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.

BRIEF FOR PETITIONER

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

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ASSIGNMENT OF ERRORS

(1) The Circuit Court erred in granting Plaintiffs' Motion for Summary Judgment and denying Motorists' Motion for Summary Judgment because Plaintiffs' losses arising from a clogged sewer are excluded from insurance coverage by a clear and unambiguous exclusion for losses caused by "[w]ater that backs up or overflows from a sewer, drain or sump."

(2) The Circuit Court erred in holding that the term "backup" in an insurance policy excluding coverage for losses caused by "[w]ater that backs up or overflows from a sewer, drain or sump," is ambiguous because it is not defined.

(3) The Circuit Court erred in applying the doctrine of reasonable expectations in interpreting the insurance policy because the policy language and the exclusion for losses caused by "[w]ater that backs up or overflows from a sewer, drain or sump" are not ambiguous.

(4) The Circuit Court erred when it granted the Plaintiffs' Motion for Summary Judgment and denied Motorists' Motion for Summary Judgment because it erroneously held that an exclusion for losses caused by "[w]ater that backs up or overflows from a sewer, drain or sump" does not apply when a sewer backup originates from a blockage off the insured premises.

STATEMENT OF THE CASE

Plaintiffs, Jacob Zukoff, Lisa Zukoff, and Automotive Accessories Limited, Inc., d/b/a Accessories Ltd., assert in their Amended Complaint a negligence action against the Moundsville Sanitary Board ("Sanitary Board") arising from the backup of raw sewage into their business on January 7, 2017, as a result of a blockage in the Sanitary Board's sewer main, along with a claim for a declaratory judgment against Motorists Mutual Insurance Company ("Motorists"), who had issued an insurance policy to Jacob Zukoff d/b/a Accessories Limited. The Circuit Court found that, "[t]he main sewer collapsed and became non-functioning at First Street and was blocking the flow of the sewer line from Washington Avenue into the 1st Street sewer at the manhole." (Appx. p. 511, ¶ 4.) Importantly, the insurance policy issued by Motorists is subject to an exclusion for any "loss or damage caused directly or indirectly by ... [w]ater that backs up or overflows from a sewer, drain or sump." (Appx. pp. 145, 192-193, Exclusion B.1.g.) The Circuit Court found that, "the evidence proves that water from the sewer main migrated into the Plaintiffs' lateral sewer line which served as a conduit into the Plaintiffs' business" and that "the water from the sewer main was the cause of the Plaintiffs' damages." (Appx. p. 511, ¶¶ 6-7.) In other words, the evidence submitted by Motorists in opposition to Plaintiffs' Motion for Summary Judgment established that there was a clog in the sewer line near where it entered the manhole located at First Street and Washington Avenue, and, as a result of this clog, water and sewage backed up into various upline properties, including the Plaintiffs' property.

I. Procedural History

On February 20, 2018, Plaintiffs filed an Amended Complaint in the Circuit Court of Marshall County at Civil Action No. 18-C-27 asserting a negligence count against the Sanitary Board arising from the backup of raw sewage and water into their business on January 7, 2017,

along with a declaratory judgment count against Motorists, which had issued an insurance policy, Policy No. 33-296858-70-E, to Jacob Zukoff d/b/a Accessories Limited. (Appx. pp. 1-4, 624.) In response to the Amended Complaint, Motorists filed an Answer and Affirmative Defenses on April 5, 2018, asserting, *inter alia*, that an exclusion in the Motorists Policy for any "loss or damage caused directly or indirectly by ... [w]ater that backs up or overflows from a sewer, drain or sump"[1] precludes coverage for the Plaintiffs' losses. (Appx. pp. 10-12, ¶¶ 18-24; 624.)

Following the close of discovery, Motorists filed a Motion for Summary Judgment in the Circuit Court of Marshall County on May 24, 2019, asserting that the foregoing exclusion precludes coverage for the backup of water and raw sewage into Plaintiffs' property, and, as a result, Motorists was entitled to summary judgment in its favor and against Plaintiffs. (Appx. 17-27, 625.) Thereafter, Plaintiffs filed a reciprocal Motion for Summary Judgment on May 28, 2019, asserting that the exclusion did not bar coverage for their alleged loss. (Appx. 347-398, 625.) On June 11, 2019, Motorists filed a Memorandum of Law in Opposition to Plaintiffs' reciprocal Motion for Summary Judgment. (Appx. pp. 391-415, 625.)

The Circuit Court held a hearing on both Motions for Summary Judgment on June 18, 2019. (Appx. pp 441-42.) Following the hearing, the Honorable Judge David W. Hummel, Jr. entered an Order on July 19, 2019, which granted Plaintiffs' Motion for Summary Judgment and denied Motorists' Motion for Summary Judgment. (Appx. pp. 510-513.) The Circuit Court stated in its Order that the Policy "does not exclude coverage for the Plaintiffs' losses." (Appx. p. 512.) The Circuit Court further ordered that this was a final appealable order pursuant to West Virginia Rule of Civil Procedure 54(b), and the Circuit Court bifurcated the Plaintiffs' claims against the

[1] This is exclusion is also referred to at times as the "Water Backup Exclusion."

Sanitary Board from the declaratory judgment action against Motorists. (Appx. p. 513.) Thereafter, Motorists filed a timely and complete notice of appeal on August 13, 2019.

II. Statement of Facts

Plaintiffs allege that the Sanitary Board is responsible for the collection, diversion and processing of sewage and wastewater within the Moundsville city limits, including from Plaintiffs' property located at 1009 1st Street and 103 Washington Avenue. (Appx. pp. 1-2, ¶ 5.) Plaintiffs claim that the Sanitary Board negligently "breached [its] duty toward the Plaintiffs, when [their] premises was caused to become filled, flooded and engulfed by sewage in great volume." (Appx. pp. 1-2, ¶¶ 5-6.)

The alleged damage was caused by a sewer line clog that led to a backup. (Appx. p. 37, Dep. pp. 25-26; Appx. p. 46, Dep. pp. 63-64.) Plaintiff, Jacob Zukoff ("Zukoff"), testified that either a block or brick "blocked the sewer and that made everything backup the street." (Appx. p. 37, Dep. pp. 27-28.) Zukoff testified that Larry Bonar from the Sanitary Board told him there was a "clog" in the sewer line and, "[i]n turn it backed everything up and it had to go out the trunks ...." (Appx. p. 46, Dep. pp. 63-64.)

