

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 13-0931

**(Lower Tribunal: Circuit Court of Kanawha County, West Virginia)
(Civil Action No.: 11-C-606)**

**STATE AUTO PROPERTY AND
CASUALTY COMPANY, Intervenor
Below,**

Petitioner,

**v.
BARRY G. EVANS, and ANN M. EVANS,
Plaintiffs Below,**

Respondents,

And

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

Respondent.

PETITIONER'S REPLY BRIEF

Chip E. Williams, WV State Bar No. 8116
cwilliams@pffwv.com
Ashley L. Justice, WV State Bar No. 10238
ajustice@pffwv.com
Jared C. Underwood, WV State Bar No. 12141
junderwood@pffwv.com
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
600 Neville Street, Suite 201
Beckley, WV 25801
*Counsel for Petitioner State Auto Property and
Casualty Insurance Company*

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ASSIGNMENT OF ERRORS

Assignment of Error No. 1

State Auto contends that it is not required to defend, insure or indemnify the Shahs or CMD, Plus, Inc. with respect to any claims in any way related to mold or fungi because any property damage or bodily injury resulting from mold or fungi is clearly excluded under the subject Commercial General Liability Insurance Policy. The Court's Order did not directly address the issue of the mold exclusion. The only reference to any mold exclusion in the Final Order was that the Court found that none of the exclusions cited by State Auto served to exclude coverage for the claims of the Evanses. This Court should review this error because the Commercial General Liability Insurance Policy clearly and unambiguously excludes any bodily injury or property damage resulting from any mold or fungi, which the lower court failed to specifically address.

Assignment of Error No. 2

State Auto contends that it is not required to defend, insure or indemnify the Shahs under the Homeowner's Policy issued to C.K. Shah for 204 Pembroke Sq., Charleston, WV 25314. At the hearing on April 1, 2013, counsel for the Respondents agreed, on the record, that they were not seeking coverage or compensation under the Homeowner's Policy. However, the Court erred in failing to find on the record that there is no duty on the part of State Auto to defend, insure, or indemnify the Shahs or CMD Plus, Inc. under the Homeowner's Policy. Therefore, this Court should address whether the lower court erred by failing to make a finding that State Auto owes no duty of coverage or indemnification under the Homeowner's Policy to the parties in this action.

Assignment of Error No. 3

State Auto also contends that it is not required to defend, insure or indemnify the Shahs under the Commercial General Liability Insurance Policy with respect to any of the claims asserted by CMD Plus, Inc. in its Third-Party Complaint asserting damages for repairs that need to be made to the property owned by CMD Plus, Inc. and the Shahs. The Court ruled contrary to the clear and unambiguous language of the policy by holding that such an exclusion was not intended to exclude coverage for an insured's liability for remediation expenses when the concern is primarily addressed to the premises of a third-party (i.e. the Evanses). This Court should review this error because the Commercial General Liability Insurance Policy clearly and unambiguously excludes any property damage to property owned by CMD Plus, Inc. and the Shahs for any repairs even to the extent of preventing injury to the Evanses' property.

STATEMENT OF THE CASE

Petitioner reincorporates its statement of the case as set forth in its Petition. Additionally, Petitioner denies that State Auto mishandled the claim made by the Evanses, and subsequently caused CMD Plus, Inc. to file its Third-Party Complaint. Petitioner, specifically denies the previous allegations set forth in CMD Plus, Inc.'s Third-Party Complaint and in Respondents' statements of the case in their respective Briefs.

SUMMARY OF THE ARGUMENT

The exclusions set forth in CMD Plus, Inc.'s Commercial General Liability Insurance Policy effectively exclude coverage as to the allegations asserted by Respondents, Barry and Ann Evans and CMD Plus, Inc., in their Complaints filed in the lower tribunal. More specifically, coverage as to the allegations of the CMD Plus, Inc. in its Third-Party Complaint should be excluded because (1) damages sustained by CMD Plus, Inc. and the Shahs as the alleged result of

damage to the property owned by CMD Plus, Inc. and the Shahs is excluded under the Commercial General Liability Insurance Policy, (2) damages allegedly sustained by CMD Plus, Inc. and the Shahs as the result of CMD Plus, Inc.'s incorrect work is clearly and expressly excluded under the Commercial General Liability Insurance Policy, and (3) repairs necessary to remediate or repair the slope failure on the property owned by CMD Plus, Inc., and the Shahs is clearly and expressly excluded under the Commercial General Liability Insurance Policy.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully requests oral argument on this matter pursuant to Rule 19(a)(1) of the West Virginia Rules of Appellate Procedure because this case involves assignments of error in the application of settled law.

