IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 21-0044

STATE FARM FIRE AND CASUALTY COMPANY,
Petitioner (Defendant),

v.

NATHANIEL REALTY, LLC and HOWARD L. SHACKLEFORD, MD
Respondents (Plaintiffs).

(On Appeal from the Circuit Court of Ohio County, West Virginia, Civil Action No. 18-C-116)

PETITIONER'S BRIEF

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III. STATEMENT OF THE CASE

A. The Parties

Plaintiff below and Respondent herein, Nathaniel Realty, LLC (hereinafter "Nathaniel Realty"), is a limited liability company organized under Ohio law with its principal office located in Ohio. *JA0006 at ¶ 1.* Nathaniel Realty is the owner of a parcel of land and dwelling located at 57561 Kennonsburg Road, Salesville, Ohio, 43778 (hereinafter the "Property"). *JA0006 at ¶ 5.* The Property was insured by a Rental Dwelling Policy issued by the Defendant below and Petitioner herein, State Farm Fire & Casualty Company (hereinafter "State Farm"), that being Policy No. 95-CJ-J5-4 (hereinafter the "Policy"). *JA0124-JA0157.* Plaintiff below and Respondent herein, Howard L. Shackelford, MD (hereinafter "Dr. Shackelford"), is the sole member and owner of Nathaniel Realty. *JA0006 at ¶ 3.*

B. The Policy

The Policy contains several terms and conditions which are dispositive to the issues before the Court. The insuring agreement portion of the Policy provides coverage for only "accidental direct physical loss to property," subject to applicable exclusions and additional terms of the Policy:

> **SECTION I – LOSSES INSURED**
>
> **COVERAGE A – DWELLING AND COVERAGE B – PERSONAL PROPERTY**
>
> We insure for accidental direct physical loss to the property described in Coverage A and Coverage B, except as provided in Section I – Losses Not Insured.

JA0130.

Additionally, the Policy contains the following pertinent exclusions:

> 1. We do not insure for loss to the property described in Coverage A and Coverage B either consisting of, or directly and immediately caused by, one or more of the following: [...]
>
> l. wear, tear, marring, scratching, deterioration, inherent vice, latent defect and mechanical breakdown; [...]
>
> 3. We do not insure under any coverage for any loss consisting of one or more of the items below. Further, we do not insure for loss described in paragraphs 1. and 2. immediately above regardless of whether one or more of the following: (a) directly or indirectly cause, contribute to or aggravate the loss; or (b) occur before, at the same time, or after the loss or any other cause of the loss: [...]
>
> b. defect, weakness, inadequacy, fault or unsoundness in:
>
> (1) planning, zoning, development, surveying, sitting;
>
> (2) design, specifications, workmanship, construction, grading, compaction;
>
> (3) materials used in construction or repair; or

(4) maintenance

of any property (including land, structures, or improvements of any kind) whether on or off the residence premises.

However, we do insure for any ensuing loss from items a. and b. unless the ensuing loss is itself a Loss Not Insured by this Section.

JA0130-JA0132.

Additionally, the Policy provides the following with respect to the insured's duties following a loss:

SECTION I – CONDITIONS

2. **Your Duties After Loss.** In case of a loss to which this insurance may apply, you shall see that the following duties are performed:

   a. give immediate notice to us or our agent, and in case of theft, vandalism, or malicious mischief, also to the police;

   b. protect the property from further damage or loss, make reasonable and necessary repairs required to protect the property, and keep an accurate record of repair expenditures; [...]

   d. as often as we reasonably require:

      (1) exhibit the damaged property;

      (2) provide us with records and documents we request and permit us to make copies;

JA0132.