Larry Bonar ("Bonar"), who is the Superintendent of the Sanitary Board, testified that at approximately 3:30 p.m. on the day of the incident he received a phone call from J.R. Logsdon, a foreman for the Sanitary Board, reporting a backup in three or four buildings and "that multiple places got flooded." (Appx. pp. 75-76, Dep. pp. 8-9, 11.) After this call, Bonar drove to the area of the backup where he met Logsdon and Tim Minor ("Minor"), the Assistant Superintendent for the Sanitary Board. (Appx. pp. 75-76, Dep. pp. 8, 12; Appx. pp. 119-20, Dep. pp. 41, 45.) Bonar thought a piece of pipe broke off the sewer main and blocked the pipe that ran into the manhole located at the intersection of First Street and Washington Avenue. (Appx. p. 77, Dep. p. 34; Appx.

pp. 81-82, Dep. pp. 32-34.) Bonar testified that Logsdon cleared this blockage by going into the manhole and pulling out the broken pipe. (Appx. p. 82, Dep. p. 34.)

J.R. Logsdon ("Logsdon") testified that on the afternoon of the day of the incident a resident reported to the Sanitary Board that "sewage [was] blowing out of the cleanouts on Washington Avenue." (Appx. p. 114, Dep. pp. 19-20.) After receiving this report, Logsdon drove to the area of First Avenue and Washington Avenue, and when he turned onto Washington Avenue he could see "sewage coming out of the cleanouts." (Appx. p. 115, Dep. p. 22.) Logsdon then proceeded to Second Street where he attempted to open the line. (Appx. p. 115, Dep. p. 22.) When he could not reach the blockage and open the line from that location, he called Minor to request assistance. (Appx. p. 115, Dep. p. 22; Appx. pp. 116-17, Dep. pp. 29-31; Appx. p. 134, Dep. p. 8; Appx. p. 141, Dep. p. 35.) Logsdon then returned to the area of First Street and Washington Avenue to wait for Minor. (Appx. pp. 116-17, Dep. pp. 27, 30-31.) Minor testified that when he arrived at First Street and Washington Avenue the sewer was still actively blocked, and that he expected sewage was still backing up into the homes and businesses. (Appx. p. 141, Dep. pp. 36-37.)[2]

After Minor arrived at the scene, Logsdon determined that there was a "blockage" at the manhole when he was unable to feed a clean-out hose into the sewer pipe. (Appx. p. 117, Dep. p. 32.) Minor then used a hoist to lower Logsdon into the manhole to access the sewer pipe from Washington Avenue. (Appx. pp. 117-18, Dep. pp. 31, 33, 35; Appx. pp. 135-136, Dep. pp. 12-13, 16; Appx. p. 141, Dep. p. 37.)

Once in the manhole, Logsdon found crushed terracotta pipe in the sewer line that was blocking the flow of sewage. (Appx. p. 118, Dep. p. 34.) Logsdon pulled out the broken pipe and

[2] Plaintiffs' property is located at the intersection of First Street and Washington Avenue. (Appx. p. 76, Dep. p. 12.)

sewage suddenly shot into the manhole. (Appx. p. 118, Dep. p. 36.) Minor also saw the "pieces of cracked tile" that Logsdon pulled out from the pipe and that the flow of water and sewage resumed once they were removed from the pipe. (Appx. pp. 136-137, Dep. pp. 17-19.) Logsdon stated that "[a]s soon as we opened the line up," the sewage "quit coming out from underneath the [Plaintiffs'] door." (Appx. p. 121, Dep. p. 46.)

Zukoff testified that he first saw the backup when he arrived at the scene between 3:00 and 4:00 p.m. on the day of the incident. (Appx. pp. 59-60, Dep. pp. 116-17.) He also testified that he witnessed another backup in his buildings:

> Q. I understand what the first one was, something happened and you had this backup.
>
> A. Yes.
>
> Q. While you were present, was there some other incident?
>
> A. Yes.
>
> Q. I'm not sure what that is. Can you tell me about what time that second incident occurred?
>
> A. It's probably about a half hour, 40 minutes after I was there.
>
> Q. Okay. And what did you observe?
>
> A. That's when I observed the sewer lid from the new building standing like this and the sewage coming out of it that high. And it come back up in the old building and it was higher than it was when I originally saw it, but just in certain areas.

(Appx. p. 60, Dep. pp. 117-18.)

Zukoff described the backup as follows:

> Q. So what did you do when you saw something coming out of the opening?
>
> A. I went back in the garage because Link [Ashby] was still in the old garage and we opened the door to go into the middle room and that's when we saw

it all come back up through the sewer in the middle room and that's when we saw the boxes going around and around. I was like, "Oh, my."

Q. Up to that point, had the sewage and water been draining out of your building?

A. Yeah. There was even turds laying on the floor.

Q. Okay. So it had gone down substantially?

A. Uh-huh.

Q. And then you're saying when you saw the water come out of this opening, the water started to come back again?

A. Yes.

Q. And so everything that drained came back again?

A. Yes. And more.

***

Q. And why do you say "more"?

A. Because when we first went in, there was only about an area of probably about 2 foot around that sewer in the middle room. And then when it went down, there was all these turds laying there.

Q. Okay.

A. And then when it came back up –

***

Q. Well, how quickly did it back up at that point?

A. When it backed up?

Q. Yes.

A. Pretty fast.

Q. Well, what's "pretty fast"? How long do you think it took –

A. I don't know.

Q. -- to flood everything and then start to rise again throughout your whole building?

A. Two, three minutes.
You got to remember now, you got something at the top end, you got all this stuff -- you got all this plug down here below it. When you blow that plug loose, that sewage come from God knows where. It could have come from Third Street, who knows, but it all come rushing down the street, and I'm at the bottom end of the street, same way as the poker machine place.

Q. So you're in the building. The water backs up again and then immediately starts to drain again?

A. Uh-huh.

Q. Is that right?

A. Uh-huh. A couple of minutes, yeah.

Q. So in a couple minutes it goes back again and drains out?

A. Yes.

Q. And you're left with the debris?

A. Yes.

(Appx. pp. 61-62, Dep. pp. 124-27.)

At the time of the alleged incident, Motorists had issued an insurance policy, Policy No. 33-296858-70-E (hereinafter the "Motorists Policy"), to Jacob Zukoff d/b/a Accessories Limited. (Appx. pp. 145, ¶ 3; 146-280.) Significantly, the property coverage of that policy is subject to an exclusion for loss caused by the backup of water from a sewer. (Appx. pp. 192-193, Exclusion B.1.g.) The insuring agreement of the Building and Personal Property Coverage Form of the Motorists Policy provides that Motorists "will pay for direct physical loss or damage to Covered Property at the premises described in the Declarations caused by or resulting from any Covered Cause of Loss." (Appx. p. 171.) The Motorists Policy, in turn, defines a "Covered Cause of Loss" as "RISKS OF DIRECT PHYSICAL LOSS unless the loss is: **1.** Excluded in Section B., Exclusions; or **2.** Limited in Section C., Limitations; ...." (Appx. p. 192.)

