractor's shoddy workmanship. *See e.g.*, *Acuity*, 544 S.W.3d at 644 (postulating that CGL coverage would be triggered under Kentucky law where a subcontractor caused a fire by mistakenly knocking over a kerosene lamp). Stated succinctly, the Policy is not "meaningless" with respect to the work of a subcontractor simply because Kentucky law is applied.

[5] Petitioners have also made a one-paragraph argument regarding Respondent's duty to defend under West Virginia law. (Pet'rs Br. at 17-18.) Respondent does not concede this point; West Virginia law is inapplicable to the Policy.

A. The ICA Properly Concluded That Petitioners' Plain Language Argument Impermissibly Bypasses the Threshold Occurrence Requirement.

Petitioners' argument is based largely on its position that coverage is triggered by a policy exclusion under Kentucky law. The Kentucky Supreme Court has considered and roundly rejected this argument in settled Kentucky case law, as it has held that "the entire process must begin with an initial grant of coverage via the insuring clause; otherwise, no further consideration is necessary." *Am. Mining Ins. Co. v. Peters Farms, LLC*, 557 S.W.3d 293, 298 (Ky. 2018). The Kentucky Supreme Court directs that the first step in CGL coverage analysis requires a determination of whether an event constitutes an "occurrence" thereby triggering coverage under the insuring clause:

> [T]he process is such: if the insuring clause does not extend coverage, one need look no further. If coverage exists, exclusions must then be considered. If an exclusion excludes coverage, an exception to the exclusion may re-grant coverage. However, ***the entire process must begin with an initial grant of coverage via the insuring clause; otherwise, no further consideration is necessary***. . . [W]e do not address any arguments regarding exclusions or exceptions to exclusions [where] there is no initial coverage due to the lack of . . . an "occurrence."

Id. (quoting *Cincinnati Ins.*, 306 S.W.3d at 78, n. 5 (emphasis added)).

Petitioners attempt to manipulate the Policy's coverage grant by skipping the question of "occurrence" and evaluating coverage based on the language of the Policy's "Damage to Your Work" exclusion. (Pet'rs Br. at 19-20.) The Kentucky Supreme Court has cautioned: "exclusion clauses ***do not grant coverage***; rather they subtract from it." *Kemper Nat'l Ins. Cos. v. Heaven Hill Distilleries*, 82 S.W.3d 869, 872 (Ky. 2002) (emphasis added). "[A] court need not consider the applicability of an exclusion if there is no initial grant of coverage under the policy." *Id*. Indeed, consideration of an exclusion if there is no initial grant of coverage constitutes erroneous "***reverse analysis***." *Robinson v. Thomas*, 2022 Ky. Unpub. LEXIS 37 at *14-15 (emphasis added).

In *Robinson,* the Kentucky Supreme Court reversed a finding of coverage that was based on application of a policy exclusion without any preceding analysis of the initial coverage grant. *Id*. at *2. The exclusion at issue in *Robinson* related to a daycare's criminal or malicious acts. *Id*. at *7. The lower court bypassed the "occurrence" analysis altogether and skipped ahead to evaluate the applicability of the daycare endorsement. *Id*. at *10-11. The Kentucky Supreme Court admonished the lower court for "overlook[ing] a critical step in the calculus of determining coverage under the CGL[.]" *Id*. at *9.

According to the Kentucky Supreme Court, the *Robinson* trial court "put the proverbial cart before the horse by determining that [the] claims are subject to the particular exclusionary language of the endorsement without ever discerning whether coverage should exist in the first instance." *Id*. at *16. "[E]xclusionary provisions of the CGL and any endorsements thereto ***only become relevant*** after the court has first determined if the claim is potentially covered under the insuring provision of the policy." *Id*. (Emphasis added).

Petitioners in this case—like the insureds in *Robinson*—assert that a policy exclusion triggers coverage. Petitioners' argument overlooks the "fundamental threshold step" in determining coverage. *See id*. at *13 ("the trial court skipped a fundamental threshold step"). Only if it is first determined that a claim states an "occurrence," then exclusions or exceptions to exclusions can be evaluated. Petitioners' reverse analysis is misguided, and the "Damage to Your Work" exclusion does not serve to create an artificial coverage grant. The ICA's holding was, therefore correct.