C. Relevant Factual Background

The insurance claim at issue arises from the infestation of bats at and in the Property. The Property was purchased by Nathaniel Realty and Dr. Shackelford (hereinafter

collectively referred to at times as "Respondents") "in the early 1990's, at least." *JA0115.* At the time of the events in question, Respondents did not use the Property as their primary residence.[1]

Bats were an ongoing problem at the Property since before 2015. Dr. Shackelford's wife, Joyce Shackelford (hereinafter "Mrs. Shackelford"), testified during her deposition that she had been cleaning damage from the bats for a number of years prior to 2015, mistakenly assuming that the damage was caused by mice. *JA0164-JA0165, JA0171.* Dr. Shackelford and Mrs. Shackelford contacted Terminix in December 2015 and Terminix advised that the damage they had been seeing was actually from bats, not mice. *JA0164-JA0165, JA0171.* Respondents contracted with Terminix in December 2015 for removal of the bats. *JA0160-JA0163.* However, the bats continued to return to the property. Terminix was unable to prevent the bats from returning despite several attempts over a period of years. *JA0163, JA0171.*

Despite the fact that the bats had been an ongoing, recurring problem for a number of years, Respondents did not report any claim related to the bats to State Farm until July 11, 2017. *JA0182.* During a telephone call regarding the claim on July 13, 2017, Dr. Shackelford advised State Farm that Terminix came to the home two (2) years prior and removed "a couple bats at that time, but more kept coming back and they could not keep up on the removal of them and ended the contract [with Terminix] to remove them." *JA0176-JA0177.* Dr. Shackelford further advised that the bats were getting into the home through the eaves of the roof. *JA0177.* Because the bats presented a safety concern for an inspection *(JA0186),* State Farm informed Dr. Shackelford that the bats needed to be removed before a State Farm employee could inspect the property.[2] *JA0177,*

[1] During a call on July 13, 2017, Dr. Shackelford stated that he did not rent the home out but visits it "every so often." *JA0178.*

[2] As noted above, under the Policy, Dr. Shackelford had a duty to "protect the property from further damage or loss" and "make reasonable and necessary repairs required to protect the property." *JA0132.*

JA0184-JA0185. State Farm further informed Plaintiff of potential coverage issues with the claim.. *JA0177, JA0184-JA0185.*

On August 11, 2017, State Farm called Dr. Shackelford to follow up on the bat claim. *JA0176.* Dr. Shackelford advised that Terminix returned to the Property and took out the roof on one side of the home and was "getting ready to take out a wall on the inside of the home to let the bats out." *JA0176.* Dr. Shackelford further advised that he was working with Terminix to resolve the issue through his Terminix contract and would contact State Farm if anything was still needed once Terminix's work was completed. *JA0176.*

On September 25, 2017, Dr. Shackelford called State Farm alleging that his house was a total loss and wanted to be paid for the total loss. *JA0119-JA0120; JA0176.* Dr. Shackelford then stated that he "would probably just burn the house down because there was no way [he] could try and fix that." *JA0120; JA0176.* State Farm again advised Dr. Shackelford that the bats would need to be removed from the Property so that an inspection could be completed safely. *JA0176.*

On October 5, 2017, Dr. Shackelford told State Farm that he spoke with Terminix and a bat expert and they "both stated they could not get the bats out of the home." *JA0175.* On October 10, 2017, Dr. Shackelford provided photographs of the home as well as the contact information for Terminix. *JA0175.* State Farm, through its claims representative, Mike Matheny (hereinafter "Matheny"), then spoke with Jeremie, the Service Manager at Terminix. Jeremie explained that Terminix had tried several times over the course of two (2) years to attempt to remove the bats. However, based on the way that the home was constructed, the bats were able to keep returning to the home through gaps in the roof. Additionally, Jeremie advised that the issue had been progressing for so long that the bat feces and urine was beginning to attract bugs, which would cause health concerns in the home. *JA0175; JA0187*

