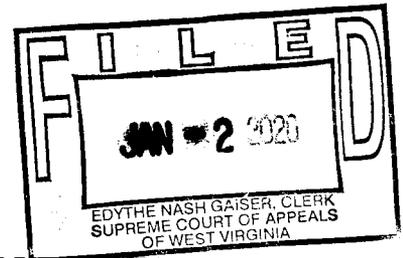


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No. 19-0711



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTORISTS MUTUAL INSURANCE COMPANY,

Defendant Below, Petitioner,

vs.

**JACOB AND LISA ZUKOFF and AUTOMOTIVE ACCESSORIES LIMITED, INC.,
d/b/a ACCESSORIES, LTD.,**

Plaintiffs Below, Respondents.

RESPONDENTS' BRIEF

Appeal from the Circuit Court of Marshall County
at Civil Action No. 18-C-27

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d/b/a Accessories, Ltd.

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I. STATEMENT OF THE CASE

On January 7, 2017, the Respondent business, Automotive Accessories Limited, Inc. (hereinafter “Accessories, Ltd.”) was heavily damaged when water and sewage entered the building in which it was located at 1009 1st Street in Moundsville, West Virginia. (Appx. pp. 61-63, Jack Zukoff Dep. pp. 121-132). The infiltration of water and sewage was caused by a freshwater leak located approximately one-half block away from Accessories Ltd. and by the negligent operation of a water or “HiVac” truck by a Moundsville Sanitary Board employee who blasted high-pressure water into the Respondents’ lateral sewer line. (Appx. p. 434, Letter from Larry Bonar; Appx. pp. 380-381, Harry Logsdon Dep. pp. 65-67).

At the time, the Zukoffs and Accessories, Ltd. were insured by the Petitioner Motorists Mutual Insurance Company (hereinafter “Motorists”) under a commercial “all-risk” policy that insured the Respondents for any and all damages that were not excluded in the policy. (Appx. p. 146-280). The Petitioner claimed that the damages suffered by the Respondents were caused by a simple “backup” of sewage and denied coverage citing an exclusion in the policy. (Appx. 386-387, Denial letter from Motorists). However, the actual cause of the Respondents’ damages was a perfect storm of negligence -- and was not the result of a backup. (Appx. p. 434, Letter from Larry Bonar; Appx. pp. 380-381, Logsdon Dep. pp. 65-67)

On that date, an employee of the Moundsville Sanitary Board, Harry Logsdon, received a call about a sewer malfunction located approximately one city block from Accessories, Ltd. (Appx. pp. 366-367, Logsdon Dep. pp. 9-11). When he arrived, Mr. Logsdon noticed that the flow of sewage at that location was abnormal and, without investigating the cause, he used the HiVac truck to shoot high pressure water into the main sewer in the direction of Accessories, Ltd. *Id.* He blasted the City’s main sewer with high pressure water until the flow returned to normal.

Mr. Logsdon failed to realize that a freshwater line servicing a residence halfway between his location and Accessories, Ltd. was ruptured and had been pumping large amounts of water into the City's main sewer line upstream from Accessories, Ltd. for an undetermined amount of time. (Appx. pp. 376-377, Logsdon Dep. pp. 49-53; Appx. p. 84, Larry Bonar Dep. p. 45). As Mr. Logsdon blasted high pressure water into the sewer on top of the leaking freshwater from the residence, he supercharged the main sewer and sent water and raw sewage up through the Respondents' lateral sewer line and into the business at depths of up to two feet. (Appx. pp. 368-371, Logsdon Dep. pp. 15-29).

Mr. Logsdon left for approximately ten minutes, came back, and again supercharged the main sewer by blasting it with high pressure water. *Id.* This time, Mr. Logsdon had reason to believe that there was a problem one block away at Accessories, Ltd., but he did not investigate nor understand that there was a large freshwater leak down the block at another residence. *Id.* Instead, he sent an entire city block's worth of HiVac hose into the sewer directly in front of Accessories, Ltd.'s lateral sewer line which caused a second surge of water and sewage into the business causing severe damage. *Id.*

Motorists denies that the water leak or the negligent operation of the HiVac truck played any role in the Respondents' damages despite each witness testifying to the contrary during Discovery. The pressurization of the main sewer from the HiVac truck did not result in a "backup or overflow" of water and sewage into Accessories, Ltd. (Appx. p. 434, Letter from Larry Bonar; Appx. pp. 380-381, Harry Logsdon Dep. pp. 65-67). The water and sewage were forced directly into the Respondents' lateral sewer line under very bizarre and unique circumstances as a result of Mr. Logsdon's pressurization of the main sewer with the HiVac truck on top of the excess water from the freshwater leak that had migrated into the City's main sewer. *Id.*

II. SUMMARY OF ARGUMENT

A. Procedural History

The Respondents filed their Amended Complaint in this matter in the Circuit Court of Marshall County on February 20, 2018 against the Moundsville Sanitary Board asserting its negligence. (Appx. pp. 1-4). Specifically, they asserted that the Sanitary Board employees “were negligent in forcing a large amount of raw sewage into Plaintiff’s property.” *Id.* Concurrently, the Respondents filed a Declaratory Judgment Action pursuant to W. Va. Code § 55-13-1 against the Petitioner alleging that the “Plaintiffs’ damages were due to raw sewage being forced into their premises, under pressure rather than a water back up or overflow. As such, the exclusion is inapplicable.” *Id.*

