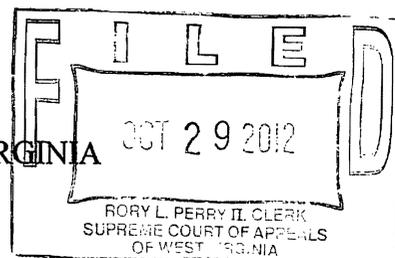


No. 12-0769

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



FREDA BRADLEY,

Plaintiff Below, Petitioner,

v.

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

FARMERS & MECHANICS MUTUAL
INSURANCE COMPANY OF WEST VIRGINIA,

Defendant Below, Respondent.

RESPONSE IN OPPOSITION TO PETITION FOR APPEAL

*(re: Petitioner's Notice of Appeal from an Order of the
Circuit Court of Logan County Entered on May 11, 2012)*

**Defendant Below/Respondent, FARMERS
& MECHANICS MUTUAL INSURANCE
COMPANY OF WEST VIRGINIA,
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CONTRA-STATEMENT OF THE CASE

In 2002, Freda Bradley (“Bradley”) purchased a Homeowners 3 Special Form “named-peril” homeowners policy of insurance from Farmers and Mechanics Mutual Insurance Company of West Virginia (“Farmers & Mechanics”). (*App. 110; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner’s Special 3 Form*).¹ At the time of her purchase of insurance in 2002, Bradley spoke with Marlene Walker at Madison Insurance Agency, Inc.²

Pursuant to the terms of the policy, *Section I - Perils Insured Against*, Farmers & Mechanics, relating to *Coverage A - Dwelling*, the policy insured against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to the property. The coverage provides, we do not insure, however, for loss:

1. Involving collapse, other than as provided in Additional Coverages 8.

(*App. 113; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner’s Special 3 Form, p. 4 of 9.*) Turning to the coverage provided within *Additional Coverages 8*, the policy provides:

8. Collapse. We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:
 - a. Perils Insured Against in COVERAGE C PERSONAL PROPERTY. These perils apply to covered buildings and personal property for loss insured by this additional coverage;
 - b. Hidden decay;

¹ References to the Appendix are designated (*App. ____*) followed by the page numbers.

² Walker Insurance Agency was originally a named defendant in the instant civil action, but has since been dismissed.

* * *

Collapse does not include settling, cracking, shrinking, bulging or expansion.

(App. 112; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 3 of 9.)

As noted within *COVERAGE C - PERSONAL PROPERTY*, the policy clearly provides as follows:

We insure for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in SECTION I - EXCLUSIONS.

(App. 113; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 4 of 9.) Collapse is not listed as one of the 16 perils under this provision, which are the only covered losses. *Id.*

On or about April 25, 2005, Bradley filed a claim with Farmers & Mechanics for damages to her home as a result of alleged blasting activities nearby. *(App. 36; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Motion for Summary Judgment and Incorporated Memorandum of Law; and App. 124; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment)*. On May 16, 2005, a home inspection was completed by Darren Franck ("Franck") of Advanced Engineering Associates ("Advanced Engineering"), at the request of Ralph Eldridge ("Eldridge"), Farmers & Mechanics Adjuster. Upon completion of his home inspection, Franck prepared a report which was mailed to Eldridge on May 19, 2005. *(App. 61-87; Advanced Engineering Associates Report dated May 19, 2005)*. By correspondence dated May 23, 2005, Eldridge provided a copy of said inspection report to Bradley. *(App. 68; May 23, 2005 Letter from Eldridge to Bradley)*. As Franck's investigation revealed no physical evidence of blasting damage

to Bradley's home, Farmers & Mechanics denied coverage for Bradley's April 25, 2005 claim by way of the May 23, 2005 correspondence.³ *Id.*

Franck's report notes that the inspection revealed past and continual water infiltration, which contributed to past settlement. Lime has been placed in the crawl space in an attempt to reduce moisture. (*App. 65; Advanced Engineering Associates Report dated May 19, 2005; p. 4*) Immediately prior to those statements, Franck's report makes direct reference to the attached photographs depicting the condition. "Photograph nos. 21 and 22 detail the crawl space under the laundry addition, while photographs 23 and 24 display the main crawl space." (*App. 65; Advanced Engineering Associates Report dated May 19, 2005; p. 4*). Thus, while Bradley may not have crawled under her house, a simple reading of the report, would have brought to her attention and established the fact that the condition she contends was hidden, was there in 2005, and that she was made aware of said condition.

In fact, in the Executive Summary of the Report, on the first page, Franck states, "[t]he results of the investigation revealed that there is no physical evidence of blasting damage to this structure. The **sinking** of the floor is associated with improper framing methods and **settlement**." (*App. 62; Advanced Engineering Associates Report dated May 19, 2005; p. 1*) (*emphasis added*). It is undisputed that Bradley was made aware of the allegedly hidden condition in 2005.