B. The ICA Properly Concluded That the Events Giving Rise to the Underlying Liability Action Were Not Accidental.

As noted, without a qualifying "occurrence," there is no duty to defend. (J.A. Vol. V, p. 685.) Under Kentucky law, claims arising from faulty workmanship do not state an "occurrence."

See Cincinnati Ins., 306 S.W.3d 69; *Acuity*, 544 S.W.3d 639. The Kentucky Supreme Court has adopted a two-part fortuity test to determine whether a claim constitutes an "occurrence." *Acuity*, 544 S.W.3d at 643. The fortuity test requires courts to assess: 1) "whether the insured intended the event to occur; and 2) whether the event was a 'chance event[] beyond the control of the insured.'" *Id*. An insured must satisfy both parts of this test to state an "occurrence." *Id*. That is, an event can only be characterized as fortuitous "if the insured did not intend the event or result to occur, ***and*** the event or result that occurred was a chance event beyond the control of the insured[.]" *Id*. (Emphasis added). The fortuity analysis is not satisfied where an insured exercises any degree of control over the work at issue. *See id*; *see also Cincinnati Ins.*, 306 S.W.3d 69.

The Kentucky Supreme Court has explained that, where an insured exercises control, "either directly or through the subcontractors it chose[,]" it cannot logically be determined that the allegedly substandard work "was a fortuitous, truly accidental event." *Cincinnati Ins.*, 306 S.W.3d at 76. The Court emphasized that any other finding would be tantamount to converting CGL policies into "performance bonds or guarantees because any claim of poor workmanship would fall within the policy definition of accidental occurrence so long as there was not proof that the policyholder intentionally engaged in faulty workmanship." *Id*. at 75. This rationale "ensures that ultimate liability falls to the one who performed the negligent work . . . instead of the insurance carrier. *Id*. It will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract." *Id*. Moreover, "[t]he purpose of a CGL policy is to protect an insured from bearing financial responsibility for unexpected and accidental damage to people or property. It is not intended to substitute for a contractor's performance bond." *Id*. at 75, n. 19 (citations omitted)

Petitioners' Brief attempts to circumvent the Kentucky Supreme Court's well-established holding that claims of faulty workmanship do not satisfy the fortuity analysis by relying on two Kentucky district court cases which are neither controlling, nor instructive, and were decided long before the seminal Kentucky Supreme Court cases in *Acuity*, 544 S.W.3d 639 and *Am. Mining*, 557 S.W.3d 293. First, Petitioners cite *Arrowood Indem. Co. v. Drees Co*., 2015 U.S. Dist. LEXIS 2755, 2015 WL 136107 (E.D. Ky. Jan. 9, 2015) (memorandum opinion). Second, Petitioners point to the case of *Westfield Ins. Co. v. B.H. Green & Son, Inc.*, 2013 U.S. Dist. LEXIS 133140, 2013 WL 5278243 (W.D. Ky. Sept. 18, 2013) (memorandum opinion).

Contrary to Petitioners' position, *Arrowood* does not hold that "where a 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." (Pet'rs Br. at 22) (internal quotations omitted). The "occurrence" determination was not even at issue in *Arrowood*. The *Arrowood* Court was tasked with a jurisdictional question regarding the applicability of the declaratory judgment act. 2015 U.S. Dist. LEXIS 2755 at *5-7. To determine whether the case could be resolved by way of declaratory judgment, the Court identified five factors it was to consider, one of which was "whether the declaratory action would settle the controversy." *Id*. at *6. In analyzing this factor, the Court provided a discussion of the parties' respective positions regarding the "occurrence" issue. *Id*. at *10-13. The *Arrowood* Court did not make a finding as to whether faulty workmanship could ever constitute an "occurrence" under Kentucky law. *Id*. Consequently, *Arrowood* neither informs nor supports Petitioners' argument under the fortuity doctrine.