At the conclusion of Discovery, both the Respondents and Petitioner filed competing Motions for Summary Judgment that were heard by the Honorable Judge David W. Hummell, Jr. on June 18, 2019. (Appx. pp. 17-27, 347-398, 624). At the conclusion of the hearing, Judge Hummell first noted his important finding of fact, that the “**Court finds there was no backup.**” (emphasis added) (Appx. p. 503) The Court further ruled that, even though the evidence proves that the Respondents’ damages were not caused by a “backup,” the term “backup” was not defined in the policy and was ambiguous. (Appx. pp. 510-513). The Court entered an Order granting the Respondents’ Motion for Summary Judgment and denying the Petitioner’s Motion for Summary Judgment on July 19, 2019, from which the Petitioner has appealed to this Court. *Id.*

B. Statement of Facts

The Respondents were insured under Motorists Policy No. 33-296858-70-E when Accessories, Ltd. was flooded with water and sewage on January 7, 2017. (Appx. p. 146). The Respondents Jack Zukoff and Lisa Zukoff (hereinafter “the Zukoffs”) have owned and operated

Accessories, Ltd. since 1982. (Appx. p. 358, Jack Zukoff Dep. p. 7). Accessories, Ltd. is located at the corner of 1st Street and Washington Avenue in Moundsville. *Id.* It is a business that specializes in selling and installing lift kits, tires and wheels on trucks and other vehicles. Additionally, it sells multiple items in the retail portion of the store. (Appx. p. 359, Zukoff depo pp. 14-15).

On January 7, 2017, at around noon, Mr. Logsdon, an employee with the Moundsville Sanitary Board, was notified that there was abnormal flow in the City of Moundsville's main sewer line at the corner of 2nd Street and Washington Avenue in Moundsville. (Appx. pp. 366-367, Logsdon Dep. pp. 9-11). Mr. Logsdon is the sewer crew foreman and has been employed with the Sanitary Board for 24 years. (Appx. p. 366, Logsdon Dep. pp. 6-9). Mr. Logsdon inspected the manhole located at the intersection of Washington Avenue and 2nd Street and verified that the sewer was not functioning properly. (Appx. p. 367, Logsdon Dep. pp. 10). Mr. Logsdon then inserted a hose from the HiVac truck that uses high pressure water to blast water into and clean the main sewer. (Appx. pp. 368-381, Logsdon Dep. pp. 15-69). The hose on the HiVac truck propels itself into the sewer line using high pressure water. *Id.* The HiVac hose shoots clean water into the sewer and is capable of pressurization. (Appx. 87, Larry Bonar Dep. p. 23).

After the hose traveled approximately 10-15 feet, the flow in the main sewer on 2nd Street returned to normal. (Appx. pp. 368-381, Logsdon Dep. pp. 15-69). Mr. Logsdon then drove the HiVac truck away from the scene. *Id.* Approximately 10 minutes later, Mr. Logsdon received another call notifying him that sewage was blowing out of the cleanouts at the intersection of 1st Street and Washington Avenue, directly in front of the Respondent business. (Appx. pp. 368-381, Logsdon Dep. pp. 15-69). Mr. Logsdon turned the truck around and immediately started to drive back to check the sewer. *Id.* He drove from 1st Street towards Washington Avenue, and discovered

that after blasting the sewer with high pressure water from the HiVac truck, water and sewage were blowing up and out of the sewer cleanout located next to the Plaintiffs' business. *Id.* Mr. Logsdon testified that water and sewage were blowing out of the sewer cleanout approximately two feet into the air:

- A. *It was coming up about that high. (indicating).*
Q. *How high are you saying?*
A. *A couple feet.*
Q. *A couple feet. So it's straight up two feet in the air and then running down the street. Was that sewage?*
A. *Yes.*
Q. *Have you ever seen that before?*
A. *Not like that.*
Q. *Okay. Have you ever seen sewage come out of cleanout pipes and rise in the air?*
A. *It normally will just overflow. It won't be under pressure.*

(Appx. pp. 368-381, Logsdon Dep. pp. 15-69).

He explained that sewer blowing out of the cleanouts is unheard of because the Moundsville Sanitary sewer system is a non-pressurized gravity flow system. (Appx. pp. 368-381, Logsdon Dep. pp. 15-69; Appx. 87, Bonar Dep. p. 56) It does not have pressure and absent some outside force cannot blow out of the cleanouts or other openings. *Id.* The difference on that day was that sewer was under pressure from the HiVac truck's high-pressure hose that had flushed out the line as well as a freshwater leak from a nearby residence. *Id.*

Upon realizing that there was a major issue with the main sewer line, Mr. Logsdon returned to the manhole located one block away from the Respondent business at the corner of Washington Avenue and 2nd Street. He again inserted the HiVac truck's high-pressure water hose. (Appx. pp. 368-381, Logsdon Dep. pp. 15-69). This time, the hose traveled 600 feet from 2nd Street to 1st Street blasting the main sewer with high pressure water directly in front of Accessories, Ltd.'s lateral sewer line. *Id.* Mr. Logsdon then drove the HiVac truck to 1st Street and called for assistance. *Id.*

The Respondent Jack Zukoff stated during his deposition that there has never been a problem with Accessories, Ltd.'s lateral sewer line prior to the incident on January 7, 2017. (Appx. p. 361, Zukoff Dep. p. 43). He also testified that Mr. Logsdon and Larry Bonar, the Moundville Sanitary Board supervisor, admitted that the sewer had been pressurized by them. (Appx. pp. 595-596, Zukoff Dep. pp. 26-28, 61-64). Larry Bonar wrote a letter to the Sanitary Board's insurance carrier noting that the problems were also caused by a freshwater leak from another residence located at 111 Washington Avenue. (Appx. p. 434, Letter from Larry Bonar; Appx. pp. 380-381). Mr. Bonar explained that the water line servicing a residence had been leaking and broke into the lateral sewer line at the residence, which caused a great amount of freshwater to be poured into the City's main sewer:

I believe what happened was that the water service broke and the pressure of the water instead of surfacing broke the lateral pipe or the connection of the sewer pipes and water went into the lateral and into our main sewer line. Then it traveled down the 8 inch main line to the manhole on 1st Street. Where the 8 inch main sewer line entered the manhole either a piece of the pipe from the lateral or a piece of the main at the manhole broke and blocked the water and sewage from going into the manhole. I don't know if the water line break caused the main line at the manhole to fail but it contributed to the amount of damage that it caused. (Appx. p. 434, Letter from Larry Bonar; Appx. pp. 380-381).