Bradley admitted that she looked into the crawl space of her house, but she does not recall when that was. (*App. 340; Deposition of Freda M. Bradley, August 22, 2011; p. 10:5; and App. 125; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*). Bradley

³ It should be noted that since the filing of the Complaint, the Plaintiff has agreed that she is not making a claim regarding the 2005 loss. However, information relative to this loss is pertinent to the 2008 claim.

admitted that she did not read Franck's 2005 report and that, as of the date of her deposition, she still had not read the report. (*App. 340; Deposition of Freda M. Bradley, August 22, 2011; p. 11 and App. 125; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*). Bradley admitted that she would have seen the reference to water infiltration should she have chosen to read the report. (*App. 340; Deposition of Freda M. Bradley, August 22, 2011; p. 12:4-6 and App. 125; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*). Franck's report indicates that, as of 2005, lime had been placed under the house in an attempt to reduce moisture. Moreover, the report indicates settlement with the house. (*App. 64-65; Advanced Engineering Associates Report dated May 19, 2005; p. 3-4*).

Regarding the alleged "collapse," Bradley testified that the floor dropped in August, 2008. She admitted to having some sloping in the floor by the door, which she first noticed in 2005, when she called the insurance company. (*App. 344; Deposition of Freda M. Bradley, August 22, 2011; p. 26-27 and App. 125; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*) Thereafter, Bradley admitted that the sloping was present from the time she purchased the home in 2002. (*App. 344; Deposition of Freda M. Bradley, August 22, 2011; p. 30 and App. 125; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*)

On September 22, 2008, Bradley filed a second claim with Farmers & Mechanics for the settling/dropping of her kitchen and bathroom floors. (*App. 37; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia' Motion for Summary Judgment and Incorporated*

Memorandum of Law and App. 125; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment). Farmers & Mechanics acknowledged receipt of Bradley's claim, assigned Eldridge as the adjuster, and contacted Advanced Engineering on September 24, 2008 to perform a home inspection. On October 1, 2008, Franck completed a second home inspection. (*App. 37; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia' Motion for Summary Judgment and Incorporated Memorandum of Law and App. 126, Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*). The results of Franck's investigation revealed that the damage to the kitchen floor of Bradley's home was caused by long-term rotting and decay resulting from inadequate perimeter drainage and lack of vapor barrier. With regard to the bathroom floor of Bradley's home, Franck's investigation revealed that water leaking from the toilet drain, associated with a faulty wax seal at the base of the toilet, caused some level of decay of the bathroom floor. (*App. 37; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia' Motion for Summary Judgment and Incorporated Memorandum of Law and App. 126, Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*).

Following Franck's October 1, 2008 inspection, Franck prepared and provided Eldridge with a report by way of correspondence dated October 2, 2008. On or about October 10, 2008, Eldridge informed Bradley, by written correspondence, that, as result of applicable policy exclusions, Farmers & Mechanics was disclaiming coverage for Bradley's September 22, 2008 claim. (*App. 59-60; October 10, 2008, Letter from Eldridge to Bradley and App. 37; Defendant Farmers and Mechanics*

Mutual Insurance Company of West Virginia' Motion for Summary Judgment and Incorporated Memorandum of Law)

Bradley filed a Complaint against Farmers & Mechanics with the West Virginia Insurance Commissioner. After a hearing was conducted, a ruling was entered in favor of Farmers & Mechanics. Bradley filed a Petition for Appeal. (*App. 37-38; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia' Motion for Summary Judgment and Incorporated Memorandum of Law*).

Bradley instituted suit against Farmers & Mechanics, Eldridge, Shawn Walker and Madison Insurance Agency. Bradley's original complaint contained seven (7) counts: breach of contract, Unfair Claims Practices Act and Insurance Regulation Violations, Common Law Bad Faith, Reasonable Expectations and Negligence in Selling the Insurance Policy, Declaratory Relief, and Fraud. Eldridge filed a motion to dismiss the entirety of the complaint against him, for various reasons, and his motion was granted by the Court. Farmers & Mechanics filed a motion to dismiss Counts II and III of the Complaint, relating to UTPA violations and the common law bad faith claim on the basis of the statute of limitations. This Court granted Farmers & Mechanics' motion to dismiss as to these two counts and Bradley has not appealed this issue. After a series of orders and amendments, Bradley filed a Second Amended Complaint against Farmers & Mechanics, Shawn Walker and Madison Insurance Agency. The Second Amended Complaint contained the following claims: Breach of Contract, Reasonable Expectations and Negligence in Selling the Insurance Policy, Fraud, Negligent Misrepresentation, and Declaratory Judgment.

Farmers & Mechanics filed a motion for summary judgment. Thereafter, based upon new assertions from Bradley, at the request of the circuit court, Farmers & Mechanics filed a Supplemental Memorandum of Law in Support in support of its Motion for Summary Judgment,

addressing issues requested by the Court. (*App. 123-149, Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*).

Bradley then contended that coverage existed under another portion of her insurance policy relating to fungi, wet or dry rot or bacteria.

