

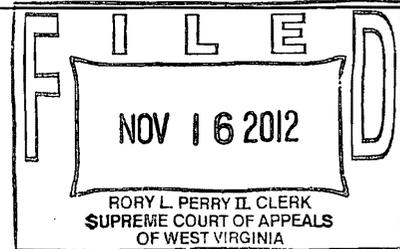
NO. 12-0769

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

FREDA BRADLEY, Plaintiff Below,
Petitioner,

v.

**FARMERS & MECHANICS MUTUAL
INSURANCE COMPANY OF WEST
VIRGINIA**, Defendant Below,
Respondent.



REPLY BRIEF OF PETITIONER FREDA BRADLEY

From the Circuit Court of Logan County, West Virginia
Civil Action No. 10-C-269

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INTRODUCTION

The Circuit Court erred in granting summary judgment and denying Freda Bradley the opportunity to present her case to a jury. First, the Circuit Court's conclusion that the term "collapse" as used in Ms. Bradley's homeowners policy is unambiguous, along with its abrupt conclusion that Ms. Bradley's floor did not collapse, is devoid of any explanation. More importantly, the majority of jurisdictions confronted with determining the meaning of "collapse" have explicitly rejected the reasoning adopted by the Circuit Court. By ignoring the ambiguity of the term "collapse" and by refusing to strictly construe the term against Farmers (as the majority of jurisdictions have done), the Circuit Court erred.

Additionally, material questions of fact remain regarding whether the decay that caused the damage to Bradley's home was "hidden" within the meaning of the homeowners policy. In ignoring these factual disputes, the Circuit Court improperly equated Bradley's knowledge of the effect (the collapse and sinking of the floor) with knowledge of the cause (the hidden decay). The record shows that questions of fact remain that should have precluded entry of summary judgment.

ARGUMENT

I. THE CIRCUIT COURT ERRED BY CONCLUDING THAT THE TERM "COLLAPSE" AS USED IN THE HOMEOWNERS INSURANCE POLICY WAS UNAMBIGUOUS AND THAT MS. BRADLEY'S FLOOR HAD NOT COLLAPSED.

By ignoring the inherent ambiguity in the policy's undefined term "collapse," the Circuit Court erred. As Farmers points out in its brief, this question of ambiguity is a question of law for the court to resolve. See Syl. Pt. 6, *Certain Underwriters at Lloyd's v. Pinnoak Resources, LLC*, 223 W. Va. 336, 674 S.E.2d 197 (2008) ("The question as to whether a contract is ambiguous is

a question of law to be determined by the court.”). However, Farmers can offer little legal support for its argument that “collapse” is unambiguous, since its homeowners policy did not define the term and the majority of courts asked to discern the meaning of “collapse” under similar circumstances have found the term to be ambiguous.¹

Thus, contrary to its acknowledgement that the meaning of this contractual term is a legal question, Farmers relies solely upon the factual testimony of its engineer Darren Franck, who testified that the floor had not “collapsed.” See Respondent’s Brief, p. 13. Yet, neither Mr. Franck’s factual observations nor his engineering background enable him to resolve a question of law best reserved for the court. Moreover, the balance of Franck’s testimony also reveals a professional opinion that he is undoubtedly qualified to offer, namely that Bradley’s floor “was in the process of letting go” and would fall to ground in a an additional few months or years.

APP 100.

Additionally, Farmers attempts to muddy the water further by suggesting that Bradley’s criticism of the Circuit Court’s cryptic order amounts to an argument that Circuit Court was required to “define” the words of a policy. See Respondent’s Brief p. 14 (“[L]ong standing law in West Virginia merely requires that the Court, in interpreting the insurance contract, apply the plain meaning of the word.”). However, Bradley does not argue that the Court needed to formulate it own definition; instead, her argument questions the Court’s (unspoken) reasoning. According to the Circuit Court, the “plain meaning” of “collapse” is the determinative issue in

¹ In an effort to avoid disputes like the instant case over the term’s meaning, Farmers’ current homeowners policy has been modified to include a clear definition of the term “collapse.” See *Plaintiff’s Second Proposed Order Denying Farmers and Mechanics Mutual’s Motion for Summary Judgment*, filed February 14, 2012 (defining “collapse” as an “abrupt falling down,” and expressly excluding structures that are “in danger of falling down” from being in a state of collapse.)

this case, the application of which warranted summary judgment. However, by failing to offer any inkling of the “plain meaning” that it applied, the parties and this Court can only surmise that the Circuit Court felt “collapse” required something more than what happened to Ms. Bradley’s floor.