Dr. Shackelford spoke with Matheny on October 16, 2017. Matheny advised Dr. Shackelford that the Policy only provides coverage for accidental physical damage caused by the bats and there was no coverage for demolition of parts of the home to remove the bats themselves. *JA0174; JA0188.* Dr. Shackelford was also told that he needed to take photographs during any work that was completed on the home. *JA0174.*

By letter dated October 21, 2017, State Farm advised that based on conversations with Dr. Shackelford and Terminix, the home could not be inspected until the bat infestation was cleared and removed due to potential hazards presented by the bats. *JA0191-JA0193.* State Farm also advised Respondents of pertinent language in the Policy regarding what is covered and is not covered in relation to the claim. *JA0191-JA0193.*

On December 28, 2017, State Farm was advised that the roof had been removed to eliminate the bats and the home was available for inspection. *JA0174.* State Farm attempted to contact Dr. Shackelford several times to set up an inspection. *JA0172.* Significantly, no photographs were taken during the course of the repairs. *JA0121, JA0122.*

The inspection eventually took place on February 6, 2018. *JA0171.* During the inspection, Mrs. Shackelford advised that the entire roof was replaced in December 2017. The roof was previously a corrugated metal roof, which was replaced with asphalt shingles. *JA0171.* During the inspection, Mrs. Shackelford stated that she first started noticing bat damage as long as five (5) years prior and that Terminix was unable to resolve the bat issue despite several attempts over a period of years. *JA0171.*

On February 7, 2018, State Farm spoke with Earl Delong (hereinafter "Delong"), a contractor hired by Respondents to replace the roof. Delong told State Farm that it appeared that the bat problem had been going on for "years" based on the damage he observed. *JA0170.* Delong

further advised that the Shackelfords were tired of paying money to exterminators so they decided to replace the roof. *JA0170.* Additionally, Delong stated that the metal roof was replaced with a different type of roof because "that is how [the bats] were getting in." *JA0170.*

During a telephone conversation with State Farm on February 13, 2018, Dr. Shackelford stated that the bats had been an ongoing problem since their first contract with Terminix on December 6, 2015. Dr. Shackelford further advised that approximately one (1) month prior to submitting the claim at issue, Terminix removed and replaced the plaster and insulation in one room, but the bats continued to damage the room. *JA0169-JA0170.*

By letter dated February 27, 2018, State Farm denied Respondents' claim for violating the conditions of their policy by failing to timely provide notice of the loss, and, by removing and replacing the roof and not notifying State Farm until afterward, failing to exhibit the damaged property. State Farm's denial letter also cited several exclusions, and the fact that the damage occurred over a number of years. *JA0191-JA0193.*

D. Respondents' Complaint

Respondents filed their Complaint on or about May 31, 2018. *JA0007-0026, JA0288.* Therein, Respondents allege that "in July 2017 it was discovered that the attic of the dwelling insured by [the Policy] [...] was infested with hundreds of bats." *JA0007 at ¶ 9.* The Complaint asserts that Respondents "promptly" notified State Farm of the infestation but State Farm "deemed the situation to be too dangerous and, therefore, refused to conduct an inspection." *JA0007 at ¶ 10.* The Complaint asserts that in December 2017, Respondents contracted with a company to eliminate the bat infestation and to effect repairs at a cost of $14,550.00. *JA0008 at ¶ 13.* The Complaint goes on to generally allege that State Farm improperly denied coverage for the claim at issue. *JA0008 at ¶ 14 - JA0010 at ¶ 30.* The sole cause of action asserted within the

Complaint is for breach of the implied covenant of good faith and fair dealing.[3] *JA0010 at ¶¶ 24-25.*