ARGUMENT

I. STANDARD OF REVIEW

“[B]ecause the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed de novo; however, any determinations of fact made by the circuit court in reaching its ultimate resolution are reviewed pursuant to a clearly erroneous standard. Accordingly, we hold that a circuit court's entry of a declaratory judgment is reviewed de novo.” *Cox v. Amick*, 195 W.Va. 608, 612, 466 S.E.2d 459 (1995); *Mitcheson v. Harris*, 955 F.2d 235, 237 (4th Cir. 1992).

II. THE COMMERCIAL GENERAL LIABILITY INSURANCE POLICY ISSUED TO CMD PLUS, INC., EXCLUDES COVERAGE FOR PROPERTY DAMAGE TO PROPERTY OWNED BY CMD PLUS, INC. AND THE SHAHS.

It is undisputed that the property on which the work was performed by C.K. Shah d/b/a CMD Plus, Inc. is owned by the Shahs. *See Appendix Volume I, Page 1; See also Appendix Volume I, Page 7.* It is also undisputed that the Evanses are alleging that beginning in the spring

of 2009 and continuing to the present, C.K. Shah d/b/a CMD Plus, Inc. engaged and continues to engage in construction and development activities which disturb the surface of the Shah property and cause water, storm water, mud and debris to inundate the Evanses' property. *See Appendix, Volume I, Page 2.* A shallow slope failure developed on the Shah property as the result of construction activity of C.K. Shah and CMD Plus, Inc., and the slope failure and other disturbances to the surface of the Shah property have diverted surface water over the Evanses' retaining wall and onto the Evanses' property. *Id.* It is clear that State Auto is not required to insure, defend, or indemnify CMD Plus, Inc. or the Shahs for any damages allegedly sustained by CMD Plus, Inc. or the Shahs as a result the slope failure that occurred on the Shahs' own property.

Courts do not rewrite the terms of an insurance policy but instead enforce it as written: “[w]here 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.” E.g., syl. *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970); syl. pt. 1, *Miller v. Lemon*, 194 W. Va. 129, 459 S.E.2d 406 (1995); syl. pt. 1, *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 422 S.E.2d 803 (1992). “Language in an insurance policy should be given its plain, ordinary meaning.” Syl. pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33 (1986); syl. pt. 2, *Russell*, 188 W. Va. at 81, 422 S.E.2d at 803.

The commercial policy at issue clearly and unambiguously excludes coverage for property damage to property that is owned by CMD Plus, Inc. and the Shahs. Accordingly, there is no coverage for any claims asserted by CMD Plus, Inc. for claims seeking compensation for damage to its own property. State Auto Policy No. SPP-2382380, issued to C.K. Shah d/b/a C.M.D. Plus, Co., states in relevant part, as follows:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION 1- COVERAGES

2. Exclusions

This insurance does not apply to:

j. Damage to Property

“Property damage” to:

- (1) **Property you own**, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property, for any reason, including prevention of injury to a person or damage to another’s property;

SECTION IV- COMMERCIAL GENERAL LIABILITY CONDITIONS

17. “Property damage” means:

- a.** Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b.** Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

See Appendix, Volume II, Page 39-40(emphasis added); See Appendix, Volume II, Page 49-50.

The policy at issue does not cover property damage to any property owned by CMD Plus, Inc. and the Shahs. The exclusionary language is clear and unambiguous. Here, the Shahs and CMD Plus, Inc. are seeking coverage under the Commercial General Liability Insurance Policy for property damage to the property that is owned by CMD Plus, Inc. and the Shahs as a result of the subsurface slip or scarp that occurred on their property and which allegedly continues to cause surface water, storm water, mud and debris to escape from their property and inundate the Evanses’ property. *See Appendix, Volume II, Pages 183-184.* Thus, coverage is excluded under

the applicable Commercial General Liability Insurance Policy for any damages asserted by CMD Plus, Inc. or the Shahs occurring on the property owned by CMD Plus, Inc. or the Shah's.