Larry Bonar testified during his deposition that the reason that so much water was in the main sewer at the time Harry Logsdon was blasting it with high pressure water was because of a freshwater leak at a residence located at 111 Washington Avenue. (Appx. pp. 79-80, Bonar Dep. pp. 23-27). Mr. Bonar stated:

We got a tractor [sic] camera. I think we noticed that day, that Saturday, that there was an extreme amount of water coming into the manhole on 1st Street. But we wasn't sure what it was. So it was just higher than what – I mean, it was – seemed like it was flowing extremely fast and, you know, so we was kind of looking for why we had that much water in our sewer line. Id.

Mr. Bonar further testified that on January 7, 2017, multiple houses and businesses were flooded with water and sewage as a result of the pressurization and excess water, and that this was an extraordinary situation. (Appx. 87, Bonar Dep. pp. 55-57). Unlike the residential homes in the area, Accessories, Ltd. was built on slab construction with no basement. (Appx. p. 82, Bonar Dep. p. 36). Mr. Bonar stated that typically, the basement of one residential home would get all the sewage from a typical backup caused by a plug in the main sewer, and not any structures built on a slab. However, on this occasion, because of the sheer volume of water in the sewer and the pressurization by Mr. Logsdon, the sewage and water infiltrated into businesses and into Accessories, Ltd.'s lateral sewer line:

I really honestly believe that it was the excess clean water that caused it. I mean, it's not like a main line that had a thousand customers on it. You know what I mean? There's no large volume of sewage going into that system, only from them limited blocks that's on that map, you know. I don't think Jack would have got it if it wasn't for the excessive drinking water. (Appx. p. 92, Bonar Dep. 76).

Mr. Logsdon testified that the leak at 111 Washington Avenue caused the destructive explosion of sewer and water that entered the Plaintiffs' property. (Appx. pp. 368-381, Logsdon Dep. pp. 15-69). Mr. Logsdon further testified that in addition to the high-pressure water he forced into the sewer, that the water leak from the residence was the most likely reason for the water and sewage that was blasted into the Plaintiffs' business:

I believe we had an excess amount of water that caused our problem. If it would have been under normal conditions, releasing what little bit we released, I would say the lowest house might have got a little bit on the basement floor, but other than that, we wouldn't have had the – under my experience, and like I said, I've got 11 years in DC, 24 here, and I answered a lot of sewer calls in 24 years, and I just don't think we would have had this magnitude. Id.

The Respondents have a commercial insurance policy with Motorists. The Respondent Jack Zukoff contacted Motorists to make a claim for damages following the incident. (Appx. pp.

362-363, Zukoff Dep. pp. 133-140). Motorists denied the claim citing an exclusion in the policy related to the backup of sewer or water:

Per the claim details, you sustained water back up damage from the drains at your property due to work being performed by the City of Moundsville.

Under your policy, Commercial Policy (CP 1030); Causes of Loss, Special Form, Section B, page 2 of 10, #1, g(3) indicates water that backs up or overflows from a drain is excluded. Below is the section of your policy pertaining to that exclusion.

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in sequence to the loss.

g. Water

(1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;

(2) Mudslide or mudflow;

(3) Water that backs up or overflows from a sewer, drain or sump: or

(4) Water under the ground surface pressing on, or flowing or seeping through:

- (a) Foundations, walls, floors or paved surfaces;*
- (b) Basements, whether paved or not: or*
- (c) Doors, windows or other openings.*

(Appx. 386-387, Denial letter from Motorists). The denial of the claim was based upon Motorists' incorrect assumption that the sewage and water that infiltrated Accessories, Ltd. was caused by damage to the drains on the Plaintiffs' property. However, all of the damage was related to the failure of the sewer from the freshwater lines off of the Plaintiffs' property and the pressurization of the main sewer line by the Sanitary Board employee. (Appx. p. 434, Letter from Larry Bonar; Appx. pp. 368-381, Logsdon Dep. pp. 15-69). Importantly, none of the damage was caused by a

backup of sewage – rather, the water and sewage were forced under pressure by the Moundville Sanitary Board employee into the Plaintiffs’ business. *Id.*

The Circuit Court ruled that the Respondents’ damages were not the result of a backup or overflow. The Court made this factual finding after reviewing all of the evidence that had been submitted at the conclusion of Discovery. The Court reasoned that although the water and sewage entered the Respondents’ premises through the Respondents’ own pipes, the ingress of water and sewage was not the result of a backup or overflow. (Appx. pp. 502-513). Likewise, the Court stated, “under the particular facts of this situation, frankly I don’t think there was backup.” *Id.* The Court continued, stating that “[p]erspective in this particular instance is key, if not crucial.” *Id.*

Only after making the factual finding that the damages were not the result of a backup did the Court make the further finding that the policy term “backup” was ambiguous. *Id.* The Court found that the Motorists policy pertinent to this action “in no way, shape or form defines backup.” (Appx. p. 502). The Court further ruled that the Zukoffs and the general public would reasonably expect coverage under these very specific factual circumstances, and therefore found that there would be coverage for the loss for that reason, in addition to finding that there was no backup. (Appx. pp. 502-513).