The applicable policy provides:

12. Fungi, Wet or Dry Rot, or Bacteria.

- a. The most we will pay is up to \$10,000.00 to cover:
- (1) the total of all loss payable under Section 1 Property Coverages caused by fungi, wet or dry rot, or bacteria;
 - (2) the cost to remove fungi, wet or dry rot, or bacteria from property covered under Section 1;
 - (3) the cost to tear out and replace any part of the building or other covered property as needed to gain access to the fungi, wet or dry rot, or bacteria;

* * *

- b. The coverage described in 12.a, only applies when such loss or costs are a result of a Peril Insured Against that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at and after the time the Peril Insured Against occurred;

(*App. 112-113; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 3 & 4 of 9*) The limited coverage under this provision only applies when the loss is a result of a Peril Insured Against. As Bradley's loss was not the result of a Peril Insured Against, coverage did not exist under the policy.

After numerous arguments and briefing, the circuit court entered an Order granting summary judgment in favor of Farmers & Mechanics. In its Order, the circuit court relied upon Franck, who testified that at the time that he inspected the premises, there was not a collapse. Bradley has failed to produce any evidence to rebut this testimony. (*App. 235; Order Granting Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Motion for Summary Judgment*).

Thereafter, the circuit court concluded that “[c]ollapse is not a named peril within Bradley’s insurance policy and there is no coverage for her claim.” (*App. 236; Order Granting Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia’s Motion for Summary Judgment*). Moreover, addressing hidden decay, the circuit court held that “[t]he limited coverage under this provision only applies when the loss is a result of a Peril Insured Against [and] Bradley’s loss is not the result of a Peril Insured Against.” (*App. 237; Order Granting Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia’s Motion for Summary Judgment*). Each of these findings are supported by the record.

Bradley filed this Appeal requesting that the Summary Judgment Order be reversed based upon allegations that the circuit court erred in concluding that the term “collapse” was not ambiguous and that Bradley’s floor did not collapse and that the circuit court erred and infringed upon the exclusive province of the jury by concluding that the damage caused to Bradley’s home was not caused by “hidden decay”.

SUMMARY OF ARGUMENT

A “named peril” policy of insurance is an insurance policy of a different breed. The insurance policy herein was a named peril policy with “collapse” not being a named peril, but being covered under certain conditions. Bradley did not have a “collapse” occur in her home. Nor was Bradley’s claim covered by a peril identified in the applicable insurance policy. Bradley contends that the word “collapse”, undefined within the policy, is ambiguous. The circuit court properly concluded otherwise. It is immaterial whether “collapse” is ambiguous, as under the circumstances of Bradley’s claim and the terms of the policy, “collapse” is not a covered peril.

Bradley seeks coverage under the “hidden-decay” exception to the collapse provision. The undisputed evidence, however, is that there was not a collapse. Setting this evidence aside, the

evidence was not the result of hidden decay, but rather of settlement and water infiltration, long-term rotting and decay. As of 2005, Bradley had information regarding the condition of her home in her possession, but chose not to review it. Bradley, however, contends that the issue of whether the decay was hidden is a question of fact for the jury. As the facts surrounding the decay are not in dispute, the issue is a question of law for the Court. Moreover, even if Bradley were able to establish hidden decay, a collapse did not occur. As a result, there is no coverage under the applicable insurance policy. For these reasons, the ruling of the circuit court should be affirmed.

STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo*. Syllabus Point 1, *Painter v. Peavy*, 192 W. Va. 189, 451 S.E.2d 755 (1994). Pursuant to Rule 56 of the West Virginia Rules of Civil Procedure, "[a] motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law." Syllabus Point 3, *Aetna Cas. & Sur. Co. v. Federal Ins. Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963). "Summary judgment is appropriate if, from the totality of the evidence presented, the record could not lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove." Syllabus Point 2, *Williams v. Precision Coil, Inc.*, 194 W. Va. 52, 459 S.E.2d 329 (1995).

Also, this Court has explained:

[t]o meet its burden [of producing additional evidence showing the existence of a genuine issue for trial], the nonmoving party on a motion for summary judgment must offer more than a mere scintilla of evidence and must produce evidence sufficient for a reasonable jury to find in a non-moving party's favor. The evidence illustrating the factual controversy cannot be conjectural or problematic. The nonmoving party must also present evidence that contradicts the showing of the moving party by pointing to specific facts

demonstrating that there is a trial-worthy issue which is not only a genuine issue but also is an issue that involves a material fact. Moreover, the nonmoving party cannot create a genuine issue of material fact through mere speculation or building of one inference upon another. The party opposing a motion for summary judgment may not rest on allegations of his or her unsworn pleadings and must instead come forth with evidence of a genuine factual dispute. Mere allegations are insufficient in response to a motion for summary judgment to show that there is a genuine issue for trial.