The overwhelming weight of case law holds that "own, rent, or occupy" exclusions for damages to property owned by an insured, under a commercial general liability insurance policy, are valid exclusions. Case law cited by the Respondents in their respective Briefs supports the previous assertion. Case law from numerous jurisdictions have held that exclusions under Commercial General Liability Insurance Policies for property damage to property owned, rented, or occupied by the insured are valid. *See Porter v. Clarendon National Insurance Company*, 76 Mass. App. Ct. 655, 925 N.E.2d 58 (2010); *Auto-Owners Insurance Company v. Madison at Park West Property Owners Association*, 834 F.Supp.2d. 437 (D.S.C. 2011); *Massachusetts Bay Insurance, Co. v. Ferraiola Construction, Co.*, 584 A.2d 608, 611 (Me. 1990). All of the previous case law makes clear that while there may be some debate as to the applicability of an "own, rent, or occupy" exclusion as to property damage to a third-party, there is no debate that exclusions to property damage to property owned by the insured is clearly excluded.

Respondents take issue with the Petitioner's analogy of the present case to the "owned but not insured" line of cases for automobile under insurance claims. Perhaps, a more concise statement of the Petitioner's previous argument was articulated by the Western District Court of Missouri in stating that the primary purpose of an "own, rent, or occupy" exclusion "is to prevent the insured from using a liability insurance policy as if it provided property insurance. It likewise insulates against the moral hazard problem where an insured has less incentive to take precaution owing to the existence of insurance." *United States v. Conservation Chemical Company*, 653 F.Supp. 152 (W.D.Mo. 1986).

As stated in Petitioner's Brief, in the instant case, the Shahs could have purchased homeowner's coverage for the property they owned; however, they apparently chose not to do so. The Commercial General Liability Insurance Policy is not designed to insure against property damage to property owned by the Shahs or CMD Plus, Inc.

Because CMD Plus, Inc. and the Shahs owned the property that the slope failure occurred on and because CMD Plus, Inc. is seeking damages as a result of the slope failure, such claims fall squarely outside of the policy issued to CMD Plus, Inc. Petitioner requests this Court to find that State Auto is not required to insure, defend or indemnify the Shahs or CMD Plus, Inc. for the damages to property owned by CMD Plus, Inc. or the Shahs.

III. THE COMMERCIAL GENERAL LIABILITY INSURANCE POLICY ISSUED TO CMD PLUS, INC., EXCLUDES COVERAGE FOR PROPERTY DAMAGE CAUSED BY C.K. SHAH D/B/A CMD PLUS, INC.'S, INCORRECT WORK AND EXCLUDES REPAIRS TO PREVENT INJURY TO ANOTHER PERSON OR THE PERSON'S PROPERTY.

CMD Plus, Inc. is not entitled to insurance coverage under the Commercial General Liability Insurance Policy issued by State Auto Property Insurance Companies d/b/a State Auto Property and Casualty Insurance Company for property damage that is alleged to have arisen from CMD Plus, Inc.'s and its, contractors' and/or subcontractors' work because the Commercial General Liability Insurance Policy unambiguously, clearly, and explicitly excludes coverage for property damage to that particular part of any property that must be restored, repaired or replaced because CMD Plus, Inc.'s work was incorrectly performed on it.

State Auto Policy No. SPP-2382380, issued to C.K. Shah d/b/a CMD Plus, Co., states in relevant part, as follows:

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COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION 1- COVERAGES

2. **Exclusions**

This insurance does not apply to:

j. **Damage to Property**

“Property damage” to:

- (1) **Property you own**, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property, for any reason, **including prevention of injury to a person or damage to another’s property**;...
- (6) That particular **part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.**

SECTION IV- COMMERCIAL GENERAL LIABILITY CONDITIONS

17. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

SECTION V- DEFINITIONS

22. “Your work”:

- a. Means:
 - (1) Work or operations performed by you or on your behalf; and
 - (2) Materials, parts or equipment furnished in connection with such work or operations.
- b. Includes
 - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”, and
 - (2) The providing of or failure to provide warnings or instructions.