The *Westfield* decision is equally inapplicable. The issue in *Westfield* was whether the latent manifestation of a chemical reaction in concrete was an "accident," and thus an "occurrence" within the meaning of an insurance policy. 2013 U.S. Dist. LEXIS 133140 at *4. The *Westfield* Court characterized a "fortuitous event" as "an accident . . . that was ***not attributable to faulty workmanship***." *Id*. at *5 (emphasis added). The *Westfield* opinion also noted "[i]t is axiomatic that poor workmanship is within the control of the contractor; therefore, faulty construction workmanship, standing alone, cannot be an occurrence under a CGL policy because it is not an accident beyond a contractor's control." *Id*. Despite discussing the fortuity doctrine, however, *Westfield* did not turn on faulty workmanship. *Id*. at *8. The Court actually stated that "defective workmanship is not at issue in the case at bar." *Id*.

Petitioners nonetheless seize on language from *Westfield*, arguing that there is no "stand alone" claim for faulty workmanship in the Underlying Liability Action. (Pet'rs Br. at 23.) Critically, however, the lower courts correctly recognized that all 11 causes of action advanced in the Underlying Liability Action flow from Petitioners' faulty workmanship and their related fraudulent conduct.

As noted by the ICA, Count I alleges failure to perform work in a good and workmanlike manner, which fails to meet the fortuity analysis. (J.A. Vol VI, pp. 720-721.) Counts II-VI allege breach of contract and warranties, which "flow directly from Bohnert's alleged faulty workmanship" and are therefore, "not occurrences under Kentucky law." *Id*. at 721-728; *see also*, *e.g.*, *Ky. Farm Bureau Mut. Ins. v. Blevins*, 268 S.W.3d 368 (Ky. 2008) (citing *Hawkeye-Security Ins. Co. v. Davis*, 6 S.W.3d 419 (Mo. Ct. App. S.D. 1999) (no coverage for insured's breach of contractual obligations or express and implied warranties because performance is within insured contractor's control and management; failure to perform cannot be described as an undesigned or unexpected event); *Yegge v. Integrity Mut. Ins. Co.*, 534 N.W.2d 100, 102 (Iowa 1995) (claims for breach of contract and breach of warranty do not involve an "occurrence"). (Additional citations omitted).

Counts VII-X are each related to fraudulent conduct on the part of Petitioners and therefore, fall squarely outside any coverage grant because "fraud is an intentional or willful act." *Id*. at 729-743; s*ee e.g*., *Dishon v. Equity One, Inc*., 2012 Ky. App. Unpub. LEXIS 128. Finally, Count XI relates to shoddy workmanship on the part of "an independent contractor working at the behest of Bohnert. *Id*. at 743-744. Per Kentucky law, shoddy workmanship, even of an independent contractor, is within the insured's control. *See Cincinnati Ins.*, 306 S.W.3d 69; *Acuity*, 544 S.W.3d 639.

The ICA noted that "because Bohnert exercised control over the workmanship of the project, either directly or indirectly through the contractors it selected, the resulting claims were not the result of 'chance events' as contemplated by the fortuity analysis." (J.A. Vol. I, p. 11.) For these reasons, *Westfield* no more supports Petitioners' position than does *Arrowood.* There is no compelling argument that either of these decisions favor a conclusion that faulty workmanship states an "occurrence" within the meaning of the Policy. Both of these cases were decided *prior to* the Kentucky Supreme Court's *Acuity* and *Am. Mining,* decisions that unequivocally stand for the proposition that faulty workmanship—even that of subcontractors and independent contractors—does not constitute an occurrence within the meaning of a CGL policy.

C. Petitioners Cannot Credibly Claim That They Accidentally Installed Defective Robots or Caused Damage to Something Other Than Their Own Work.

Petitioners maintain that they had to install used or defective equipment because "Tesla Manufacturing had acquired all worldwide supply of new robots and [ ] waiting for new robots to be manufactured would delay the . . . deadline for barrel production." (Pet'rs Br. at 23.) This argument does nothing to salvage Petitioners' position. It is illogical—if not disingenuous—to argue that "the alleged use of used or defective equipment and any resultant delay or damage is a fortuitous event, i.e. an accident." *Id*. at 25. Petitioners cannot credibly argue that they "accidentally" installed used or defective equipment because no new robots were available.