The "Water Back Up" Exclusion is found in Paragraph 1.g of Section B, Exclusions of the Causes of Loss – Special Form of the Motorists Policy, and it provides in relevant part:

> **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 any sequence to the loss.
>
> ***
>
> **g. Water**
>
> **(3)** Water that backs up or overflows from a sewer, drain or sump; ...

(Appx. pp. 192-93.) The evidence in the record demonstrates that Plaintiffs' alleged loss arose from the backup of a sewer.

SUMMARY OF ARGUMENT

This case involves the entry of sewer water and sewage into the Plaintiffs' premises as a result of a clogged sewer line. Plaintiffs moved for summary judgment contending that their property damage claims are not barred by the terms of a clear exclusion in the insurance policy for losses that are caused by "water that backs up or overflows from a sewer, drain, or sump." (Appx. pp. 192-193.) In support of their Motion, Plaintiffs contended, *inter alia*, that, "Motorists [has] not produced a single witness that believes this was a sewage backup." (Appx. p. 353.)

The "Water Back Up" Exclusion at issue is found in Paragraph 1.g of Section B, Exclusions of the Causes Of Loss – Special Form of the Motorists Policy, and it provides in relevant part: "We will not pay for loss or damage caused directly or indirectly by ... [w]ater that backs up or overflows from a sewer ...." (Appx. pp. 192-193.) This exclusion plainly bars coverage for losses that are caused in whole or only in part by the backup of a sewer. Indeed, courts across the country have repeatedly held that the water backup exclusion at issue here excludes coverage for losses arising from the backup of water and sewage from municipal sewer lines caused by blockages that

are not located on the insured premises. *E.g.*, *For Kids Only Child Development Center, Inc. v. Philadelphia Indemnity Insurance Co.*, 260 S.W.3d 652 (Tex. App. 2008).

In opposition to Plaintiffs' Motion for Summary Judgment, Motorists relied upon the deposition testimony of three Sanitary Board employees who all testified that there was a water and sewage backup from the Sanitary Board's clogged sewer line: Larry Bonar, J.R. Logsdon, and Timothy Minor. (Appx. pp. 75-77, Dep. pp. 8, 12, 14; Appx. pp. 81-82, Dep. pp. 32-34; Appx. pp. 117-18, Dep. pp. 31, 33-35; Appx. p. 141, Dep. pp. 36-37.) Even the Plaintiff, Jacob Zukoff, testified that that either a block or brick "blocked the sewer and that made everything backup the street. (Appx. p. 37, Dep. pp. 27-28; Appx. p. 46, Dep. pp. 63-64.) Thus, the uncontroverted evidence in the record is that there was a clog in the sewer line near where it entered the manhole located at First Street and Washington Avenue, and, as a result of this clog, water and sewage backed up into various properties, including the Plaintiffs' property.

The "Water Back Up" Exclusion plainly applies to any "loss or damage caused directly or indirectly by ... [w]ater that backs up ... from a sewer." (Appx. pp. 192-93.) In the present case, the Circuit Court found that, "[t]he main sewer collapsed and became non-functioning at First Street and was blocking the flow of the sewer line from Washington Avenue into the 1st Street sewer at the manhole." (Appx. p. 511, ¶ 4.) The Circuit Court found that, "the evidence proves that water from the sewer main migrated into the Plaintiffs' lateral sewer line which served as a conduit into the Plaintiffs' business" and that "the water from the sewer main was the cause of the Plaintiffs' damages." (Appx. p. 511, ¶¶ 6-7.) The exclusion at issue clearly precludes coverage for the backup of water and raw sewage into Plaintiffs' property, and, as a result, the Circuit Court erred in granting summary judgment in favor of the Plaintiffs.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner represents that oral argument is necessary pursuant to the criteria set forth in Appellate Rule 18(a). Petitioner submits that this appeal should be set for argument under Appellate Rule 20(a) for the following reasons. First, the application of an insurance policy exclusion for loss or damage caused by "[w]ater that backs up or overflows from a sewer, drain or sump" appears to be an issue of first impression before this Court. Secondly, the Circuit Court's decision in this action, which declined to enforce the aforementioned exclusion, is in conflict with a decision of the Circuit Court of Kanawha County, West Virginia in *Sylvania Properties, LLC v. AIG Clam Services, Inc.*, No. 05-C-1497, 2006 WL 6179293 (Kan. Co. Nov. 3, 2006). (Appx. pp. 299-303.) Finally, this case involves an issue of fundamental public importance because both insurers and policyholders have a significant interest in knowing whether the aforementioned exclusion will be enforced in a consistent manner throughout this State.

STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo*. *Painter v. Peavy*, 192 W. Va. 189, 190, 451 S.E.2d 755, 756 (1994). Moreover, this Court has stated that, "[t]he interpretation of an insurance contract, including the question of whether the contract is ambiguous, is a legal determination which, like the court's summary judgment, is reviewed *de novo* on appeal." *Payne v. Weston,* 195 W. Va. 502, 506–07, 466 S.E.2d 161, 165–66 (1995). Under West Virginia Rule of Civil Procedure 56(c), "summary judgment is proper only where the moving party shows that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law." *Painter*, 192 W. Va. at 192, 451 S.E.2d at 758. This Court has long recognized that "[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." *Dailey v. Ayers Land Dev., LLC*, 241 W. Va. 404, 825 S.E.2d 351, 357 (2019) (quoting Syl. pt. 3, *Aetna Casualty & Surety Co. v. Federal Insurance Co. of New York*, 148 W. Va. 160, 133 S.E.2d 770 (1963)).

ARGUMENT

I. The Circuit Court erred in granting Plaintiffs' Motion for Summary Judgment and denying Motorists' Motion for Summary Judgment because Plaintiffs' losses arising from a clogged sewer are excluded from insurance coverage by a clear and unambiguous exclusion for losses caused by "[w]ater that backs up or overflows from a sewer, drain or sump."

"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." *Pilling v. Nationwide Mut. Fire Ins. Co.*, 201 W. Va. 757, 758, 500 S.E.2d 870, 871 (1997) (citing Syllabus, *Keffer v. Prudential Ins. Co.,* 153 W. Va. 813, 172 S.E.2d 714 (1970)). "The mere fact that parties do not agree to the construction of a contract does not render it ambiguous." Syl. Pt. 1, *Berkeley County Public Service District v. Vitro Corp. of America*, 152 W. Va. 252, 162 S.E.2d 189 (1968). This Court has stated that, "[l]anguage in an insurance policy should be given its plain, ordinary meaning." *Pilling*, 201 W. Va. at 759, 500 S.E.2d at 872.