Regardless, the Circuit Court’s murky conclusion of unambiguity was simply wrong. *See* Syl. Pt. 1, *Prete v. Merchants Prop. Ins. Co. of Indiana*, 159 W. Va. 508, 223 S.E.2d 441 (1976) (“Whenever the language of an insurance policy provision is reasonably susceptible of two different meanings or is of such doubtful meaning that reasonable minds might be uncertain or disagree as to its meaning, it is ambiguous.”). Indeed, the Circuit Court’s finding of unambiguity conflicts with the majority of jurisdictions that have long recognized that policies that fail to define “collapse” are ambiguous and include coverage for any substantial impairment of the structural integrity of a building, damage similar to that suffered by Ms. Bradley. The rationale underpinning these decisions may be best expressed by the Supreme Court of Appeals of Nebraska in *Morton v. Travelers Indemnity Company*, 171 Neb. 433, 106 N.W.2d 710 (Neb. 1960), which explained:

[I]t cannot be reasonably assumed that a person purchasing insurance for his home, including coverage for direct loss by “collapse of a building or any part thereof” understood such phrase as providing coverage if and only if his home, or at least a part thereof, falls together in an irregular mass or flattened form. Otherwise, the homeowner would be purchasing little if any added protection.

Id. at 720-21. Similarly, in *Auto Owners Insurance Company v. Allen*, 362 So.2d 176 (Fla. Dist. Ct. App. 1978), the District Court of Appeal of Florida rejected an insurer’s argument that “collapse” was unambiguous, even with the policy’s express exclusion of coverage for “settling, cracking, shrinkage, bulging, or expansion.” *Id.* at 177. If coverage for “collapse” was intended

to be so limited, the policy would have restricted “collapse” coverage to “a flattened form or rubble.” *Id.*

The persuasiveness of this rationale has prompted most courts to conclude “that the term ‘collapse’ is sufficiently ambiguous to include coverage for any substantial impairment of the structural integrity of a building. The cases to the contrary . . . have come to be in the distinct minority.” *Indiana Ins. Co. v. Liaskos*, 297 Ill. App. 3d 569, 577, 231 Ill. Dec. 844, 850 (Ill. App. Ct. 1998). Indeed, courts in Georgia, Iowa, Maryland, Michigan, New Mexico, Texas, Wisconsin, and Connecticut have all found that “collapse” is sufficiently ambiguous to include coverage for any substantial impairment of a structure. *See Beach v. Middlesex Mutual Assurance Co.*, 205 Conn. 246, 252, 532 A.2d 1297, 1300 (Conn. 1987) (citing court decisions from these states).²

Since the meaning of “collapse” in this context has yet to have been definitively resolved in West Virginia, Bradley urges this Court to adopt the majority position, reverse the Circuit Court’s entry of summary judgment, and find that the term is ambiguous and includes coverage for the substantial impairment to Bradley’s home.³

II. THE CIRCUIT COURT ERRED AND INFRINGED UPON THE EXCLUSIVE PROVINCE OF THE JURY BY CONCLUDING THAT THE DAMAGE CAUSED TO MS. BRADLEY’S HOME WAS NOT CAUSED BY HIDDEN DECAY.