E. Respondents' Motion for Partial Summary Judgment and Related Pleadings

On November 18, 2020, Respondents filed their *Motion for Partial Summary Judgment. JA0027-JA0094.* Respondents argued that the Policy was an "all-perils policy" which they contended "covers all perils unless specifically excluded by the policy terms." *JA0031.* Respondents noted that although the Policy does not define the phrase "accidental direct physical loss" it does define the phrase "property damage" as "physical damage to or destruction of tangible property, including loss of use of this property." *JA0031.* Respondents also erroneously argued that it was "undisputed" that the Policy did not have any language that operates to exclude coverage to eliminate bats. *JA0031-JA0032.* Additionally, Respondents argued that the phrase "accidental direct physical loss" is ambiguous and should therefore be interpreted in favor of Respondents. *JA0032-JA0033.* Notably, Respondents' *Motion for Partial Summary Judgment* contained no choice of law analysis and did not offer any argument as to why West Virginia law would apply to an insurance policy that was issued in Ohio and insured a dwelling located in Ohio. *JA0096-JA0095.*

State Farm timely filed a *Response to Plaintiffs' Motion for Partial Summary Judgment. JA0096-JA0213.* In State Farm's *Response to Plaintiffs' Motion for Partial Summary*

[3]Plaintiffs' Complaint also asserts that State Farm breached the implied covenant of good faith and fair dealing by improperly cancelling the Policy following the submission of the claim at issue as well as improperly cancelling an insurance policy which covered a different property owned by Dr. Shackelford. *JA0006-JA0012.* However, the alleged cancellation of these policies were not specifically addressed by the Court's January 19, 2021 *Order Granting Plaintiffs' Motion for Partial Summary Judgment and Continuing the January 19, 2021 Trial Scheduled in this Case. JA0001-JA0003.* State Farm denies that it improperly cancelled either policy. *JA0013-JA0026.*

Judgment, State Farm argued that Ohio law applied to the interpretation of the Policy as it was issued in Ohio and provided coverage for a dwelling located in Ohio. *JA0103.* For the reasons explained in further detail below, State Farm further argued that *Plaintiffs' Motion for Partial Summary Judgment* should have been denied for a number of reasons under Ohio law: (1) there was no "accidental direct physical loss" under the Policy; (2) the "latent defect" exclusion bars coverage; (3) the "design defect" exclusion precludes coverage; (4) Respondents' failure to provide timely notice of loss bars their claim for coverage; (5) Respondents' failure to notify State Farm of the removal of the roof and failure to document the same barred coverage under the Policy. *JA0104-JA0113.* Respondents then filed a *Reply to Defendant's Response to Plaintiffs' Motion for Partial Summary Judgment. JA0214-JA0287.*

F. The Circuit Court's *Order Granting Plaintiffs' Motion for Partial Summary Judgment and Continuing the January 19, 2021 Trial Scheduled in this Case*

On December 21, 2020, the Circuit Court entered its *Order Granting Plaintiffs' Motion for Partial Summary Judgment and Continuing the January 19, 2021 Trial Scheduled in this Case* (hereinafter the "Order"). *JA0001-JA0003.* The Order failed to address practically all of the arguments raised by State Farm. The Order does not address which State's law applies to the interpretation of the Policy and, in fact, does not cite a single case or other legal authority from either State at any point within the Order. The Order states that "[w]hen the [Respondents] discovered the [bat] problem, they immediately filed a claim with [State Farm]," but fails to address that Respondents were aware that the bat infestation had been ongoing for several years. The Order conflates the definition of "property damage" with "accidental direct physical loss to the property" without any explanation or citing to any legal authority in support of such a conclusion. *JA0002.* The Order concludes that "State Farm breached the contract of insurance

with [Respondents]." *JA0003.*

The Order is not entirely clear as to what the Circuit Court determined constituted an "accidental direct physical loss" (*i.e.*, the removal and replacement of the roof to eliminate the bats, damage to the Property, or some combination thereof). However, the Court found that State Farm "must pay [Respondents] $14,500 plus prejudgment interest and court costs in this litigation." *JA0003.* Since $14,500 was the amount Respondents paid to Delonge to remove the old roof to eliminate the bats and replace with a different style of roof, it would appear that the Circuit Court found that the replacement of the roof constituted an "accidental direct physical loss."