It is well established across the country that the type of water backup exclusion at issue precludes coverage for losses caused from the back up of water from municipal sewer lines regardless of the location of the blockage. Indeed, courts across the country have repeatedly held that the water backup exclusion at issue here excludes coverage for losses arising from the backup of water and sewage from municipal sewer lines even where the backup does not originate on the insured premises. *Jackson v. Am. Mut. Fire Ins. Co.*, 299 F. Supp. 151 (M.D. N.C. 1968), *aff'd*, 410 F.2d 395 (4th Cir. 1969) (excluded coverage for loss which arose from back up of municipal sewer following a heavy rainfall); *Haines v. United Security Ins. Co.*, 43 Colo. App. 276, 602 P.2d

901 (1979) (excluded coverage for a loss caused by a heavy rainfall that entered a municipal sewer line which resulted in, "excessive pressure in the line [that] caused raw sewage to be discharged into the [plaintiffs'] basements"); *Old Dominion Ins. Co. v. Elysee, Inc.*, 601 So.2d 1243 (Fla. 1st Dist. Ct. App. 1992) (excluded coverage for storeowner's claim for a loss that was caused when water backed up because of a blockage located in the main sewer line); *Iozzi v. City of Cranston*, 52 A.3d 585 (R.I. 2012) (excluded coverage for homeowners' loss which arose from back up of a city sewer disposal system following a heavy rainfall); *Gammons v. Tennessee Farmers Mut. Ins. Co.*, No. 85-334-II, 1986 WL 13039, at *1 (Tenn. Ct. App. Nov. 19, 1986) (excluded coverage for loss to a residence which was flooded by water and sewage that was forced through its plumbing system by the pressure from an overloaded city sewer line); *For Kids Only Child Development Center, Inc. v. Philadelphia Indemnity Insurance Co.*, 260 S.W.3d 652 (Tex. App. 2008) (excluded coverage for a loss that occurred when a daycare center was flooded with four to six inches of sewage that flowed from floor drains into the building as a result of a stoppage located in the city's twelve-inch sewer main); *Hallsted v. Blue Mountain Convalescent Center*, 23 Wash. App. 349, 595 P.2d 574 (1979) (affirming summary judgment in favor of insurer where the insured suffered a loss when a city's sewer line under the street in front of the insured's home became clogged). The Circuit Court erred when it departed from the sound reasoning of the above-referenced cases, ignored the policy language, and held that the exclusion does not apply to blockages located in municipal sewer lines.

Consistent with the holdings in the above-referenced cases, the Circuit Court of Kanawha County has stated: "It is further well-recognized that 'such an exclusion precludes coverage when sewage from a municipal sewerage system backs up into a dwelling house through the private sewer line damaging the property.'" *Sylvania Properties, LLC v. AIG Clam Services, Inc.*, No. 05-

C-1497, 2006 WL 6179293, at ¶ 18 (Kan. Co. Nov. 3, 2006) (Trial Court Order) citing 11 Couch on Ins. § 155:71. (Appx. p. 301.) The plain meaning of the backup exclusion precludes coverage for damages caused by the blockage of a sewer pipe, regardless of where the blockage occurs—*i.e.*, whether the blockage is located on or off the insured premises. *Penn–America Insurance Co. v. Mike's Tailoring,* 125 Cal.App.4th 884, 22 Cal.Rptr.3d 918 (2005); *For Kids Only, supra.; Hallsted, supra.*

Courts across the country have repeatedly enforced water backup exclusions like the one at issue here. For example, in *Old Dominion Ins. Co,* 601 So.2d at 1243, the insured's store sustained damage as a result of water that backed up because of a blockage in the main sewer line. *Id.* at 1244. The storeowner's property insurer asserted that damages were not covered because the insurance policy excluded coverage for "water that backs up from a sewer or drain." *Id.* The District Court of Appeal of Florida held that the policy unambiguously excluded coverage for the loss and remanded the case "for entry of a summary judgment for the [insurer], indicating that there is no coverage under the policy." *Id.* at 1246.

Similarly, in affirming the entry of summary judgment in favor of an insurer, the United States Court of Appeals for the Fourth Circuit held that an exclusion for loss caused by "water which backs up through sewers or drains" precluded coverage for a loss which arose from the backup of a municipal sewer. *Jackson,* 410 F.2d at 396. In *Jackson*, a heavy rainstorm caused the municipal sewer lines to become full, which led to a backup when the manhole could not handle the volume of sewage and rainwater entering the sewer system. *Jackson,* 299 F. Supp. at 154-55. As a result of the backup, "sewage from the municipal sewage system backed up into the plaintiff's dwelling house, through her private sewer line, and seriously damaged her property." *Jackson,* 410 F.2d at 396. Similar to the Motorists Policy, the homeowners insurance policy issued to the

plaintiff in *Jackson* excluded coverage for "loss caused by, resulting from, contributed to or aggravated by ... water which backs up through sewers or drains." *Id.* The District Court found that the "overflow of water and sewage from within the plumbing system of the plaintiff's home was caused by water backing up through the sewers of the Town of Robbins," and, as a result, the District Court held that the loss was specifically excluded by the exclusion for a loss caused by "water which backs up through sewers or drains." *Jackson*, 299 F. Supp. at 157. The Fourth Circuit agreed and affirmed the entry of summary judgment in favor of the insurer on the basis of the District Court's opinion. *Jackson*, 410 F.2d at 396.

The California Court of Appeal reached the same result in *Mike's Tailoring, supra*, holding that a water backup exclusion barred coverage where the insured, Mike's Tailoring, suffered a loss "when a clogged sewer line running underneath Mike's property caused raw sewage to flow into Mike's basement." *Mike's Tailoring,* 125 Cal.App.4th at 886, 22 Cal Rptr.3d at 920. The water backup exclusion in that case excluded coverage for damage caused by "water that backs up from a sewer or drain." *Id.* In that case, a breakage in the sewer pipe servicing the insured's premises constricted the flow of water and sewage, which led to the blockage that caused water and sewage to accumulate upstream from the blockage. *Mike's Tailoring,* 125 Cal.App.4th at 888, 22 Cal Rptr.3d at 921. "The pressure of the accumulating water and sewage eventually caused the plastic cap on the clean out pipe to fail and the contents of the sewer line were forced up the clean-out pipe and into [the insured's] basement." *Id.* The Court held that the damage caused by the water and sewage was excluded from coverage.

The California Court of Appeal, in a cogent opinion, explained its reasoning as follows:

> **The phrase "[w]ater that backs up from a sewer or drain" is facially unambiguous.** It is unreasonable to assume that water in a sewer will be free from waste, contaminants, and other noxious substances that are commonly referred to as sewage. A lay person reading the policy would assume that a backup of water

> from a sewer would contain both water and contaminants. No reasonable person would assume that water backing up from a sewer would be pure water. It is also unreasonable to assume the term "sewer," which is facially unqualified, has a latent, technical meaning which limits its application to the public portion of the sewer line.
>
> ***
>
> The dictionary definition of "back up" is an intransitive verb meaning "to accumulate in a congested state...." (Webster's New Collegiate Dict. (1979) p. 82.) It also means "to rise and flow backward or overflow adjacent areas ..." such as "water checked by an obstruction." (Webster's 3d New Internat. Dict. (1971) p. 160.) These definitions accurately describe what happened in this case.
>
> ***
>
> Accordingly, we conclude the sewer backup exclusion includes loss or damage caused by sewage and pollutants contained in sewer water, and the loss in this case was excluded from coverage.