Crum v. Equity Inns, Inc., 224 W. Va. 246, 254, 685 S.E.2d 219, 227 (2009) (citing *Powderidge Unit Owners Ass'n v. Highland Props., Ltd.*, 196 W. Va. 692, 698, 474 S.E.2d 872, 878 nn. 10, 11 (1996))

Moreover, “[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 judgement, shall be reviewed *de novo* on appeal.” *Certain Underwriters at Lloyd's v. PinnOak Res. LLC*, 223 W. Va. 336, 674 S.E.2d 197 (2008) (citing Syllabus point 2, *Riffe v. Home Finders Associates, Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999); Syllabus point 2, *Horace Mann Insurance Co. v. Adkins*, 215 W. Va. 297, 599 S.E.2d 720 (2004)). This Court has also held that, “determination of proper coverage of an insurance contract when the facts are not in dispute is a question of law.” *Tennant v. Smallwood*, 211 W. Va. 703, 568 S.E.2d 10 (2002).

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rules 10(c)(6) and 18 of the West Virginia Rules of Appellate Procedure, Farmers & Mechanics requests that this Court grant it the opportunity to present oral argument. Oral argument is necessary, pursuant to the requirements listed in W. Va. R.A. P. 18(a) for the following reasons and those apparent to the Court. The parties have not waived oral argument. W. Va. R.A.P. 18(a)(1). The issues presented in this appeal addressing are clearly not frivolous. W. Va. R.A.P. 18(a)(2). While authoritative decisions exist relative to rulings of the circuit court, an analysis of the issues is warranted. W. Va. R.A.P. 18(a)(3).

Farmers & Mechanics believes that this case is suitable for a Rule 19 oral argument as, contrary to Bradley's assertion, the case involves assignments of error in the application of settled law.

ARGUMENT

I. THE CIRCUIT COURT DID NOT COMMIT ERROR IN CONCLUDING THAT THE TERM "COLLAPSE" WAS UNAMBIGUOUS OR THAT BRADLEY'S FLOOR DID NOT COLLAPSE.

As noted above, the question of whether an insurance contract is ambiguous is a question of law for the Court. *Certain Underwriters at Lloyd's v. PinnOak Res. LLC*, 223 W. Va. 336, 674 S.E.2d 197 (2008) (citing Syllabus point 2, *Riffe v. Home Finders Associates, Inc.*, 205 W. Va. 216, 517 S.E.2d 313 (1999); Syllabus point 2, *Horace Mann Insurance Co. v. Adkins*, 215 W. Va. 297, 599 S.E.2d 720 (2004)). It is not disputed that Bradley's Homeowners 3 Special Form "named-peril" policy contained a provision regarding collapse.

Specifically, the policy provided, *Section I - Perils Insured Against*, Farmers & Mechanics, relating to *Coverage A - Dwelling*, insured against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to the property. The coverage provides, we do not insure, however, for loss:

1. Involving collapse, other than as provided in Additional Coverages 8.

(*App. 113; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 4 of 9*). Turning to the coverage provided within Additional Coverages 8, the policy provides:

8. Collapse. We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:
 - a. Perils Insured Against in COVERAGE C PERSONAL PROPERTY. These perils apply to covered buildings and

personal property for loss insured by this additional coverage;

b. Hidden decay;

* * *

Collapse does not include settling, cracking, shrinking, bulging or expansion.

(*App. 112; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 3 of 9*). As noted within COVERAGE C - PERSONAL PROPERTY, the policy clearly provides as follows:

We insure for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in SECTION I - EXCLUSIONS.

(*App. 113; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 4 of 9*). Collapse is not listed as one of the 16 perils under this provision, which are the only covered losses. Thus, unless the “collapse” is caused by a peril listed, or by hidden decay, amongst others, there is no coverage for collapse.⁴ It is undisputed that the word “collapse” is not defined within the Farmers & Mechanics’ policy.⁵

Bradley complains that the circuit court’s perfunctory conclusions regarding collapse is devoid of any factual or legal support. *Petitioner’s Brief, p. 7*. This statement, however, must be disregarded. As this Court has held, “determination of the proper coverage of an insurance contract when the facts are not in dispute is a question of law.” Syllabus Point 1, *Tennant v. Smallwood*, 211

⁴ As noted, the policy at issue is a “named perils” policy. This Court has recognized that, “[u]nlike an “all risk” policy that includes all risks that are not specifically excluded in the terms of the contract, a “named perils” policy excludes “all risks not specifically included in the contract.” *West Virginia Fire & Casualty Company v. Matthews*, 209 W. Va. 107, 543 S.E.2d 664 (2000)(internal citations omitted).

⁵ In footnote 3 of her brief, Bradley points out current homeowners policy modifications regarding the definition of collapse. A future modification, however, is immaterial to the issues as presented to this Court, as the circuit court’s order is based upon the policy provisions at the time.

W. Va. 703, 568 S.E.2d 10 (2002). Moreover, this Court has opined that, “[w]hen this Court interprets an insurance policy, the “language in an insurance policy should be given its plain, ordinary meaning.”” Syllabus Point 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986). In addition,

...where the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.

West Virginia Fire & Casualty Company v. Stanley, 216 W. Va. 40, 602 S.E.2d 483 (2004) (citing *Keffer v. Prudential Ins. Co.*, 153 W. Va. 430, 345 S.E.2d 33 (1986)).