IV. SUMMARY OF ARGUMENT

State Farm presents this appeal respectfully requesting that the *Order Granting Plaintiffs' Motion for Partial Summary Judgment and Continuing the January 19, 2021 Trial Scheduled in this Case* from the Circuit Court of Ohio County be reversed. The Circuit Court erred in concluding that as a matter of law State Farm breached the Policy and erred in granting partial summary judgment to Respondents. State Farm argued to the Circuit Court that Ohio law applied to the application and interpretation of the Policy in light of the fact that the Policy was issued in Ohio, to an Ohio insured, and the risk insured by the Policy (*i.e.* the Property) was located in Ohio. In its Order, the Circuit Court failed to address the issue of conflict of law and did not even indicate whether it was applying Ohio law or West Virginia law to the Policy. Therefore, the Circuit Court erred in failing to apply Ohio law to the application and interpretation of the Policy.

The Policy requires that an "accidental direct physical loss" occur in order for coverage to be provided under the Policy. State Farm argued to the Circuit Court that Respondents had not shown an "accidental direct physical loss" in light of the fact that the loss at issue occurred

over an extended period of time due to the roof of the Property being improperly constructed. The Circuit Court failed to address this argument. Instead, the Circuit Court erred by relying on the unrelated definition of "property damage" within another portion of the Policy to conclude that Respondents had sustained an "accident direct physical loss" because they allegedly lost use of the property and such a loss of use is encompassed within the definition of "property damage."

Additionally, the Policy contains exclusions for "latent defects." This exclusion bars Respondents' claim because the defect in the roof that allowed the bats to enter the property was not discovered until years after the Respondents purchased the Property. The Circuit Court's Order offered no analysis of the "latent defect" exclusion and does not explain in any manner why the exclusion would not be applicable to Respondents' claim. Thus, the Circuit Court erred in this regard.

The Policy also contains an exclusion for "design defects." State Farm presented the Circuit Court with undisputed evidence that the bats were able to enter the Property due to the roof being improperly constructed. The Circuit Court erred by failing to find that the design defect barred Respondents' claim.

The Policy required that Respondents provide "immediate notice" of a loss under the Policy to State Farm or its agents. It was undisputed that Respondents were aware of the damage caused by the bats for a number of years prior to 2015, mistakenly assuming that the damage was being caused by mice. Respondents contracted with Terminix in December 2015 and were informed that the damage they saw was caused by bats. Despite the fact that the bats were a long-term, ongoing, and recurring problem for a number of years, Respondents did not report any claim related to the bats to State Farm until July 11, 2017. The Circuit Court erred in finding coverage under the Policy despite Respondents' failure to provide timely notice of the loss at issue.

In the event of a loss, the Policy requires the insured to "exhibit the damaged property" and "provide [State Farm] with records and documents [State Farm] request[s][.]" State Farm advised Dr. Shackelford to take photographs during any work on the Property in relation to the bats in order to document the damage. However, Respondents subsequently hired a contractor to remove and replace the roof, did not notify State Farm of the same until the repairs had been completed, and did not take any photographs during the course of the roof replacement to document the damage. The Circuit Court erred in finding coverage under the Policy despite Respondents' failure to notify State Farm of the removal of the roof and failure to document the same.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is appropriate in this case because this Court has not authoritatively decided some of the issues and the decisional process would be aided by oral argument. State Farm further asserts that Rule 20 argument is appropriate in this case because an issue of first impression is involved.

VI. STANDARD OF REVIEW

As set forth below, State Farm asserts that the Circuit Court erred in multiple regards by finding that the Policy provided coverage for the loss in question and granting partial summary judgment to Respondents. The Circuit Court's Order granting partial summary judgment to Respondents is subject to *de novo* review. Syl. Pt. 2, *Riffe v. Home Finders Assocs.*, 205 W. Va. 216, 517 S.E.2d 313 (1999) ("The interpretation of an insurance contract [...] is a legal determination that, like a lower court's grant of summary judgement, shall be reviewed de novo on appeal."

