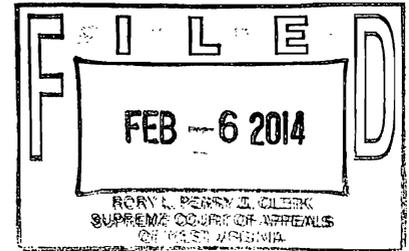


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 13-0931



STATE AUTO PROPERTY AND
CASUALTY COMPANY, Intervenor Below,

Petitioner,

v.

BARRY G. EVANS and ANN M. EVANS,
and CMD PLUS, INC., Plaintiffs Below,

Respondents,

And

CMD PLUS, a West Virginia corporation,
Third-Party Plaintiff Below,

Respondent.

BRIEF OF RESPONDENTS
BARRY G. EVANS AND ANN M. EVANS

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February 6, 2014

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STATEMENT OF THE CASE

Barry G. Evans and Ann M. Evans (“the Evans Respondents”) instituted the underlying civil action against CMD Plus, Inc. (“CMD”) and C.K. Shah and Kimberly Shah (“the Shah Respondents”) in April 2011 on the legal theories of nuisance, trespass and negligence for property damage arising from continuing incursions of surface water, storm water, mud and debris escaping from the property of the Shah Respondents and onto the Evans’ property. App. Vol. 1 at 2, ¶ 5.¹

The Evans Respondents own and live in a residence (“the Evans Property”) on Shamrock Road in the Highland Meadows Subdivision (aka Emerald Heights) in the City of Charleston. App. Vol. I at 1, ¶ 1. The Shah Respondents own several lots fronting on Meadow Road (“the Shah Property”) in the City which abut upon the rear of the Evans Property. App. Vol. I at 1, ¶ 2. The engineer’s sketches of the relative locations of these properties can be found in Volume II of the Appendix at 204 and 207.

CMD is a West Virginia corporation and the named insured in the Commercial General Liability Policy No. SPP2382380 03 (“the CGL Policy”) issued by State Auto Property and Casualty Insurance Company (“State Auto”). App. Vol. I at 2, ¶ 4; App. Vol. II at 4–179. CMD engages in the business of development and construction activities. App. Vol. I at 2, ¶ 4; App. Vol. I at 5, ¶ 1.

As the circuit court found, CMD entered into a contract with the Shah Respondents “to allow CMD to construct a custom home” on the Shah Property on Meadow Road for sale to a Mr. and Mrs. Jackson. App. Vol. II at 365, ¶¶ 3, 4. There exists no contractual relationship of any kind between the Evans Respondents and either CMD or the Shah Respondents. In the

¹ References to the contents of the Appendix will be made herein as “App. Vol. _____, at _____.”

Spring of 2009 and after CMD commenced development and construction activities on the Shah Property, surface water, storm water, mud and debris began flowing off the Shah property and onto the Evans Property, more or less, continuously to the present. App. Vol. II at 2, ¶ 5. The surface/storm water flowing onto the Evans Property at times has entered the Evans residence and caused exterior damage to the Evans yard, landscaping and walkways and interior damage to basement walls and floors. App. Vol. II at 309.

The Evans Complaint alleges that CMD's development of and construction on the Shah Property are the causes of the Evans property damages. App. Vol. I at 2, ¶ 6. The Complaint seeks, among other things, compensatory damages for expenses for clean up; repair and replacement of damaged property; loss of use of the Evans Property; and diminution of the value of the Evans Property. App. Vol. I at 3-5, ¶¶ 15, 22; *see also* App. Vol. II at 313-14.

Prior to the commencement of the underlying litigation, representatives of State Auto sought and received permission to inspect both the exterior and interior of the Evans Property. State Auto eventually provided the Evanses with its adjuster's estimates of a portion of the property damages and a copy of a consulting engineer's report on recommendations for remediation work to be done on the Shah Property. App. Vol. II at 201-08.

During the pretrial development of the Evans' claims, CMD obtained leave of the circuit court to file its Third-Party Complaint against State Auto. App. Vol. II at 372, line 26. On March 20, 2012, CMD filed its Third-Party Complaint alleging common law bad faith, violations of the West Virginia Unfair Trade Practices Act, and breach of contract. App. Vol. I at 14-34. Subsequently, State Auto obtained a bifurcation for trial of the Evans' claims from CMD's bad faith claims. Ultimately, State Auto sought declaratory relief under W. Va. Code §§ 55-13-1, *et seq.* contending that neither the CGL Policy nor a homeowner's policy of the Shahs affords any

coverage for the Evans' claims or obligates State Auto to provide a defense. App. Vol. II at 266-82.

The parties briefed State Auto's Motion for Declaratory Judgment, and on April 1, 2013, the circuit court heard oral argument. App. Vol. II at 330-63. The parties subsequently submitted proposed findings of fact and conclusions of law as directed by the circuit court. On May 17, 2013, the circuit court issued the Order ("Declaratory Judgment Order") from which State Auto appeals finding that the CGL Policy affords coverage for the claims asserted in the Evans Complaint. App. Vol. II at 364-71.