The undisputed evidence upon which the circuit court based its ruling, in part, is the testimony of Franck. Darren Franck, the only engineer to inspect the property testified that at the time that he inspected the property in 2008, the floor had not collapsed. (*App. 235; Order Granting Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia’s Motion for Summary Judgment*). Bradley failed to offer any evidence to rebut this testimony. To the contrary, Bradley herself testified that she noticed sloping with the floor in 2002. (*App. 344; Deposition of Freda M. Bradley, August 22, 2011; p. 30 and App. 125; Defendant Farmers and Mechanics Mutula Insurance Company of West Virginia’s Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*). Accordingly, the circuit court was correct in finding, based upon the evidence, that there was not a collapse.

As a part of her complaint about the circuit court, Bradley complains that “collapse” was not defined and is ambiguous. *Petitioner’s Brief, p. 4*. While not contained in the Definition section of the policy, the policy does contain an explanation of what is not a collapse. (*App. 112; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner’s Special 3 Form, p. 3 of 9*). Specifically, the policy provides, “Collapse does not include settling, cracking,

shrinking, bulging or expansion.” (*App. 112; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner’s Special 3 Form, p. 3 of 9*). A review of this language, provides explanation of the term collapse.

This Court addressed a similar argument, the lack of definition of a term within an insurance policy, regarding the word “accident” in *Stanley, supra*. In *Stanley*, the Petitioners argued that the term “accident” in the insurance policy was ambiguous because it was not defined, was of doubtful meaning, and reasonable minds might be uncertain or disagree as to its meaning. *Stanley* at 48, 602 S.E.2d at 491. Rejecting this argument, this Court looked to the common every day meaning and concluded that the acts in question were deliberate. *Id.* at 49, 602 S.E.2d at 492.

In its Order granting summary judgment herein, the circuit court referenced Franck’s testimony wherein he rendered the conclusion that the floor had not collapsed. (*App. 235; Order Granting Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia’s Motion for Summary Judgment*). Criticizing lack of plain meaning of collapse in the circuit court’s order, Bradley makes reference to the “sinking” and “dropping” references by the circuit court. *Petitioner’s Brief, p. 7*. Thereafter, Bradley complains that the circuit court failed to define the plain meaning of collapse. *Id.* Nowhere in the case law, however, is it stated that the circuit court must define the words of the policy. In fact, long standing law in West Virginia merely requires that the Court, in interpreting the insurance contract, apply the plain meaning of the word. Syllabus Point 1, *Soliva v. Shand, Morahan & Co., Inc.*, 176 W. Va. 430, 345 S.E.2d 33 (1986). Failure by the circuit court to define the plain, ordinary meaning of collapse, in light of reference to the sinking and dropping floor, does not make the holding of the circuit court error. Moreover, the policy noted that “collapse” did not include settling. (*App. 112; Farmers and Mechanics Mutual Insurance Company Policy Number HPP 0034541 06 Homeowner’s Special 3 Form, p. 3 of 9*). Franck’s report clearly

stated that the sinking of the floor was associated with settlement. (*App. 62; Advanced Engineering Associates Report dated May 19, 2005; p. 1*). This alone is sufficient to determine lack of collapse under the policy terms. As set forth in the Order, the circuit concluded that there ***under the plain and ordinary meaning of “collapse” Ms. Bradley’s floor did not collapse.*** (*App. 236; Order Granting Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia’s Motion for Summary Judgment*). In that regard, the circuit court rejected the use of sinking, dropping and the fact that Bradley “fell through” her floor, according to her, as being evidence of collapse. Thus, as the circuit court followed West Virginia law and interpreted collapse using its plain meaning, it did not commit error. Moreover, as this Court has noted,

[t]he mere fact that parties do not agree to construction of a contract does not render it ambiguous. The question of whether a contract is ambiguous is a question of law to be determined by the court.

Syllabus Point 1, *Berkeley Co. Pub. Serv. v. Vitro Corp.*, 152 W. Va. 252, 162 S.E.2d 189 (1968).

In further support of her argument, Bradley asserts that this Court has never been presented with discerning the meaning of “collapse.” While that may be accurate, a lack of definition of “collapse” does also not render the term ambiguous. In fact, there are likely many terms within insurance policies issued in this State that this Court has not defined. That, however, is not the applicable standard. Although Bradley contends that the term is subject to different meanings or is of such a doubtful meaning that reasonable minds disagree as to its meaning, other than a blanket assertion, Bradley fails to offer any evidence of those different meanings. *Petitioner’s Brief, p. 8.* Webster’s dictionary defines collapse as “to fall down suddenly.” *Merriam-Webster Learners Dictionary* available at [http://www.learnersdictionary.com/search/collapse\[1\]](http://www.learnersdictionary.com/search/collapse[1]). By her own admission, Bradley testified to having some sloping in the floor by the door, which she first noticed in 2005, when she called the insurance company. (*App. 344; Deposition of Freda M. Bradley, August*

22, 2011; p. 26-27 and App. 125; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment). Thereafter, Bradley testified that the sloping was present from the time she purchased the home in 2002. (App. 344; Deposition of Freda M. Bradley, August 22, 2011; p. 30 and App. 125; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment).