See Appendix, Volume II, Page 39-40; See Appendix, Volume II, Page 49-50.

In the Complaint, the Evanses allege that the Shahs and CMD Plus, Inc., engaged in activities on the Shah property which have disturbed the surface of the Shah property and continue to cause surface water, storm water, mud and debris to escape the Shah property and inundate the Evanses' property. *See Appendix, Volume I, Pages 1-6.* In their discovery responses, the Evanses contend that a shallow slope failure developed on the property owned by the Shahs and CMD Plus, Inc., as a result of the construction activity of C.K. Shah and his company, CMD Plus, Inc., causing water and debris to inundate the Evanses' property. *See Appendix, Volume II, Pages 183-184.* According to the Evanses, this slope failure has periodically and repeatedly diverted surface water over the Evanses' retaining wall and onto Evanses' property. *Id.* The report produced in discovery by the Evanses indicates that the shallow slope failure necessitates a repair, restoration, or enhancement of the property owned by the Shahs by way of a pile and lagging wall being placed on the Shah property uphill from the downhill slope failure at 6 Meadow Road, Charleston, West Virginia. *See Appendix, Volume II, Pages 201-208.*

All of the claims made by the Evanses in the subject lawsuit and the claims of CMD Plus, Inc. contained in its Third-Party Complaint stem from the property damage that has allegedly occurred to the Evanses' property due to the alleged incorrect work performed by C.K. Shah d/b/a CMD Plus, Inc. It is implied that if the work was performed properly no such subsurface slip or scarp would have occurred and therefore, the Evanses would not have sustained any damages and CMD Plus, Inc. and the Shahs would not have suffered any alleged damages as a result of State Auto not paying to repair the CMD Plus, Inc./Shah property.

Under the Commercial General Liability Insurance Policy, State Auto is not required to provide coverage for any damages allegedly sustained by CMD Plus, Inc. or the Shahs as a result

of work incorrectly performed on any part of the CMD Plus, Inc./Shah property. With regard to the initial slope failure, this failure is, according to the Evanses, directly associated with the construction activities performed by C.K. Shah and CMD Plus, Inc. and/or their contractors and subcontractors. *See Appendix, Volume I, Pages 1-6; See Appendix Volume II, Pages 183-184.* These activities were performed by individuals working directly or indirectly for C.K. Shah d/b/a CMD Plus, Inc. when the damages to the Evanses' property occurred. It is implied that CMD Plus, Inc., its contractors, or subcontractors performed the work incorrectly or the aforementioned subsurface slip/scarp would not have occurred. The policy language, cited above, expressly and unambiguously excludes coverage for the damages alleged by CMD Plus, Inc. in its Third-Party Complaint for any property damage due to the work that was incorrectly performed.

The Court's recent decision in *Cherrington* only further supports the Petitioner's position. In *Cherrington*, this Court held that defective workmanship causing bodily injury or property damage is an "occurrence" under Commercial General Liability Insurance Policies. *Cherrington v. Erie Insurance Property and Casualty Company*, 231 W.Va. 470, 745 S.E.2d 508 (2013). Since this Court has articulated that defective workmanship is an occurrence it is logical that damages as the result of workmanship can be excluded. Other jurisdictions have articulated that if the definition of "occurrence" cannot be understood to include an insured's faulty workmanship, an exclusion that exempts from coverage, any damage due to the insured's faulty workmanship is nugatory. *Stanley Martin Companies Incorporated v. Ohio Casualty Group*, 313 Fed. Appx. 609, 613 (4th Cir. 2009). If on the other hand, the definition of "occurrence" includes an insured's faulty workmanship, such an exclusion functions as a meaningful "limitation or restriction on the insuring clause." *Id.* Thus, the exclusion for incorrect work performed on

property owned by the insured, in the subject Commercial General Liability Policy, functions as a meaningful limitation on coverage in the present matter and excludes coverage on the same basis for damages to CMD Plus, Inc. or the Shahs resulting from the incorrect work of CMD Plus, Inc.