SUMMARY OF THE EVANS RESPONDENTS' ARGUMENT

State Auto makes five (5) assignments of error concerning the circuit court's Declaratory Judgment Order. Two (2) assignments dealing with the mold exclusion and the Shah Respondents' homeowner's policy are without merit because none of the Respondents controverted State Auto's position on either issue. The remaining three (3) assignments assert that the Evans' claims in the Complaint are not covered by CMD's CGL Policy based under Exclusion J to Coverage A—Bodily Injury and Property Damage in the Insuring Agreement. These assignments of error are also without merit for the reasons that (a) State Auto's overly expansive reading of Exclusion J is supported by no case law; and (b) the Evans' claims are a classic example of the claims covered by commercial general liability policies.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Evans Respondents submit that oral argument is unnecessary because "the facts and legal arguments are adequately presented in the brief and record on appeal, and the decisional process would not be significantly aided by oral argument." Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure.

ARGUMENT

A. Standard of Review

Citing *Cox v. Amick*, 195 W. Va. 608, 612, 466 S.E.2d 459, 463 (1995), State Auto contends that the circuit court's Declaratory Judgment Order is entitled to *de novo* review and the determinations of fact in the same Order are reviewed under a clearly erroneous standard. The Evans Respondents agree.

B. The Declaratory Judgment Order Appropriately Does Not Address Either the Mold Exclusion or the Homeowner's Policy Issues Because Neither Issue Was Controverted Below by Respondents

In its Assignment of Error No. 1, State Auto contends that the circuit court erred because its "Order did not directly address the issue of the mold exclusion" in the CGL Policy and argues extensively that it is entitled to declaratory relief on the mold exclusion issue. State Auto's Brief at 5, 11-15. In its Assignment of Error No. 2, State Auto contends the circuit court erred by failing to make a finding that the Shah Respondents' homeowner's policy created no duty to defend or indemnify in connection with the Evans' claims. State Auto's Brief at 5, 16.²

Both assignments of error and the ancillary arguments fail for the same reason. State Auto presented no justiciable controversy regarding the mold exclusion in the CGL Policy or the applicability of the Shah's homeowner's policy. See *West Virginia Utility Contractors Ass'n v. Laidley Field Athletic and Recreational Center Governing Bd.*, 164 W. Va. 127, 131, 260 S.E.2d 847, 850 (1979), quoting *Trail v. Hawley*, 163 W. Va. 626, 627-28, 259 S.E.2d 423, 425 (1979) "[F]or the purpose of a declaratory judgment action, a justiciable controversy exists when a legal right is claimed by one party and denied by another.").

² References to State Auto's Brief will be made as "State Auto's Brief at ____."

As State Auto points out, all of the Respondents conceded on the record that the Shah's homeowner's policy was not implicated by the Evans' claims. State Auto Brief at 5, 16; App. Vol. II at 339-40. The circuit court properly did not include a declaratory ruling about the Shah's homeowner's policy when the court issued the Declaratory Judgment Order because nothing remained for adjudication on the question.

Although somewhat less obvious, similar circumstances may have caused the circuit court to conclude that it need not address the mold exclusion. At the conclusion of oral argument, the circuit court directed the parties to submit proposed findings of fact and conclusions of law. App. Vol. II at 356-57. None of the Respondents – either the Evanses or CMD and the Shahs – submitted any proposed findings which took issue with State Auto's position on the mold exclusion. Therefore, as the circuit court was preparing its rulings on State Auto's Motion for Declaratory Judgment, the court had little to nothing before it to adjudicate about the mold exclusion.

C. The Declaratory Judgment Order Appropriately Finds that Coverage for the Evans' Claims Are Not Excluded Under the CGL Policy

By its last three assignments of error, State Auto argues that portions of Exclusion J of the CGL Policy relieve State Auto of the obligation to defend and indemnify CMD in connection with the Evans' claims. These remaining issues are addressed in Insuring Agreement, Coverage A which covers claims for "bodily injury" and "property damage" caused by an "occurrence" in the coverage territory that happens during the policy period. App. Vol. II at 36-37.

State Auto does not challenge the facts that the Evans' claims are an "occurrence" in the coverage territory that occurred during the policy period within the meaning of the CGL Policy. Rather, State Auto resorts to vague interpretations of portions of Exclusion J of the CGL Policy to attempt to avoid coverage for the Evans' claims.

1. Exclusion J Contains No Language Excluding Coverage for Claims of Third-Parties Because the Harm Originated on the Insured's Property.

State Auto argues that the CGL Policy “clearly and unambiguously excludes any property damage to others as a result of damage to property owned by the policy holder [CMD].” Assignment of Error No. 3, State Auto Brief at 6. No single portion of State Auto’s Brief appears to present an argument in support of Assignment of Error No. 3. Instead, State Auto makes an argument after quoting Exclusion J(1) that the CGL Policy does not cover the Evans property damage claims because the harm originated on the Shah Property. State Auto Brief at 17-18. Exclusion J(1) cannot be reasonably construed to produce that result, and the Evans Respondents can find no language elsewhere in Exclusion J which could form a basis for State Auto’s assignment of error.