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner has requested oral argument pursuant to Rules 18(a) and 20(a). The Respondents and Plaintiffs below respectfully submit that oral argument is not necessary because the dispositive issues have been decided in a Final Order after thorough briefing by competent counsel, and the facts and legal arguments are adequately presented in the briefs and record on appeal. Likewise, the Respondents do not believe oral argument is necessary because the primary factual determination made by the Circuit Court, that under these unique factual circumstances the

backup exclusion did not apply, should not be relitigated in this Court. To the extent this Court deems oral argument would significantly aid the decisional process, the Respondent would be honored to appear and defend the issuance of the Final Order by the Circuit Court.

IV. STANDARD OF REVIEW

A. Standard of Review regarding the Circuit Court's determination that the Respondents' damages were not the result of a backup or overflow.

The Circuit Court correctly denied the Petitioner's Motion for Summary Judgment and granted the Respondents' Motion for Summary Judgment with regard to the Declaratory Judgment Action in the case below because it found that the undisputed evidence in the case proved that the Respondents' damages were not the result of a backup or overflow. Therefore, this Court has stated the findings of fact contained in orders, judgments or decrees entered by a Circuit Court are reviewed under a clearly erroneous standard. *Cox v. Amick*, 195 W. Va. 608, 612, 466 S.E.2d 459, 463 (1995). A Circuit Court's entry of Summary Judgment is reviewed *de novo*. Syl. Pt. 1, *Davis v. Foley*, 193 W. Va. 595, 457 S.E.2d 532 (1995).

B. The Standard of review regarding the Circuit Court's determination that the Motorists Mutual insurance policy was ambiguous.

Because the Circuit Court's factual determination that the Respondents' loss was not the result of a backup or overflow should be affirmed, the remaining issues raised in the Petition regarding the ambiguity of the policy are rendered moot. Notwithstanding mootness, a Circuit Court's entry of a declaratory judgment is reviewed *de novo*. *Cox v. Amick*, 195 W. Va. 608, 466 S.E.2d 459 (1995). Moreover, "[a] motion for summary judgment should be granted if the pleadings, affidavits or other evidence show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Syl. Pt. 2, *Harrison v. Town of Eleanor*, 191 W. Va. 611, 447 S.E.2d 546 (1994).

V. ARGUMENT

- I. The Circuit Court correctly granted the Respondents' Motion for Summary Judgment and denied the Petitioner's Motion for Summary Judgment because the Circuit Court found that the Respondents' loss was not caused by a backup or overflow. Moreover, the Petitioner failed to prove that the exclusion applied to the facts of this case.**

This Court has held that when an insurance company seeks to avoid liability through the operation of an exclusion, the insurance company has the burden of proving that the exclusion applies to the facts of the case. *Syllabus Point 7, National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734 (1987). Likewise, “[w]here the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated.” *Syllabus Point 5, Id.*

In this case, the Petitioner failed to prove that the backup exclusion in its policy applied to the very unique and bizarre facts of the case. The Respondents have a commercial insurance policy with Motorists Mutual, and the Respondent Jack Zukoff contacted Motorists Mutual to make a claim for damages related to the January 7, 2017 supercharged sewer catastrophe. (Appx. pp. 362-363, Zukoff Dep. pp. 133-140). The Petitioner Motorists denied the claim citing an exclusion in the policy related to the backup of sewer or water. (Appx. 386-387, Denial letter from Motorists). The denial of the claim was based on the assumption by Motorists Mutual that the sewer damage was caused by a damage to the drains on the Plaintiffs' property. However, all the damage was related to the freshwater leak at another residence and the pressurization of the main sewer line in Moundsville. (Appx. p. 434, Letter from Larry Bonar; Appx. pp. 380-381, Logsdon Dep. pp. 65-67; Appx. pp. 595-596, Zukoff Dep. pp. 26-28, 61-64). In its denial letter to the Respondents, Motorist stated:

“Per the claim details, you sustained water back up damage from the drains at your property due to work being performed by the City of Moundsville” Motorist further stated:

Under your policy, Commercial Policy (CP 1030); Causes of Loss, Special Form, Section B, page 2 of 10, #1, g(3) indicates water that backs up or overflows from a drain is excluded. Below is the section of your policy pertaining to that exclusion.

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in sequence to the loss.

g. Water

- (1) Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;*
- (2) Mudslide or mudflow;*
- (3) Water that backs up or overflows from a sewer, drain or sump: or*
- (4) Water under the ground surface pressing on, or flowing or seeping through:*
 - (a) Foundations, walls, floors or paved surfaces;*
 - (b) Basements, whether paved or not: or*
 - (c) Doors, windows or other openings.*

(Appx. 386-387, Denial letter from Motorists).

After reviewing the Motions for Summary Judgment, the exhibits, and after hearing argument of counsel, the Circuit Court found that “under the particular facts of this situation, frankly I don’t think there was backup.” (Appx. p. 502) The Circuit Court’s Order states that “the Plaintiffs’ damages were not the result of a backup or overflow, but rather, the Plaintiffs’ damages were caused by the infiltration of water from the sewer main line into the lateral sewer line that served as a conduit into Accessories, Ltd.” (Appx. pp. 502-513). Furthermore, the Circuit Court found that “[p]erspective in this particular instance is key, if not crucial.” *Id.* The Circuit Court made an the additional finding that the Motorists policy was ambiguous because the term “backup” was not defined anywhere in the policy, however, the Court believed that the factual determination

alone regarding the exclusion was sufficient to Grant the Respondents' Motion for Summary Judgment and Deny the Petitioner's Motion for Summary Judgment:

I don't even think I have to go to ambiguous, quite frankly, but I'm going to. Just belt and suspenders. But because the policy doesn't define backup, it's ambiguous. (Appx. p. 503).