Thus, there was no sudden collapse. Most significant, it is immaterial as to whether there was a collapse, as collapse was not a named peril insured against. Under the clear and unambiguous terms of the policy, collapse was covered if it was caused by hidden decay, among others. (App. 112; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 3 of 9). The circuit court acknowledged this in its ruling when it opined that "even if the term collapse were open to interpretation... it was not caused by "hidden decay." (App. 236; Order Granting Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Motion for Summary Judgment). Thus, a finding of ambiguity of the word "collapse" does not render the circuit court's ruling error, because under any definition of collapse, or even rendering it ambiguous, does not overcome the issue that collapse was not a named peril insured against. (App. 113; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 4 of 9).

The insuring agreement sets the outer limits of an insurance carrier's contractual liability. However, if the coverage is not provided for under the enumerated coverage within the named perils policy, then coverage does not exist under the applicable insurance policy. (App. 113; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 4 of 9); West Virginia Fire & Casualty Company v. Matthews, 209 W. Va. 107, 543 S.E.2d

664 (2000)(internal citations omitted). Given that collapse is not a named peril within Bradley's insurance policy, there is no coverage for her claim.

Bradley contends that the majority of states have concluded that collapse does not require a complete destruction or falling in. *Petitioner's Brief*, p. 8. Neither Farmers & Mechanics, nor the circuit court for that matter, have stated that a complete destruction of the structure was required. Thereafter, Bradley directs this Court to cases from various jurisdictions which define collapse. Of interest, none of these cases support Bradley's argument that the term is ambiguous. The support for that proposition comes from Bradley's reliance upon a footnote in this Court's opinion in *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 509 S.E.2d 1 (1998) wherein it was stated, "[a] provision in an insurance policy *may* be deemed to be ambiguous if courts in other jurisdictions have interpreted the provision in different ways." *Id.* at fn. 5. This Court has specifically rejected reliance upon language in footnotes. In *State ex rel Medical Assurance v. Recht*, 213 W. Va. 457, 471, 583 S.E.2d 80, 94, (2003), this Court held, "language in a footnote generally should be considered obiter dicta which, by definition, is language "unnecessary to the decision in the case and therefore not precedential."" *Id.* (citing *Black's Law Dictionary* 1100 (7th ed. 1999); *see also Mylan v. American Motorists Ins. Co.*, 226 W. Va. 307, 700 S.E.2d 518 (2010). Concluding, this Court in *Medical Assurance* stated, "new points of law... will be articulated through syllabus points as required by our state constitution." *Id.* (citing Syllabus Point 2, *Walker v. Doe*, 210 W. Va. 490 558 S.E.2d 290 (2001). Accordingly, Bradley's reliance upon this footnote is misplaced and should be rejected by this Court.

Other than blanket assertions, Bradley has failed to offer any evidence or case law support to this Court establishing that the term "collapse" as used within the Farmers & Mechanics policy is ambiguous. To the contrary, courts looking at the issue have specifically held that the term

“collapse” is unambiguous. 44 AM. JUR. 2d Insurance 5 1282 (2009) citing *Krug v. Millers' Mut. Ins. Ass'n of Ill.*, 209 Kan. 111, 495 P.2d 949 (1972); *Williams v. State Farm Fire & Cas. Co.*, 514 S.W.2d 856, 71 A.L.R.3d 1065 (Mo. Ct. App. 1974); *Fantis Foods, Inc. v. North River Ins. Co.*, 332 N.J. Super. 250, 753 A.2d 176 (App. Div. 2000); *Graffeo v. U.S. Fidelity & Guaranty Co.*, 20 A.D.2d 643, 246 N.Y.S.2d 258 (2d Dep't 1964); *Employers Mut. Cas. Co. of Des Moines, Iowa v. Nelson*, 361 S.W.2d 704 (Tex. 1962).

Thus, while Bradley makes much ado about the purported ambiguity of the word collapse and the error committed by the circuit court in finding that the floor had not collapsed under the policy, Bradley does not address that collapse is not a covered peril. Thus, Bradley's argument is much ado about nothing, as regardless of whether the term is ambiguous or the floor collapsed, collapse is not a named peril. Given the above, the circuit court did commit error in its findings regarding collapse and its ruling should be affirmed.

Bradley's final argument regarding collapse relates to Section 12 of the applicable insurance policy. *Petitioner's Brief*, p. 10. Bradley argues that the coverage under Section 12 of the policy is separate and distinct from the occurrence of a “collapse.” *Id.* This argument, however, is incorrect in light of the applicable language of the insurance policy.