Mike's Tailoring, 125 Cal.App.4th at 889, 892-93, 22 Cal. Rptr.3d at 922, 924-25 (Emphasis added.).

Relying upon the decision in *Mike's Tailoring*, *supra*, the Circuit Court of Kanawha County, has also held that a backup exclusion will preclude coverage for a loss that occurs when raw sewage backs up into an insured's premises. *Sylvania Properties, LLC v. AIG Clam Services, Inc., supra.* In that case, water and raw sewage backed up into the real estate owned by Sylvania Properties, LLC that was occupied by its tenant, West Virginia Foot Care. *Sylvania Properties, LLC,* 2006 WL 6179293 at ¶¶ 1-3. (Appx. p. 299.) At the time of the alleged loss, Erie insured both the owner and the tenant under separate policies of insurance. *Id.* at ¶¶ 4-5. (Appx. p. 299.) It was undisputed that the alleged loss or damage was caused directly or indirectly by water or sewage, which backed up through the sewers or drains, from a blockage occurring off of the premises. *Id.* at ¶ 6. (Appx. p. 299.) Both Erie policies contained the following exclusion:

> We do not cover... 'loss' or damage caused directly or indirectly by any of the following. Such 'loss' or damage is excluded regardless of any cause or event that contributes concurrently or in any sequence to the 'loss':
>
> By water or sewage which backs up through sewers or drains, or which enters into and overflows from within a sump pump, sump pump well, or any other system

designed to remove subsurface water which is drained from the foundation area;
....

Id. at ¶ 9. (Appx. p. 300.) Based upon this exclusion, Erie denied the tenant's claim, which led to both insureds filing a declaratory judgment action. *Id.* at ¶¶ 10-11. (Appx. p. 300.)

The Circuit Court of Kanawha County, citing *Mike's Tailoring, supra,* found "the water and sewer backup exclusion at issue ... to be clear and unambiguous." *Sylvania Properties, LLC*, 2006 WL 6179293 at ¶ 29. (Appx. p. 302.) As a result, the Circuit Court of Kanawha County held that the backup exclusions barred coverage for the alleged damages suffered by the owner and the tenant, and, therefore, the Court granted summary judgment in favor of the insurer, Erie. The Circuit Court of Kanawha County, in its Findings of Fact and Conclusions of Law, explained its decision as follows:

> 17. As set forth above, it is undisputed that "[t]he loss or damage, if any, caused to the improved real estate located at 3860 Teays Valley Road, Scott Depot, Putnam County, West Virginia or its contents was caused directly or indirectly by water or sewage, which backed up through the sewers or drains, from a blockage occurring off of the premises." ... The subject policies exclude from coverage 'loss' or damage caused directly or indirectly by any of the following. Such 'loss' or damage is excluded regardless of any cause or event that contributes concurrently or in any sequence to the 'loss': ... By water or sewage which backs up through sewers or drains.... "
>
> 18. Commentators have noted that "[i]t is not uncommon for a policy of property insurance to contain an exclusion concerning loss caused by a sewer backup." Michelle E. Evans, ''Recovery Under Property Insurance for Loss Due to Surface Water, Sewer Backup, and Flood,'' 48 Am.Jur. POF3d 419. It is further well-recognized that "such an exclusion precludes coverage when sewage from a municipal sewerage system backs up into a dwelling house through the private sewer line damaging the property." 11 Couch on Ins. § 155:71. (footnotes omitted).
>
> ***
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> 20. The Court finds that the policy's exclusionary language is clear and unambiguous. Accordingly, the Court will apply the policy language and does not need to construe or interpret it.
>
> 21. Applying the plain meaning of the clear and unambiguous exclusionary language, the Court determines that the claims of Sylvania and WV Foot Care are excluded from coverage by the water and sewer backup exclusions in the Erie

policies.

Id. at ¶¶ 17-18, 20-21. (Appx. p. 301.)

The decision of the Circuit Court of Kanawha County in *Sylvania Properties, supra*, is consistent with the decisions of courts across the country that have repeatedly enforced water back up exclusions like the one in this case. The Washington Court of Appeals affirmed the entry of summary judgment in favor of an insurer based upon a policy exclusion for loss caused by "water which backs up through sewers or drains," where the insured suffered a loss when a sewer under the street in front of her home became clogged. *Hallsted,* 23 Wash. App. at 351, 595 P.2d at 575. "As a result, the sewage backed up through the sewer pipes to plaintiff's home and ultimately flowed out of the commode in her second-floor bathroom." *Id.* The Court stated: "The exclusionary clause is unambiguous [and] damage caused by water which backs up through the sewers (plural) is not covered." *Id.* The Court held that, "[i]f the cause of the discharge is ... a clogged sewer pipe which forces water from outside plaintiff's system to overflow, then the [exclusionary clause] is applicable even though the water flowed through plaintiff's plumbing system." *Id.*

Relying upon the decision in *Hallsted, supra*, the Colorado Court of Appeals reached the same conclusion in *Haines,* 43 Colo. App. at 276, 602 P.2d at 901. In that case, a heavy rainfall entered a sewer line being constructed by the City of Denver near the plaintiffs' residences. *Id.,* 43 Colo. App. at 277, 602 P.2d at 902. "As a result, excessive pressure in the line caused raw sewage to be discharged into the basements" of the plaintiffs' homes. *Id.* Each homeowners insurance policy issued to the plaintiffs provided that: "This policy does not insure against loss ... [c]aused by ... [w]ater which backs up through sewers or drains." *Id.* The Court held that the exclusion was unambiguous and "must be interpreted as written." *Id.* The Court stated that, "because the cause of the flooding here resulted from outside forces causing the water to back up

through the system, the exclusion controls." *Id.* The Court, therefore, affirmed the entry of summary judgment in favor of the insurers because the policies did not cover damage resulting from the backup of sewer water. *Id.*

The Court of Appeals of Texas also affirmed the entry of summary judgment in favor of an insurer based upon the same exclusionary clause at issue here for a loss that arose from the backup of raw sewage caused by a sewer line stoppage. *For Kids Only,* 260 S.W.3d at 652. In *For Kids Only,* the insured operated a daycare center that was flooded with four to six inches of sewage that flowed from floor drains in the building. *Id.* at 653. A stoppage in the city's twelve-inch sewer main was the cause of the overflow. *Id.* The applicable insurance policy expressly excluded coverage for damage caused by "[w]ater that backs up or overflows from a sewer, drain or sump." *Id.* Interestingly, the insured had also purchased optional insurance in which the insurer agreed to pay for loss caused by "flood damage or water that backs up from a sewer, drain or sump" subject to a limit of $25,000. *Id.* at 654. The insurer paid the insured $25,000 under the optional insurance coverage for backups, but it refused to provide any coverage under the main policy based upon the water backup exclusion *Id.* The Court agreed with the insurer that the exclusion barred coverage under the main policy, stating, "we conclude the policy unambiguously excludes from coverage the type of drain and sewer backup [the insured] experienced." *Id.*