The Circuit Court ruled in the Respondents' favor and against the Petitioner based upon a factual finding that the loss was not the result of a backup or overflow. In light of that finding, this Court should affirm the Circuit Court's ruling as the Petitioner's assignments of error based on the "backup" exclusion and ambiguity are rendered moot.

Notwithstanding the Court's finding that the backup exclusion did not apply, the Respondents provided overwhelming and irrefutable evidence that the exclusion regarding the backup did not apply to the facts of the case because damages were not caused by a "backup". The Respondents provided the following evidence in their Motion for Summary Judgment and Reply briefing:

1. On January 7, 2017, a Moundsville Sanitary Board employee investigated an abnormal sewer flow approximately one block away upstream from the Respondents' business. (Appx. pp. 380-381, Logsdon Dep. pp. 65-67).
2. At the same time, a water leak from a residence about halfway down the block was pouring water into the main sewer at a residence downstream in the sewer from Mr. Logsdon, and upstream in the sewer from Accessories, Ltd. (*Id.* at Appx. p. 381, Dep. pp. 66-69; Appx. p. 434, Letter from the Sanitary Board Supervisor Larry Bonar).
3. Mr. Logsdon used a HiVac truck to address abnormal flow in the main sewer on 2nd Street. The HiVac truck shoots high pressure water from a

hose that is fed into the sewer with a hydraulic motor. (Appx. p. 380, Logsdon Dep. p. 62).

4. The HiVac truck holds 2,000 gallons of water and uses a pressurized hose that is strong enough to cut through tree roots. (*Id.*, Dep. p. 64; Appx. p. 79, Bonar Dep. p. 56).
5. Mr. Logsdon assumed that the source of the abnormal sewer flow was an issue localized at 2nd Street and shot the main sewer at 2nd Street with high pressure water to return the flow to normal by removing any blockages. (Appx. pp. 367-368, Logsdon Dep. pp. 12-18).
6. Immediately after using the HiVac truck at 2nd Street, water and sewage was shooting out like a geyser two feet into the air from the cleanouts one block away at the intersection of 1st Street and Washington Avenue directly in front of Accessories, Ltd. (Appx. p. 369, Logsdon Dep. pp. 19-21).
7. Mr. Logsdon had never seen sewage shooting out like that before and attributed the bizarre result to the water leak and supercharging the sewer with high pressure water. (Appx. p. 370, Logsdon Dep. p. 23).
8. Mr. Logsdon was unable to address the problem at the manhole located in front of Accessories, Ltd. because he needed an additional employee to help direct traffic while he lowered himself into the manhole. (Appx. p. 370, Logsdon Dep. p. 24).
9. Instead of waiting for help, Mr. Logsdon drove the HiVac truck back to 2nd Street, and fed the entire 600 feet of the high-pressure hose into the main sewer, and blasted the sewer all the way down to 1st Street where the

Respondents' lateral sewer line is located. (Appx. p. 370, Logsdon Dep. p. 25).

10. Mr. Logsdon testified that the Respondent business would not have been affected by the problem with the sewer at 1st street had it not been for the broken water line located at 111 Washington Avenue pouring an excess amount of water into the main sewer when he blasted the main sewer twice with high pressure water. (Appx. p. 381, Logsdon Dep. p. 67).
11. In fact, Mr. Logsdon testified that, "In my years of experience, under normal conditions, without a broken water line, this would have never happened. That's my experience." (*Id.*).
12. Mr. Logsdon testified that a camera was used subsequent to the events on January 7, 2017 to determine the source of the freshwater leak and determined that the leak was from a residence located at 111 Washington Avenue, approximately one-half block away from Accessories, Ltd. (Appx. p. 329, Dep. pp. 54-56; Appx. pp. 332-333, Dep. pp. 69-73).
13. Larry Bonar, the Moundsville Sanitary Board Supervisor, testified that the Zukoffs would not have had any water or sewage infiltrate their lateral sewer line had it not been for the enormous amount of freshwater from the neighboring residence's water leak under the pressurization of the HiVac truck. (Appx. pp. 87, 92, Bonar Dep. pp. 56, 76).
13. Immediately after using the HiVac truck, Mr. Logsdon saw water and sewage coming out from underneath the garage doors of the Respondent business. (*Id.*).

14. The Petitioner presented no witnesses or evidence that contradicted any of the Sanitary Board witness testimony concluding that the Respondents' damages were the result of a freshwater leak and pressurization of the sewer line that forced water and sewage at high pressure up through the Respondents' lateral sewer line. (Appx. pp. 281-305, Motorists Memorandum in Support of its Motion for Summary Judgment).

The Circuit Court had sufficient evidence to rule that the Respondents' damages were not due to a backup or overflow, but rather, that the damages were the result of a water leak at a neighboring residence leaking into the main sewer as well as high-pressure water being blasted directly into Accessories, Ltd.'s lateral sewer line. In fact, all the evidence presented in this case was that the Respondents' damages were not the result of a backup or overflow.

However more importantly, the Petitioner failed to meet its burden of proving that the exclusion applied to the facts of this case. The specific exclusion states that "Water that backs up or overflows from a sewer, drain or sump" is not covered under the policy. Motorists assumed that the water and sewage that poured into the business was the result of damage to the drains on the Respondents' property according to the denial letter. However, the Petitioner has failed to provide any evidence that there was a problem on the Respondents' property or a sewer blockage. To the contrary, the evidence proves that there was a unique and bizarre set of circumstances that caused water and sewage to be forced into the Respondents' lateral sewer line and then through the building's drains, sinks and toilets.

The Petitioner has failed to meet its burden of proof that the backup exclusion applies to the facts of this case. The only evidence regarding what happened is the testimony provided by the Sanitary Board employees who unanimously agree that the Zukoffs would not have had any

water and sewage damage had it not been for the water leak at another property and the pressurization of the line.