Similarly unavailing is Petitioners' argument that coverage is triggered because "the alleged damages here occurred to 'something other than the insured's faulty work product.'" *Id*. The Kentucky Supreme Court rejected this argument in *Acuity*. In *Acuity*, Martin/Elias Properties ("MEP") purchased a home to renovate and resell. *Id*. at 640. As part of this, MEP hired a subcontractor to renovate the basement. *Id*. The subcontractor's work in the basement resulted in extensive damage to the entire home. *Id*. at 640-641. MEP instituted a lawsuit against the subcontractor and sought coverage under the subcontractor's CGL policy with Acuity. *Id*. at 641. Among other things, MEP argued that the damage done to the property above the basement should trigger coverage as an "occurrence" because the subcontractor's faulty work was limited to the basement. *Id*. at 643. MEP argued that faulty workmanship can constitute an "occurrence" if it results in damage to a third-party. *Id*. The *Acuity* Court refused to adopt a general rule that faulty workmanship causing damage to a third-party constitutes an "occurrence." *Id*. at 644. The Court reasoned that it would be improper to reach such a conclusion because the only damage sustained was to the property of MEP, not property of an uninvolved third-party. *See id.*

Plainly, the *Acuity* Court had an opportunity to adopt a rule that faulty workmanship causing third-party damage satisfied the definition of "occurrence," but expressly declined to do so. Petitioners ask this Court to ***make*** Kentucky insurance law. Not only do Petitioners request that this Court make a finding which the Kentucky Supreme Court has refused to make, but also there is no factual basis to maintain that faulty workmanship caused damage to something other than Petitioners' work product. (Pet'rs Br. at 24.) The record is devoid of any factual findings of "bodily injury or property damage to something other than the insured's work product." *See Cincinnati*, 306 S.W.3d at 80, n. 45. Likewise, there are no allegations that Petitioners caused injury or damage to third-party property. Rather, the Underlying Liability Action alleges that Petitioners failed to satisfy their contractual and warranty obligations in the design, fabrication, and installation of custom cooperage equipment. (J.A. Vol. V, p. 707.) It is further alleged that the custom cooperage equipment was riddled with design and installation defects. (J.A. Vol. VI, p. 714.) The operative complaint seeks to recover damages for "cost of work to remediate the deficient and defective custom equipment," the "increased cost due to additional labor and materials," and lost profits. *Id*. at 719. There is no cause of action or category of damages relating to something other than Petitioners' work.

At bottom, Petitioners controlled their work with Barrel—either directly or indirectly through the subcontractors they chose. The Underlying Liability Action resulted from actions taken by Petitioners or those working under Petitioners' direction, not from "chance events" beyond their control. Therefore, the events giving rise to the Underlying Liability Action cannot be considered fortuitous and do not come within the meaning of "occurrence" under the Policy.

III. A Finding Regarding The Absence Of A Duty To Indemnity Is Not Premature.

Petitioners argue that the question regarding Respondent's duty to indemnify is premature because the Underlying Liability Action has not been resolved. (Pet'rs Br. at 25.) Petitioners offer no support for this contention beyond their own assertion.

It is axiomatic—if not self-evident—that an insurer determined to owe no duty of defense, has no duty of indemnification. This is true under both Kentucky and West Virginia law because each state recognizes that the duty to defend is broader than the duty to indemnify. *See e.g., Am. Physicians Assur. Corp. v. Schmidt*, 187 S.W.3d 313 (Ky. 2006); *Bowyer v. Hi-Lad, Inc*., 216 W.

Va. 634, 609 S.E.2d 895 (W. Va. 2004). The ICA correctly determined that Respondent owes no duty of defense here and, in turn, there is no duty to indemnify. Absent the duty to defend, any argument that an indemnity determination is premature is simply incorrect.

CONCLUSION

WHEREFORE, Respondent, Motorists Mutual Insurance Company, respectfully seeks an Order from this Court affirming the Intermediate Court of Appeals' ruling that no duty of defense or indemnity exists in connection with the underlying liability lawsuit.

MOTORISTS MUTUAL INSURANCE COMPANY,

By counsel,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2025, *Respondent's Response Brief* was filed and served via File&ServeXpress on all counsel of record.

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