The same result as in the above well-reasoned decisions should follow here.[3] No genuine issue of material fact exists that a clog in the Sanitary Board's municipal sewer line caused a

[3] This Court will consider decisions from other jurisdictions. *Edlis, Inc. v. Miller*, 132 W. Va. 147, 51 S.E.2d 132, 141–42 (1948) ("The cases referred to from other jurisdictions ... are, of course, not of controlling force or effect or binding in authority upon this Court. They are, however, entitled to great respect and should be regarded as persuasive authority."); *see also State v. Blatt*, 235 W. Va. 489, 498, 774 S.E.2d 570, 579 (2015).

backup of water and raw sewage. Indeed, the Circuit Court found that, "[t]he main sewer collapsed and became non-functioning at First Street and was blocking the flow of the sewer line from Washington Avenue into the 1st Street sewer at the manhole, and that "the water from the sewer main was the cause of the Plaintiffs' damages." (Appx. p. 511, ¶¶ 4, 6-7.) Even Plaintiff Zukoff has admitted that water and raw sewage backed up through the drains of his buildings. (Appx. pp. 61-62, Dep. pp. 124-27.) The Motorists Policy clearly and unambiguously excludes coverage for a loss which is caused by "[w]ater that backs up or overflows from a sewer, drain or sump ...." (Appx. pp. 192-93.) This exclusion clearly and unambiguously precludes coverage for the backup of water and raw sewage into Plaintiffs' property, and, therefore, the Circuit Court erred in granting summary judgment in favor of Plaintiffs.

In support of Motorists' Motion for Summary Judgment and in opposition to Plaintiffs' Motion for Summary Judgment, Motorists relied upon the filed deposition transcripts of four witnesses who all testified that there was a water and sewage backup from the clogged sewer line: Jacob Zukoff, Larry Bonar, J.R. Logsdon, and Timothy Minor. Thus, the evidence in the record is that the alleged damage was caused by a sewer line clog that led to a backup.

Logsdon, who is a foreman for the Sanitary Board, testified that on the afternoon of the day of the alleged incident, he determined that there was a "blockage" at the manhole located at the intersection of First Street and Washington Avenue. (Appx. p. 117, Dep. p. 32.) After Logsdon was lowered into the manhole, he found crushed terracotta pipe in the sewer line that was totally blocking the flow of all sewage. (Appx. pp. 117-18, Dep. pp. 31, 33-35.) Logsdon pulled out the broken pipe and sewage suddenly shot into the manhole and continued flowing into the manhole. (Appx. pp. 118-19, Dep. pp. 36-38.) Logsdon stated that "[a]s soon as we opened the line up," the sewage "quit coming out from underneath the [Plaintiffs'] door." (Appx. p. 121, Dep. p. 46.)

Minor, the Assistant Superintendent for the Sanitary Board, also saw the "pieces of cracked tile" that Logsdon pulled out from the pipe, and he confirmed that the flow of water and sewage immediately resumed once the tiles were removed from the pipe. (Appx. pp. 136-137, Dep. pp. 17-19.)

Bonar, the Superintendent for the Sanitary Board, testified that on the day of the incident he received a phone call from Logsdon reporting, "that multiple places got flooded, had a backup." (Appx. p. 75, Dep. pp. 8-9.) After this call, Bonar drove to the area of the backup, and, at the time, he testified that he thought a piece of pipe broke off the sewer main and blocked the pipe that ran from Washington Avenue into the manhole located at the intersection of First Street and Washington Avenue. (Appx. pp. 75-77, Dep. pp. 8, 12, 14; Appx. pp. 81-82, Dep. pp. 32-34.) Moreover, Bonar specifically testified that he believes that the blocked sewer is how sewage backed up into Zukoff's business. (Appx. p. 94, Dep. p. 83.)

Plaintiff Zukoff testified that he first saw the backup when he arrived at the scene between 3:00 and 4:00 p.m. on the day of the incident. (Appx. pp. 59-60, Dep. pp. 116-17.) Zukoff testified that either a block or brick "blocked the sewer and that made everything backup the street." (Appx. p. 37, Dep. pp. 27-28.)

The evidence in the record is that there was a clog in the sewer line near where it entered the manhole located at First Street and Washington Avenue, and, as a result of this clog, water and sewage backed up into various properties, including the Plaintiffs' property. The "Water Back Up" Exclusion plainly applies to any "loss or damage caused directly or indirectly by ... [w]ater that backs up or overflows from a sewer, drain or sump." Moreover, "[s]uch loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." (Appx. pp. 192-93.) (Emphasis added.). This exclusion clearly precludes coverage

for the backup of water and raw sewage into Plaintiffs' property, and, as a result, the Circuit Court erred in granting summary judgment in favor of Plaintiffs. This Court, therefore, should reverse the Order of the Circuit Court and remand this case with directions to enter summary judgment in favor of Motorists.

II. The Circuit Court erred in holding that the term "backup" in an insurance policy excluding coverage for losses caused by "[w]ater that backs up or overflows from a sewer" is ambiguous because it is not defined.

Appellate courts across the country have repeatedly recognized that the type of "Water Backup" Exclusion at issue is unambiguous. *For Kids Only,* 260 S.W.3d at 652 ("[T]he parties' contract unambiguously provides that sewer and drain backups are not a 'covered cause of loss' compensable under the policy."); *Mike's Tailoring,* 125 Cal.App.4th at 890, 22 Cal.Rptr.3d at 922 ("The phrase '[w]ater that backs up from a sewer or drain' is facially unambiguous."); *Gammons,* 1986 WL 13039 at *3 ("We find no ambiguity in this policy."); *Haines*, 43 Colo. App. at 278, 602 P.2d at 902 ("[W]here, as here, the policy is unambiguous the policy exclusion must be interpreted as written."); *Iozzi,* 52 A.3d at 590 ("A review of the homeowner's policy leads this Court to conclude, as did the Superior Court justice, that the policy language, including the exclusion at issue, is clear and unambiguous."). Despite the wealth of caselaw across the country that the exclusion at issue is clear and unambiguous, the Circuit Court concluded that, "the policy language at issue is ambiguous because it does not define 'back up'." (Appx. p. 512, ¶ 13.)