The Circuit Court found that the backup exclusion did not apply to the facts of this case. The water and sewage that infiltrated into Accessories, Ltd. did not originate in the business, and did not flow backwards from a clog downstream in the sewer. The water and sewage that infiltrated the Zukoff's business was shot directly into its lateral sewer line and up through the toilets, sinks and drains. These facts are undisputed in the case and are the same mechanism of entry into the Zukoff's business as if Mr. Logsdon stood in the sewer with a high-pressure water hose attached to the lateral sewer line.

The District Court for the Northern District of New York examined whether a "backup" exclusion was applicable under a similar factual scenario where the affecting substance did not flow backward from an obstruction:

The definition of the verb "back up" (as it relates to water checked by an obstruction) is "to rise and flow backward or overflow adjacent areas," as in the following sentence: "clogged pipes caused drain water to back up into the house." *Webster's Third New International Dictionary* at 160 (1971) (emphasis in original). The definition of the preposition "through" is (1) "movement into at one side or point and out at another and especially the opposite side of," (2) "by way of," and (3) "passage from one end or boundary to another." Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/through> (last visited June 25, 2014). *Davis v. Standard Fire Ins. Co.* (N.D. N.Y. 2014)

The *Davis* Court found that under the facts of that case, that the "flow backward" part of the definition did not apply. Similarly, in this case, the water and sewage that entered Accessories, Ltd. did not originate in the business, and did not flow backwards from an obstruction in the main sewer. It was pumped directly in the Zukoff's lateral sewer line under pressure due to an active act of negligence by the Sanitary Board employee. The Circuit Court agreed.

After the underlying Declaratory Judgment Action was filed, the Petitioner has argued that even though there was no evidence that a problem occurred on the Respondents' property, there was a still a backup downstream in the City of Moundsville's main sewer line that caused the loss. Again, however, Motorists has not met its burden of proving that the exclusion applies because it has not provided any evidence that the source of the Respondents' water and sewage damage was a backup, and "backup" is undefined in the policy.

The Petitioner did not retain any experts or provide evidence contrary to the testimony given by the Sanitary Board witnesses in this case who unanimously testified that the Respondent business would not have suffered any damages had it not been for the freshwater leaking into the sewer that was supercharged by Mr. Logsdon's use of the HiVac truck.

In the Motorist denial letter, it denied the Respondents' claim because it believed that the Respondents suffered damage to the drains on their property, however, there was no defect or backup with any drains on the Respondents' own property. The damage was caused by problems which all occurred at another residence: a leaking water line and the pressurization by Mr. Logsdon of the main sewer. (Appx. p. 434, Letter from Larry Bonar; Appx. pp. 368-381, Logsdon Dep. pp. 15-69; Appx. pp. 595-596, Zukoff Dep. pp. 26-28, 61-64). The causes of the Respondents' water and sewer damages are undisputed by Motorists Mutual, and they have not produced a single witness that believes the loss was caused by a sewage backup.

Therefore, because the Petitioner failed to meet its burden that the exclusion applied to the facts of this case; because the Respondents' damages were caused by a freshwater leak at another residence and the manual pressurization of the sewer line causing sewage and water to be forced directly into the Respondents' lateral sewer line; and because the Circuit Court made the factual

determination that the “backup” exclusion did not apply, this Court should affirm the Circuit Court’s ruling.

II. The Circuit Court correctly found that the Respondents’ loss was not caused by a backup or overflow. Likewise, the Circuit Court correctly found that the Petitioner’s policy was ambiguous.

In light of the Circuit Court’s ruling that the Respondents’ loss was not caused by a backup, the Respondents believe that addressing the Petitioner’s arguments related to the subsequent ruling that the policy was ambiguous is unnecessary because the ambiguity arguments contained in sections II, III and IV of the Petitioner’s brief are moot. However, to completely respond, the Circuit Court correctly found that the Motorists policy was ambiguous because the term “backup” in the exclusionary language is ambiguous and conflicts with other non-excluded coverages in the policy.

“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.” Syllabus Point 1, *Prete v. Merchants Property Ins. Co. of Indiana*, 159 W.Va. 508 (1976); (See also, *Murray v. State Farm Fire and Cas. Co.*, 203 W.Va. 477 (1998) Furthermore, “[i]t is well settled law in West Virginia that ambiguous terms in insurance contracts are to be strictly construed against the insurance company and in favor of the insured.” Syllabus Point 4, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W. Va. 734 (1987). Moreover, “[a]mbiguous or conflicting terms in an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. *First Mercury Ins. Co. v. Russell*, 806 S.E.2d 429, 436 (W.Va. 2017).

The insurance policy at issue fails to define “backup”, and this is undisputed. In this case, the question of whether backup means a clogged toilet, sink or drain, or even sewer is irrelevant.

The applicable question in this case is whether “backup” includes a scenario whereby freshwater along with sewage is sent directly into the insured’s lateral sewer line because of a Sanitary Board employee shooting a pressurized water line directly into it. The policy fails to provide any guidance on the issue, and therefore the ambiguity should be strictly construed against the Petitioner.

The Petitioner has provided multiple case illustrations related to factual scenarios that are not remotely relevant to the case at bar. None of these include third-party negligence or active involvement by a third-party that caused the water or sewage to infiltrate a business built on slab construction. In this case, active negligence and active participation by a person shooting high-pressure water into the lateral sewer line caused water and sewage to infiltrate into the Respondent business. This was not a passive backup where a clog sitting in a drain caused water to flow backwards. The water and sewage in this case never flowed backwards from an obstruction, rather, it was blown directly into the business without flowing backwards from an obstruction. As such, the reasonable interpretation of “backup” is not applicable in this case where the water and sewage entered into Accessories Ltd.’s lateral sewer line from being blasted by a high-pressure hose rather than having the substance flow backward from an obstruction. *See Davis v. Standard Fire Ins. Co.* (N.D.N.Y. 2014).