Section 12 of the policy provides,

12. Fungi, Wet or Dry Rot, or Bacteria.
 - a. The most we will pay is up to \$10,000 to cover:
 - (1) The total of all loss payable under Section I Property Coverages caused by fungi, wet or dry rot, or bacteria;
 - (2) The cost to remove fungi, wet or dry rot or bacteria from Property Covered under Section I;

- (3) The cost to tear out and replace any part of the building or Other covered property as needed to gain access to the fungi, wet or dry rot, or bacteria; and,
- (4) The cost of testing of air or property to confirm the absence, presence or level of fungi, wet or dry rot, or bacteria, whether performed prior to, during or after removal, repair, restoration or replacement. The cost of such testing will be provided only to the extent that there is a reason to believe that there is the presence of fungi, wet or dry rot, or bacteria.

(App. 112; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 3 of 9.)

- b. The coverage described in 12.a. only applies when such loss or costs are a result of a Peril Insured Against that occurs during the policy period and only if all reasonable means were used to save and preserve the property from further damage at and after the time the Peril Insured Against occurred.

(App. 113; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 4 of 9.) Thus, in order for this limited coverage to apply, it must be the result of a Peril Insured Against. As there is no evidence that the damage was caused by a Peril Insured Against, whether collapse or otherwise, there is no coverage for Fungi, Wet or Dry Rot or Bacteria under the policy.

II. THE CIRCUIT COURT DID NOT COMMIT ERROR, OR INFRINGE UPON THE PROVINCE OF THE JURY, BY CONCLUDING THAT THE DAMAGE TO BRADLEY'S HOME WAS NOT CAUSED BY HIDDEN DECAY.

In its findings, the circuit court concluded that the damage to Bradley's home was not caused by "hidden decay." *(App. 236; Order Granting Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Motion for Summary Judgment)*. In this regard, Bradley's argument is that material questions of fact remain as to whether the collapse was caused by hidden decay. *Petitioner's Brief, p. 10*. As recognized by this Court,

the mere fact that parties do not agree to construction of a contract does not render it ambiguous. The question of whether a contract is ambiguous is a question of law to be determined by the court.

Syllabus Point 1, *Berkeley Co. Pub. Serv. v. Vitro Corp.*, 152 W. Va. 252, 162 S.E.2d 189 (1968).

Pursuant to the terms of the policy, *Section I - Perils Insured Against*, Farmers & Mechanics, relating to *Coverage A - Dwelling*, insured against risk of direct loss to property described in Coverages A and B only if that loss is a physical loss to the property. The coverage provides, we do not insure, however, for loss:

1. Involving collapse, other than as provided in Additional Coverages 8.

(*App. 113; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 4 of 9*). Turning to the coverage provided within Additional Coverages 8, the policy provides:

8. Collapse. We insure or direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:
 - a. Perils Insured Against in COVERAGE C PERSONAL PROPERTY. These perils apply to covered buildings and personal property for loss insured by this additional coverage;
 - b. Hidden decay;

* * *

Collapse does not include settling, cracking, shrinking, bulging or expansion.

This coverage does not increase the limit of liability applying to the damaged covered property.

(*App. 112; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 3 of 9*). As noted within COVERAGE C - PERSONAL PROPERTY, the policy provides as follows:

We insure for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in SECTION I - EXCLUSIONS.

(App. 113; Farmers and Mechanics Mutual Insurance Company, Policy Number HPP 0034541 06 Homeowner's Special 3 Form, p. 4 of 9)

As noted, in his 2005 Report, Franck stated that the inspection revealed past and continual water infiltration, which contributed to past settlement. Lime has been placed in the crawl space in an attempt to reduce moisture *(App. 65; Advanced Engineering Associates Report dated May 19, 2005; p. 4)*. Immediately prior to those statements, Franck's report makes direct reference to the attached photographs depicting the condition. "Photograph nos. 21 and 22 detail the crawl space under the laundry addition, while photographs 23 and 24 display the main crawl space." *(App. 65; Advanced Engineering Associates Report dated May 19, 2005; p. 4)*. Thus, while Bradley may not have crawled under her house, a simple reading of the report, or review of the attached photographs established the condition that she now seeks to have this Court believe was hidden.

In the Executive Summary of the Report, on the very first page, Franck states, "[t]he results of the investigation revealed that there is no physical evidence of blasting damage to this structure. The sinking of the floor is associated with improper framing methods and **settlement**." *(App. 62; Advanced Engineering Associates Report dated May 19, 2005; p. 1) (emphasis added)*.

During the course of her deposition, Bradley admitted that she looked into the crawlspace of her house, but she does not recall when that was. *(App. 340; Deposition of Freda M. Bradley, August 22, 2011; p. 10:5 and App. 125; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment)*. Confirming her previous testimony before the hearing examiner at the Office of the Insurance Commissioner, Bradley testified that she did not read Franck's 2005 report and that

as of the date of her deposition she still had not read the report. (*App. 340; Deposition of Freda M. Bradley, August 22, 2011; p. 11 and App. 125; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*) Bradley admitted that she would have seen the reference to water infiltration should she have chosen to read the report (*App. 340; Deposition of Freda M. Bradley, August 22, 2011; p. 12:4-6 and App. 125; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*). Franck's report indicates that as of 2005, lime had been placed under the house in an attempt to reduce moisture. Moreover, the report indicates settlement with the house.