This Court, however, "has never required every term in an insurance policy, nor any contract for that matter, to be defined or else be found ambiguous." *Blake v. State Farm Mut. Auto. Ins. Co.*, 224 W. Va. 317, 322, 685 S.E.2d 895, 900 (2009). Under West Virginia law, "a court should read policy provisions to avoid ambiguities and not torture the language to create them." *Payne v. Weston*, 195 W. Va. 502, 507, 466 S.E.2d 161, 166 (1995). The Circuit Court

erred in failing to follow this basic rule of construction and in failing to apply the plain and clear meaning of the "Water Backup" Exclusion when it granted the Plaintiffs' Motion for Summary Judgment and denied Motorists' Motion for Summary Judgment.

The exclusion is unambiguous on its face. *Mike's Tailoring,* 125 Cal. App. 4th at 890, 22 Cal. Rptr.3d at 922 ("We shall conclude the meaning a lay person would ascribe to the phrase, '[w]ater that backs up from a sewer or drain' is not facially ambiguous and the record does not establish a latent ambiguity."); *Sylvania Properties, LLC,* 2006 WL 6179293 at ¶ 20 (Trial Court Order) ("The Court finds that the policy's exclusionary language is clear and unambiguous."). (Appx. p. 301.) The Tennessee Court of Appeals has noted that, "[o]ther courts construing substantially similar insuring clauses and exceptions have likewise found that no ambiguity exists." *Gammons,* 1986 WL 13039 at *3 (citing *Jackson,* 299 F. Supp. at 156; *Haines,* 43 Colo.App. at 278, 602 P.2d at 902; *Hallsted,* 23 Wash.App. at 352, 595 P.2d at 575-76).

The California Court of Appeal, in holding that the exclusion barred coverage for losses arising from a sewer line blockage, explained the meaning of "back up" as follows:

> The dictionary definition of "back up" is an intransitive verb meaning "to accumulate in a congested state...." (Webster's New Collegiate Dict. (1979) p. 82.) It also means "to rise and flow backward or overflow adjacent areas ..." such as "water checked by an obstruction." (Webster's 3d New Internat. Dict. (1971) p. 160.) These definitions accurately describe what happened in this case.

Mike's Tailoring, 125 Cal. App. 4th at 892–93, 22 Cal. Rptr.3d at 924 (2005).

In *Old Dominion Ins. Co.,* 601 So.2d at 1243, the Florida Court of Appeal rejected an insured's argument that the exclusion at issue in this case was ambiguous simply because certain terms were not defined. Like the present case, the insured's store in *Old Dominion Insurance Co.* sustained damage as a result of water that backed up because of a blockage in the main sewer line. *Id.* at 1244. The Florida District Court of Appeal stated:

> There is no dispute between the parties concerning where the blockage occurred or

> the function of the pipe where the blockage occurred—the blockage was off appellee's premises in a main drain pipe that serviced the entire mall, at a point before sewage entered the city's sewage system. The only dispute concerns what is meant by the words "sewer" or "drain" utilized in appellant's insurance policy. These words are not defined in the policy.
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> The common understanding of the words "sewer" and "drain" is that they describe devices which carry water and sewage *away from* property. It is also understood that a plumbing blockage which contains waste from another premises must be a backup from a "sewer" or "drain."

Id. at 1245.

The Circuit Court erred in concluding that the exclusion is ambiguous merely because the phrase "backs up" is not defined in the policy. In opposition to Plaintiffs' Motion for Summary Judgment, Motorists cited multiple cases which have found the "Water Back Up" Exclusion at issue to be unambiguous. (Appx. p. 398).[4] As the Florida District Court of Appeal cogently recognized: "It is ... understood that a plumbing blockage which contains waste from another premises must be a backup from a 'sewer' or 'drain.'" *Id.* This is precisely what occurred here. A blockage in the sewer main caused sewer water and sewage to back up into the Plaintiffs' premises. The policy plainly excludes coverage for such losses. The Circuit Court, therefore, erred in granting the Plaintiffs' Motion for Summary Judgment and erred in denying Motorists' Motion for Summary Judgment.

III. The Circuit Court erred in applying the doctrine of reasonable expectations in interpreting the insurance policy because the policy language and the exclusion for losses caused by "[w]ater that backs up or overflows from a sewer, drain or sump" are not ambiguous.

Under West Virginia law, the doctrine of reasonable expectations is generally "limited to those instances ... in which the policy language is ambiguous." *Luikart v. Valley Brook Concrete*

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[4] The cited cases include *Mike's Tailoring,* 125 Cal. App. 4th at 892–93, 22 Cal.Rptr.3d at 924-25; *Haines,* 43 Colo. App. at 277, 602 P.2d at 902; *Hallsted*, 23 Wash. App. at 350-51, 595 P.2d at 575; *For Kids Only,* 260 S.W.3d at 656.

& Supply, Inc., 216 W. Va. 748, 755, 613 S.E.2d 896, 903 (2005).[5] "[T]he doctrine of reasonable expectations is essentially a rule of construction, and unambiguous contracts do not require construction by the courts." *Id.* The Circuit Court erred in applying the doctrine of reasonable expectations in this action because the policy language at issue is unambiguous for the reasons discussed in the preceding Argument section. *See Sylvania Properties, LLC,* 2006 WL 6179293 at ¶ 30 (Trial Court Order) ("The Court finds that the doctrine of 'reasonable expectations' is inapplicable as the subject policy is clear and unambiguous."). (Appx. p. 302.)

The exclusion at issue provides that insurance coverage does not exist for "loss or damage caused directly or indirectly by ... [w]ater that backs up or overflows from a sewer ...." (Appx. pp. 192-93.) It is "well-recognized" that this type of exclusion "precludes coverage when sewage from a municipal sewerage system backs up into a dwelling house through the private sewer line damaging the property.'" *Sylvania Properties, LLC,* 2006 WL 6179293 at ¶ 18 (Trial Court Order) *citing* 11 Couch on Ins. § 155:71. (Appx. p. 301.) As already noted above, courts across the country have recognized that the plain meaning of the type of "Water Backup" Exclusion excludes coverage for damages caused by the blockage of a sewer pipe, regardless of whether the blockage occurs off the insured premises. *E.g., Jackson,* 299 F. Supp. at 157, *aff'd,* 410 F.2d at 395.

The Circuit Court, however, "applie[d] the doctrine of reasonable expectations in interpreting the policy language" because the Circuit Court "found the term 'backup' to be ambiguous." (Appx. p. 512, ¶¶ 13-14.) Ignoring the plain meaning of exclusion, the Circuit Court

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[5] "With 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, *State ex rel. Universal Underwriters Ins. Co. v. Wilson*, 241 W. Va. 335, 825 S.E.2d 95 (2019).

reasoned that, "if the damaging substances originated from beyond the insured's property and used the insured's sewer connection as a conduit to enter the insured's property, an insured would reasonably expect coverage." (Appx. p. 512, ¶ 15.) In reaching this conclusion, the Circuit Court did not cite any caselaw which either found the exclusion to be ambiguous or limited the application of the exclusion in this manner.