The Petitioner’s commercial liability policy also contains multiple sections concerning a loss caused by or due to water infiltration that conflict with each other. For instance, Section B(g)(3) states that losses caused by water that “backs up or overflows from a sewer, drain or sump are excluded from the policy.” (Appx. p. 193). However, “backup” is not defined anywhere in the policy. (Appx. p. 502-13, Circuit Court Order and transcript).

Conflicting with the “backup” exclusion, Section (B)(e) of the policy states that covered damages caused resulting from the failure of a utility service will be covered by the policy. (Appx. p. 193) Notwithstanding the Respondents’ belief that the exclusion does not apply in this matter, in Section (B)(e), the policy explicitly states that the damages caused by the failure of the City of Moundsville’s sewer system will be covered by the above clause. *Id.* The policy affirmatively declares that any damages caused by the failure of a utility will be covered under the policy. *Id.* The Petitioner is attempting to exclude coverage because of a sewer backup even though the policy provides specific coverage for the failure of a utility, or in this case, the sewer.

Furthermore, in another section of the policy, specific coverage exists related to the accidental discharge or leakage of water that applies in this case. Section (F)(2) – Additional Coverage Extension of the Respondents’ Motorists Mutual policy applies to “loss or damage caused by or resulting from covered water or other liquid” (Appx. p. 200). This coverage explicitly covers damages caused by water or other liquid. *Id.* Moreover, Section G(2)(c) defines water damage as “accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of any part of a system or appliance containing water or steam.” (Appx. p. 201).

In toto, the Petitioner’s policy has three separate sections of the policy that cover losses from water, either from the failure of a utility or accidental discharge or leakage of water from a part of a system containing water. The policy contains one section excluding water caused by a backup, where backup is undefined. The policy makes no distinction whether “backup” is due to natural causes or man-made causes.

This Court has previously held that an insurance policy is susceptible to different meanings and ambiguous if the policy fails to define whether the excluded cause is natural or man-made. *Murray v. State Farm Fire and Cas. Co.*, 203 W.VA. 477, 482, 509 S.E.2d 1,8 (1998). In that

case, this Court used the doctrine of reasonable expectations to determine coverage would be honored even though painstaking study of the policy provisions would have negated those expectations. *Id.*

This Court has held that an “insurance policy should never be interpreted so as to create an absurd result, but instead should receive a reasonable interpretation, consistent with the intent of the parties. *D’Annunzio v. Security-Connecticut Life Ins. Co.*, 186 W.Va. 39, 410 S.E.2d 275 (1991). Here, essentially a City of Moundsville employee directed a high-pressure water hose to shoot water directly into the Respondents’ lateral sewer line that caused a geyser in their business. Using Motorists argument, a person could stand within the City of Moundsville’s sewer and pump raw sewage into the Respondents’ pipes and Motorists would still deny coverage because it is a “backup”. This would certainly be an absurd result and should not be interpreted as to exclude coverage.

Therefore because the undisputed facts of this case are that the Respondents’ damages were caused by the pressurization of the sewer line and freshwater leak, and not a backup; because the exclusion in the Petitioner’s policy conflicts with other sections in the policy providing coverage for the exact same type of loss, and because the Petitioner’s interpretation of the policy would lead to an absurd result, this Court should affirm the Circuit Court’s ruling.

III. The Circuit Court properly applied the doctrine of reasonable expectations to the insurance policy because it found that the policy was ambiguous.

This Court has long held that an “all-risk” insurance policy may not exclude coverage where the result would be contrary to the reasonable expectations of the policyholders. *Murray v. State Farm Fire and Cas. Co.*, 203 W.Va. 477, 448, 509 S.E. 2d 1, 14 (1998). When an insurance carrier chooses to insure against a loss proximately caused by a particular peril, it may not rely on the

mere concurrence of an excluded peril to deny coverage. *Id.* Likewise, “[w]ith respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations.” *Syllabus Point 8, National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

In *Murray*, third-party negligence was alleged to be the proximate cause of the loss. *Id.* However, the policy contained an exclusion and lead-in clause that attempted to defeat coverage where the loss was caused directly or in conjunction by “earth movement”. *Id.* In that case, third-party negligence set in motion a catastrophic event that caused several large boulders and rocks to fall from a highwall and onto houses owned by the plaintiffs. *Murray*, 203 W.Va. 477, 509 S.E.2d at 3. The insurance carrier argued that the lead-in clause and exclusion defeated coverage for any type of earth movement damage, no matter if man-made causes also contributed to or caused the ultimate rock fall. *Murray*, 203 W.Va. 477, 482, 509 S.E.2d at 8. The plaintiffs in *Murray*, argued that the facts showed that the damage to their homes was caused by third-party negligence and the negligent maintenance of a highwall, which would be covered under the policy. *Id.*

In *Murray*, this Court held that even though “earth movement” was well defined in the policy, it was ambiguous because it did not make a distinction between a natural or man-made earth movement loss. *Id.* The plaintiffs in that case had not alleged that the cause of the loss was due to natural erosion or a landslide. *Id.* On the contrary, the *Murray* plaintiffs had alleged that the loss was caused by third-party negligence. 203 W.Va. 477, 482, 509 S.E.2d at 9. This Court reasoned that because there was no distinction between man-made or natural in either the lead-in

clause or the exclusionary language, the policy language was reasonably susceptible to different meanings and ambiguous. *Id.*

Like the plaintiffs in *Murray*, the Respondents in this case alleged that the cause of their loss was due to third-party negligence and due to man-made causes. The Respondents alleged that the negligence of the Moundsville Sanitary Board employee had forced water and sewage directly into their lateral sewer line as a result of the operation of a HiVac truck. The Petitioner's policy does not define "backup" anywhere in the policy, and certainly does not make a distinction between a naturally occurring backup or a backup due to third-party, man-made negligence.