Of significance to Bradley's claim is that by her own admission, in 2008, when the repairs were performed on her property, the repairman advised her that one rafter underneath the house was completely rotted out. (*App. 346; Deposition of Freda M. Bradley, August 22, 2011; p. 36 and App. 128; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*). Upon inquiry, Bradley testified that she knows that water is a general cause of rot. (*App. 346; Deposition of Freda M. Bradley, August 22, 2011; p. 36 and App. 129; Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*). Based upon the above, the decay cannot be deemed hidden. Moreover, Bradley's failure to review information that she had available to her from the Franck report and photographs should not inure to her benefit.

Reference is made to the circuit court's questioning whether there was a genuine issue of material fact of hiddenness at August 8, 2011, hearing. *Petitioner's Brief p. 11*. The comment however, was more in the context of advising Bradley as to what she needed to argue. It was

thereafter that the Court required each party to submit a proposed order and brief on the issue of hiddenness. (*App. 121; Order from August 8, 2011, Hearing; and App. 287-288; Transcript of Proceedings Held August 8, 2011*).

Addressing Farmers & Mechanics' argument regarding knowledge, Bradley, relying upon Franck's testimony, argues that the black and white photos attached to the report are difficult to see. *Petitioner's Brief, p. 12*. Using this testimony, Bradley argues that questions of fact remain as to whether the decay was hidden. *Id.* Accepting the position that the photographs were difficult to read, does not establish questions of fact, nor does it excuse Bradley from her failure to read the report and gather information relative to the condition of her home. Essentially, while the photographs may have been difficult to see, Franck's report clearly states past and continual water infiltration, which contributed to past settlement. Thus, while Bradley may not have crawled under her house, a simple reading of the report, established the condition that she contends was hidden.

In support of this position, Bradley relies upon *State Auto Mut. Ins. Co. v. R.H.L., Inc.*, 2010 WL 909073 (W.D. Tenn. March 12, 2010) wherein the Court held that despite the insured being given an inspection report, the damage was not "hidden" because the report did not document specific decay and there was no evidence that the decay was visible. *Id.* Such is not the case in the instant appeal. The very testimony of Franck, upon which Bradley relies, provides that one could see the decay was visible under the house. (*App. 370; Deposition of Darren Franck, P.E., August 31, 2011; p. 22*).

Examining the definition of "hidden decay," the Tennessee Court stated in the establishment of this element

it is not enough for the insured to simply assert that [it] was aware of the decay. The test much have an objective element to it – that is to say that a reasonable insured under such circumstances would have seen or otherwise been aware of the decay. The applicable standard is that of a reasonable

insured. While an insured need not affirmatively inspect the insured premises so as to uncover otherwise hidden decay and repair it before it worsens, [it] likewise cannot retreat to willful blindness or refusal to draw those conclusions a reasonable insured would draw from visible signs of deterioration or decay.

State Auto at *8 (internal citations omitted). In this case, Franck's report provided details regarding the decay. (*App. 126, Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia Supplemental Memorandum of Law in Support of Its Motion for Summary Judgment*). Franck's report indicates that as of 2005, lime had been placed under the house in an attempt to reduce moisture. Moreover, the report indicates settlement with the house. (*App. 64-65; Advanced Engineering Associates Report dated May 19, 2005; p. 3-4*)

While Bradley may not have been required to crawl under the house to conduct her own inspection, given the knowledge of moisture and attempts to reduce it, as well as settling, coupled with photographs of areas at issue, Bradley should not be permitted to sit by and now claim the decay was hidden. Bradley should be required to draw the conclusions of a reasonable insured. Accordingly, the circuit court was correct in the entry of its Order granting summary judgment to Farmers & Mechanics as questions of fact did not remain as to whether the decay was "hidden." The undisputed facts establish that there was decay, Bradley just chose to ignore it. (*App. 236; Order Granting Defendant Farmers and Mechanics Mutual Insurance Company of West Virginia's Motion for Summary Judgment*).

CONCLUSION

For the reasons set for above, the Respondent, Farmers and Mechanics Mutual Insurance Company of West Virginia, requests that this Honorable Court affirm the ruling of the circuit court

granting summary judgment on behalf of Farmers and Mechanics Mutual Insurance Company of West Virginia.

Respectfully submitted this 29th day of October, 2012.

**Defendant Below/Respondent, FARMERS
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CERTIFICATE OF SERVICE

This is to certify that on the 29th day of October, 2012, the undersigned counsel served the foregoing “**RESPONSE IN OPPOSITION TO PETITION FOR APPEAL (re: Petitioner’s Notice of Appeal from an Order of the Circuit Court of Logan County Entered on May 11, 2012)**” upon counsel of record *via facsimile* and/or by depositing true copies in the United States Mail, postage prepaid, in envelopes addressed as follows:

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A handwritten signature in black ink, appearing to read "James A. Kirby, III", written over a horizontal line.