State Auto then goes on to discuss several cases which address uninsured and underinsured motorist issues. State Auto’s Brief at 18-19. The relevance of the cited cases to the coverage issues presented here eludes the Evans Respondents. State Auto’s concept that the Evans damage claims are excluded because “the damage allegedly originated on the Shah’s property” (State Auto’s Brief at 19) simply has no basis in either Exclusion J or elsewhere in the CGL Policy.

“An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.” Syllabus point 10, *Cherrington v. Erie Ins. Property and Casualty Co.*, 231 W. Va. 410, 745 S.E.2d 508 (2013). State Auto has not met its burden.

2. Exclusion J Does Not Preclude Coverage Because the Third-Party's Damages Are Caused by the Insured's Poor Workmanship.

State Auto next argues that the CGL Policy does not cover property damages to a third party [the Evans Respondents] caused by the poor workmanship of CMD. Assignment of Error No. 4, State Auto Brief at 6. In its Argument, State Auto restates its point that any damage to the Evans Property caused by CMD's work which was performed "incorrectly" or "negligently" is not covered by the CGL Policy. State Auto's Brief at 20, 23.

State Auto's argument is simply wrong and contains not a single citation or reference to legal authority despite State Auto's assertion that the proposition is supported by "the overwhelming weight of case law" State Auto's Brief at 6. State Auto's contention is antithetical to the key purpose of commercial general liability policies. "CGL policies are intended to insure against . . . 'the risk that the [contractor's] work or product will cause bodily injury or property damage to other property,' which may give rise to tort liability to third parties." *Pekin Ins. Co. v. Miller*, 854 N.E.2d 693, 699 (Ill. 2006), quoting *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 881 (Minn. 2002).

3. The Evans Respondents Are Not Seeking Any Relief that Entails Repair or Remediation of the Insured's Property.

Finally, State Auto contends that coverage under the CGL Policy is excluded for any repairs, alterations, and the like to the Shah's property "even to the extent needed for prevention of injury to a person or damage to another's property." Assignment of Error No. 5, State Auto Brief at 7. This contention is but another reiteration of State Auto's assertion of Exclusion J(1).

The circuit court correctly dealt with Exclusion J(1) in applicability by its finding that the Evans Respondents are seeking recovery of damages for harm to their property, not to the property of CMD. App. Vol. II 369-70, ¶ 6. Exclusion J(1) "is common to commercial general

liability policies. 9 Couch, *Insurance* §126:16 (3d ed. 1977). That exclusion prevents the insured from using the general liability policy as property insurance.” *Porter v. Clarendon Nat’l Ins. Co.*, 925 N.E.2d 58, 62 (Mass. 2010).

State Auto places significant emphasis on its contention that “[t]he only way to make the Evans whole and to ensure that their property does not continue to be inundated by mud, water, and debris as a result of water runoff from the Shah property is to construct a pile and lagging structure. See Appendix, Volume II, pp. 201-208. The only way for the Evanses to be made whole is by correcting the subsurface slip or scarp that occurs on the Shah property.” State Auto Brief at 23-24. In making this argument, State Auto relies on an August 29, 2009 engineering report that State Auto obtained from its consulting engineer whose services it terminated shortly after the report’s issuance. The engineering report describes proposed remedial measures on the Shah property but *no where* does the report state that no other remedial measures are possible to abate the nuisance and terminate the continuing trespass upon the Evans property. App. Vol. II at 201-03. The record is simply insufficient to demonstrate that State Auto’s consultant has ever concluded that improvements to the Shah Property are the only alternative. Significantly, the record is devoid of any indication that the Evans Respondents seek or agree to any improvements to the Shah Property.

To the extent that State Auto’s Brief can be construed to invoke Exclusion J(6), the “your work” exclusion, the Declaratory Judgment Order succinctly and appropriately found that the “your work” exclusion does not preclude insurance coverage for the Evans’ claims. App. Vol. II at 369, ¶ 5. The case law cited by the circuit court explains that Exclusion J(6) only precludes “. . . coverage for liability for replacing the insured’s own defective work; it does exclude

coverage for damage to other property resulting from the defective work.” *Wilshire Ins. Co. v. RJT Construction, LLC*, 581 F.3d 222, 226 (5th Cir. 2009) (applying Texas law).

CONCLUSION

Upon the foregoing argument and the record, the Evans Respondents respectfully submit that a memorandum decision affirming the circuit court’s Declaratory Judgment Order of May 17, 2013 should be issued in this appeal.

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Respondents,

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CERTIFICATE OF SERVICE

I, JAMES S. ARNOLD, counsel for Respondents, certify that I have served the foregoing “Brief of Respondents Barry G. Evans and Ann M. Evans” upon counsel of record by placing a true and exact copy in the United States mail, postage prepaid, this 6th day of February, 2014, as follows:

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