This policy also excludes coverage for repair, replacement, enhancement, restoration or maintenance of such property, for any reason, including prevention of injury to a person or damage to another's property. CMD Plus, Inc. argues that because the Evanses are not seeking damages to repair the slope failure this exclusion does not apply. However, the evidence in the record, which is the report produced by the Evanses in discovery, suggests that the only way to stop the Evanses' property from being inundated by mud, water, and debris as a result of water runoff from the Shah property is to construct a pile and lagging structure uphill from the slope failure on the Shah property. *See Appendix, Volume II, Pages 201-208.*

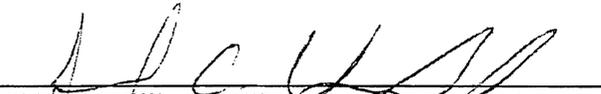
Although the Respondents state that the report regarding the pile and lagging wall was prepared by an expert at the expense of State Auto, such report was produced by the Evanses in discovery. Moreover, the pile and lagging wall required to address the damage to the Evanses' property falls within the express language of this section of the policy. The wall would be placed on the Shahs' property in order to repair the alleged damage caused by CMD Plus, Inc.'s incorrect work and to prevent further injury to the Evanses' property due to the construction activities performed by the C.K. Shah and CMD Plus, Inc., which is expressly excluded under the policy issued by State Auto. As a result, State Auto requests this Court to find that State Auto is not obligated to defend or indemnify the Shahs or CMD Plus, Inc. for any repairs necessary to correct the slope failure on the Shah property.

CONCLUSION

WHEREFORE, based upon the reasons stated above, and the terms, conditions, limitations, and exclusions set forth in the aforementioned State Auto Policy No. SPP-2382380, State Auto is entitled to a judicial declaration that it does not have the duty or obligation to provide coverage or a defense to CMD Plus, Inc., C.K. Shah (also known as Chandrakant Shah) and Kimberly Shah with respect to any damages allegedly sustained by CMD Plus, Inc. and the Shahs as a result of any damage they allegedly suffered as a result of the shallow slop failure that occurred on the Shah property, that State Auto has no obligation to provide a defense or indemnification for any claims resulting or relating to mold or fungi and that State Auto has no obligation to provide a defense or indemnification under the State Auto Homeowner's Policy. The Petitioner also requests any and all other relief, in equity or otherwise, that this Court sees fit to grant.

Respectfully Submitted,

STATE AUTO PROPERTY AND CAUSALTY
INSURANCE COMPANY



Chip E. Williams, WV State Bar No. 8116
Ashley L. Justice, WV State Bar No. 10238
Puffin, Fowler, Flanagan, Brown & Poe, PLLC
600 Neville Street, Suite 201
Beckley, WV 25801
Telephone (304) 254-9300
Facsimile (304) 255-5519

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Respondents,

And

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

Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioner, State Auto, does hereby certify on this 26th day of February, 2014, that a true copy of the foregoing "*PETITIONER'S REPLY BRIEF*" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

Charles M. Johnstone, II
Johnstone Gabhart & Prim LLP
P. O. Box 313
1125 Virginia Street, East
Charleston, WV 25321

James S Arnold, Esquire
Thomas Combs & Spann, PLLC
300 Summers Street, Suite 1380
PO Box 3824
Charleston, WV 25338

David P. Cook, Jr., Esquire
MacCorkle Lavender & Sweeney, PLLC
300 Summers Street, Suite 800
P. O. Box 3283
Charleston, WV 25332-3283

Trevor K. Taylor, Esquire
Taylor Law Office
34 Commerce Drive, Suite 201
Morgantown, WV 26501


Chip E. Williams, WVSB No. 8116
Ashley L. Justice, WVSB No. 10238
Jared C. Underwood, WVSB No. 12141

PULLIN, FOWLER, FLANAGAN, BROWN & POE, PLLC

600 Neville Street, Suite 201
Beckley, WV 25801
Telephone: (304) 254-9300
Facsimile: (304) 255-5519