As such, the Circuit Court found that the policy was ambiguous, and that the doctrine of reasonable expectations applied in this matter. The Respondents would not expect that their all-risk policy would exclude coverage for a loss due to a third-party forcing sewage and water directly into their lateral sewer line causing sewage and water to explode from their sinks, drains and toilets. Moreover, the Petitioner had not disputed the facts of the case or the testimony of the witnesses that agree that the loss was not caused by a backup.

The cause of the water and sewage damage to the Respondents' business is undisputed. (Appx. p. 434, Letter from Larry Bonar; Appx. pp. 368-381, Logsdon Dep. pp. 15-69; Appx. pp. 595-596, Zukoff Dep. pp. 26-28, 61-64). The Superintendent of the Moundsville Sanitary Board wrote the following in a letter regarding a broken water line located at 111 Washington Avenue in Moundsville:

I believe what happened was that the water service broke and the pressure of the water instead of surfacing broke the lateral pipe or the connection of the sewer pipes and water went into the lateral and into our main sewer line. Then it traveled down the 8 inch main line to the manhole on 1st Street. Where the 8 inch main sewer line entered the manhole either a piece of the pipe from the lateral or a piece of the main at the manhole broke and blocked the water and sewage from going into the manhole. I don't know if the water line break caused the main line at the

manhole to fail but it contributed to the amount of damage that it caused. (Appx. p. 434, Letter from Larry Bonar).

The event described by Larry Bonar refers to a broken water line servicing the residence located at 111 Washington Avenue. According to Mr. Bonar's letter, and testimony of JR Logsdon, a Moundsville Sanitary Board employee, the Respondents' damages would never have occurred had it not been for the freshwater leak at another residence and the pressurization of the main sewer under those circumstances. (Appx. p. 434, Letter from Larry Bonar; Appx. pp. 368-381, Logsdon Dep. pp. 15-69; Appx. pp. 595-596, Zukoff Dep. pp. 26-28, 61-64). Mr. Logsdon testified that the Respondents' business would not have been affected had it not been for the broken water line:

I believe we had an excess amount of water that caused our problem. If it would have been under normal conditions, releasing what little bit we released, I would say the lowest house might have got a little bit on the basement floor, but other than that, we wouldn't have had the – under my experience, and like I said, I've got 11 years in DC, 24 here, and I answered a lot of sewer calls in 24 years, and I just don't think we would have had this magnitude.

(Appx. pp. 380-381, Logsdon Dep. pp. 65-67).

During his deposition, Mr. Logsdon explained exactly how the large volume of water from the residence at 111 Washington Avenue contributed to the surge of water and sewage that blasted into the Respondents' business. (Appx. pp. 368-381, Logsdon Dep. pp. 15-69). He explained that the house at 111 Washington Avenue had a water line coming out of their house that was broken, and that this was discovered with a camera that was snaked into the sewer. *Id.* The water from the line was getting into a fracture in the lateral sewer line coming from the residence, and then into the main sewer line. *Id.* Mr. Logsdon testified that the flooding of the Respondents' business would not have occurred had it not been for the excess water from the water line:

Well, what I'm saying is if you wouldn't have the excess water from the water line, you wouldn't have had this problem.

Id.

Therefore, because the Court appropriately determined that the Petitioner's policy was ambiguous; because the policy failed to define backup in any manner; and because the cause of the Respondents' damages was man-made negligence and not a natural backup; and because excluding coverage under these particular circumstances would be contrary to the reasonable expectations of the policyholders, this Court should affirm the Circuit Court's ruling.

IV. The Circuit Court properly granted the Respondents' Motion for Summary Judgment and Denied the Petitioner's Motion for Summary Judgment because it found that the source of the Respondents' damages did not occur as a result of a backup or overflow.

The Circuit Court made a factual finding in this matter that the water and sewage that entered the Respondents' business was not the result of a backup or overflow. To the contrary, the evidence presented in this case proves that the only reason the Respondents' business was flooded with sewage and water was because of a freshwater leak at another residence and the pressurization of the main sewer by a Sanitary Board employee. This Court has stated the findings of fact contained in orders, judgments or decrees entered by a Circuit Court are reviewed under a clearly erroneous standard. *Cox v. Amick*, 195 W. Va. 608, 612, 466 S.E.2d 459, 463 (1995).

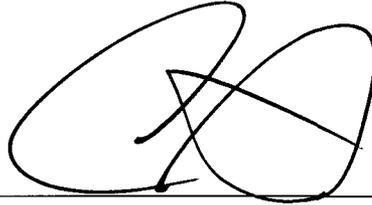
The only witnesses in this case were the Respondent Jack Zukoff, and employees of the Moundsville Sanitary Board. All of the Sanitary Board witnesses agree that there was a major leak from a freshwater line servicing residence on Washington Avenue, and the fresh water had migrated into the City's main sewer line. (Appx. p. 434, Letter from Larry Bonar; Appx. pp. 368-381, Logsdon Dep. pp. 15-69; Appx. pp. 595-596).

The Circuit Court's statement that the substance causing the Respondents' damages did not originate on the Respondents' property was correct because the source of the substance was

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Respondents' Brief has been served upon the following counsel of record by first class U.S. Mail, postage prepaid this 31st day of December, 2019.

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A handwritten signature in black ink, appearing to be 'AG Meek', written over a horizontal line.

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