The Supreme Court of Oklahoma's decision in *Porter v. Oklahoma Farm Bureau Mut. Ins. Co.*, 330 P.3d 511 (Okla. 2014), demonstrates that the Circuit Court incorrectly interpreted the exclusion and that that the exclusion would apply in a circumstance where the damaging substances originate from beyond the insured's premises. The Oklahoma Supreme Court, in interpreting an exclusion for loss caused by "water that backs up through drains or sewers," stated:

> The sewer-or-drain-backup exclusion modifies the coverage for loss to real and personal property by excluding any loss "resulting directly or indirectly from ... water which backs up through sewers or drains." This is so even if the direct cause of the real or personal property loss is an overflow or discharge from within a plumbing system. ... **For example, if a city sewer line off an insured's property is cut, causing raw sewage and waste to back up into the sewer and ultimately overflow from an insured's toilets, the loss would be excluded under the policy. Specifically, an insured's real property loss would be excluded under the sewer-or-drain-backup exclusion because the loss resulted indirectly from a sewage backup. Similarly, an insured's personal property loss would be excluded under the sewer-or-drain-backup exclusion for the above reason.**

Porter, 330 P.3d at 517 (Emphasis added.).

The evidence in the record is that Plaintiffs' alleged losses arose from the backing up of water and sewer into their business through their private lateral sewer line as a result of the clogged sewer main located near the manhole at First Street and Washington Avenue in the City of Moundsville. As a result, Plaintiffs' alleged losses are excluded from coverage by the unambiguous exclusion for "loss or damage caused directly or indirectly by ... [w]ater that backs up or overflows from a sewer ...." The Circuit Court, therefore, erred in applying the doctrine of reasonable expectations in interpreting this clear policy language when it ruled upon the parties'

Motions for Summary Judgment. *See West Virginia Employers' Mut. Ins. Co. v. Summit Point Raceway Assocs., Inc.*, 228 W. Va. 360, 373, 719 S.E.2d 830, 843 (2011) (reversing entry of summary judgment in favor of an insured where this Court "conclude[d] that the circuit court erred in concluding that the policy at issue was ambiguous and therefore resulted in deliberate intent coverage being included in the policy under the doctrine of reasonable expectations.").

Simply put, the Circuit Court's Order ignores the plain meaning of the "Water Backup" Exclusion by impermissibly limiting its application only to backups that originate from a blockage on an insured's premises. The exclusion applies to losses caused by sewer backups regardless of the location of the clog or the cause of the backup. In other words, the exclusionary language applies to losses caused by sewer water and sewage that backs up into a building through a private lateral sewer line as a result of clogged municipal sewer line regardless of the location of the blockage. *For Kids Only,* 260 S.W.3d at 652. The Circuit Court, therefore, erred when it granted Plaintiffs' Motion for Summary Judgment and denied Motorists' Motion for Summary Judgment.

In opposition to Plaintiffs' Motion for Summary Judgment, Motorists presented the deposition testimony of three Sanitary Board employees who all testified that there was a water and sewage backup from the Sanitary Board's clogged sewer line: Larry Bonar, J.R. Logsdon, and Timothy Minor. (Appx. pp. 75-77, pp. 8, 12, 14; Appx. pp. 81-82, Dep. pp. 32-34; Appx. pp. 117-18, Dep. pp. 31-36; Appx. p. 141, Dep. pp. 36-37.) Thus, the uncontroverted evidence in the record is that there was a clog in the sewer line near where it entered the manhole located at First Street and Washington Avenue, and, as a result of this clog, water and sewage backed up into various properties, including the Plaintiffs' property. Even the Circuit Court found that, "[t]he main sewer collapsed and became non-functioning at First Street and was blocking the flow of the sewer line from Washington Avenue into the 1st Street sewer at the manhole. (Appx. p. 511, ¶ 4.) The Circuit

Court also found that, "the evidence proves that water from the sewer main migrated into the Plaintiffs' lateral sewer line which served as a conduit into the Plaintiffs' business" and that "the water from the sewer main was the cause of the Plaintiffs' damages." (Appx. p. 511, ¶¶ 6-7.) Accordingly, based upon the Circuit Court's factual findings, the exclusion bars coverage for the backup of water and raw sewage into Plaintiffs' property, and, as a result, the Circuit Court erred as a matter of law in granting summary judgment in favor of the Plaintiffs. This Court, therefore, should reverse the Circuit Court's Order and remand this case with directions to enter judgment in favor of Motorists.

IV. The Circuit Court erred when it granted the Plaintiffs' Motion for Summary Judgment and denied Motorists' Motion for Summary Judgment because it erroneously held that an exclusion for losses caused by "[w]ater that backs up or overflows from a sewer, drain or sump" does not apply when a sewer backup originates from a blockage off the insured premises.

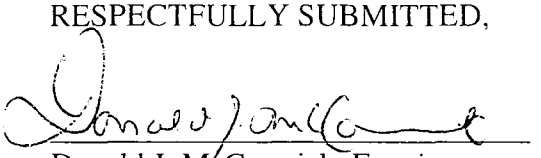
It is well-recognized that the "type of exclusion at issue precludes coverage when sewage from a municipal sewerage system backs up into a dwelling house through the private sewer line damaging the property." 11 Couch on Ins. § 155:71 citing *Jackson*, 410 F.2d at 395. As explained above, courts across the country have recognized that the plain meaning of the "Water Backup" Exclusion at issue excludes coverage for damages caused by the blockage of a sewer pipe, regardless of where the blockage occurs—*i.e.*, whether on or off the insured premises. *For Kids Only,* 260 S.W.3d at 652; *Old Dominion Ins. Co.,* 601 So.2d at 1243. The Circuit Court's Order ignores the plain meaning of the "Water Backup" Exclusion by impermissibly limiting its application only to backups that originate on an insured's premises. The exclusionary language applies to losses caused by sewer water and sewage that backs up into a building through a private lateral sewer line as a result of clogged municipal sewer line regardless of the location of the

blockage. The Circuit Court, therefore, erred when it granted Plaintiffs' Motion for Summary Judgment and denied Motorists' Motion for Summary Judgment.

CONCLUSION

For the foregoing reasons, the Petitioner-Defendant Below, Motorists Mutual Insurance Company, respectfully requests that this Honorable Court reverse the Circuit Court's Order granting summary judgment in favor of the Plaintiffs Below-Respondents. The Petitioner-Defendant Below further requests that judgment be entered in its favor, or, in the alternative, that this case be remanded to the Circuit Court with directions to enter judgment against the Respondents-Plaintiffs Below and in favor of Petitioner-Defendant Below, Motorists Mutual Insurance Company.

RESPECTFULLY SUBMITTED,



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