Likewise, the Circuit Court erred by concluding that damage caused to Ms. Bradley’s home was not caused by “hidden decay.” The overwhelming evidence in the record suggests

³ The Circuit Court’s conclusion that no collapse had occurred also resulted in the erroneous decision to deny Ms. Bradley’s claim under Section 12 of the policy. However, coverage under Section 12 was based upon damage to Ms. Bradley’s floor separate and distinct from the occurrence of a “collapse.” The Circuit Court was apparently so hung up on defining “collapse” (albeit only to itself) that it erroneously determined that coverage under Section 12 also was contingent upon the occurrence of a “collapse” – a determination wholly at odds with the plain language of the policy.

otherwise. At a minimum, the record reveals a straightforward dispute of fact that should have precluded entry of summary judgment.

Ms. Bradley testified that she had no knowledge of the decay that caused the floor to collapse. **APP 94**. Of course, Farmers disagrees and asserts that Ms. Bradley had knowledge of the decay, and therefore it could not have been “hidden.” The thrust of Farmers’ argument centers on an earlier claim for coverage that Bradley had filed in 2005. At that time, Farmers denied Ms. Bradley’s claim, informing her that the damage to her home was the result of “improper methods of construction and settlement.” **APP 58**. Critically, the 2005 denial made no mention of mold, fungi, bacteria, or damage caused by water infiltration – the precise type of hidden decay that caused the 2008 collapse. Nevertheless, Farmers argues that if Ms. Bradley had read the report that accompanied the 2005 denial, she would have known about the decay, stating, “had Bradley bother [sic] to read the report, she would have known what was reported about the condition of the home[.]” **APP 46**, especially since she testified that she knows that water causes rot.

However, as Farmers’ own representatives apparently concede, Bradley could not have discovered the hidden decay simply by reading the report or looking at the black and white pictures provided to her in 2005. Farmer’s inspector Darren Franck testified that “from a black and white photo it’s hard to tell exactly what’s going on [under the house].” **APP 369**. Likewise, Franck admitted it was unlikely that one could see the decay to the floor joists unless you crawled under the house. **APP 372**.

As these exchanges suggest, there is a **factual** dispute over the “hiddenness” of the decay, a dispute best reserved for the jury. The Circuit Court itself had previously acknowledged that questions of fact remained, inquiring on the record whether there was “a genuine issue of

material fact of hiddenness.” **APP 288**. Later, the court answered its own question, stating, “I’m convinced that with respect to the hiddenness of the decay that there’s an issue of fact there . . . And as I’ve said, there’s an issue of fact on the hiddenness of decay.” **APP 313** (emphasis added). Yet, in granting summary judgment, the Circuit Court inexplicably changed his mind, concluding that, “Even if the term collapse were open to interpretation and it could be found that Ms. Bradley’s sinking floor is a ‘collapse’ (which this Court clearly finds it is not a collapse), it was not caused by ‘hidden decay.’” **APP 236**.

A review of the record reveals that the Circuit Court’s initial impression was correct: material questions of fact remain. The judgment of the Circuit Court should be reversed.

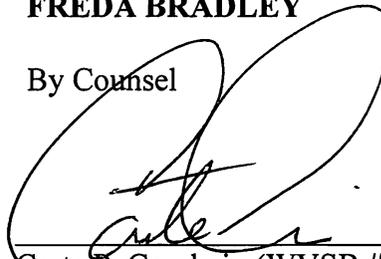
CONCLUSION

For the foregoing reasons, and for the reasons set forth in Petitioner’s brief, this Court should reverse the Circuit Court’s order of summary judgment.

Respectfully submitted,

FREDA BRADLEY

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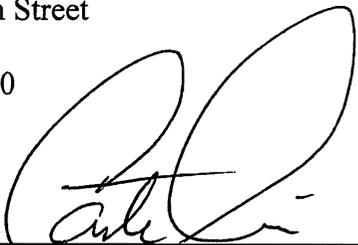
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(From the Circuit Court of Logan County, Civil Action No. 10-C-269)

CERTIFICATE OF SERVICE

I, Carte P. Goodwin, hereby certify that I served a copy of the foregoing **Reply Brief of Petitioner Freda Bradley** on this 16th day of November, 2012, by United States mail, postage prepaid, to the following:

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