VII. ARGUMENT

A. The Circuit Court erred in failing to conclude that Ohio law is applicable to the interpretation of the Policy.

"[T]he interpretation of insurance policy coverage, rather than liability, is treated as a contract question for purposes of conflicts analysis." *Liberty Mut. Ins. Co. v. Triangle Indus.*, 182 W. Va. 580, 583, 390 S.E.2d 562; 565 (1990)(citing *Lee v. Saliga*, 179 W.Va. 762, 373 S.E.2d 345, 350 (1988)). In cases involving the interpretation of a contract, West Virginia courts apply the doctrine of *lex loci contractus*, meaning that the law of the State where the contract was formed applies. *Johnson v. Neal*, 187 W. Va. 239, 418 S.E.2d 349, 351-52 (1992)(noting West Virginia adheres to the "normal rule of applying in contract cases the ancient doctrine of *lex loci contractus*"). "The law of the state in which a contract is made and to be performed governs the construction of a contract when it is involved in litigation in the courts of this state." *General Electric Co. v. Keyser*, 166 W.Va. 456, 275 S.E.2d 289 (1981).

In this case, the named insured on the Policy is Nathaniel Realty, LLC, which is a limited liability company organized under Ohio law with its principal office located in St. Clairsville, Belmont County, Ohio. *JA0006 at ¶ 1; JA0197.* Moreover, the Property insured under the Policy is located in Ohio. *JA0007 at ¶ 5; JA0197.* Additionally, the Policy was issued from a State Farm office located at 1440 Granville Road, Newark, OH 43093. *JA0197.* Thus, the Policy was issued in Ohio, to an Ohio insured, and the risk insured by the Policy is located in Ohio. Clearly then, Ohio law should apply to the application and interpretation of the Policy.

Respondents' *Motion for Partial Summary Judgment* and *Memorandum of Law in Support of Motion for Summary Judgment* did not address whether West Virginia or Ohio law applied to the Policy. *JA0027-JA0064.* However, in their *Reply to Defendant's Response to*

Plaintiffs' Motion for Partial Summary Judgment, Respondents argued that "the Policy was not issued in Ohio, but rather, was issued to [Respondents] in West Virginia." *JA0214.*

In support of this argument, Respondents cited a Renewal Certificate for the Policy and apparently relied on the fact that the Renewal Certificate was mailed to Nathaniel Realty, LLC, C/O Gompers & Associates, 117 Edgington LN, Wheeling, WV 26003. *JA0219.* However, the address of 117 Edgington LN, Wheeling, WV 26003 was simply the address of Nathaniel Realty's accountant, Gompers & Associates. *See https://www.gomperscpa.com/ (retrieved 6/21/2021).* The mailing of a renewal certificate to an accountant employed by Nathaniel Realty at a West Virginia address does not mean that the Policy was "issued" in West Virginia.

Even if Respondents could establish that the Policy was "issued" in West Virginia because a Renewal Certificate was mailed to Nathaniel Realty's accountant in West Virginia, Ohio law would still apply. Pursuant to *Triangle Industries,* "[i]n a case involving the interpretation of an insurance policy, made in one state to be performed in another, the law of the state of the formation of the contract shall govern, unless another state has a more significant relationship to the transaction and the parties, or the law of the other state is contrary to the public policy of this state." Syl. Pt. 1, *Liberty Mut. Ins. Co. v. Triangle Indus.*, 182 W. Va. 580, 581, 390 S.E.2d 562, 563 (1990) (emphasis added). In the present case, the Property insured by the Policy is located in Ohio. *JA0007 at ¶ 5; JA0197.* The Policy was issued by a State Farm agent located in Ohio. *JA0197.* The only named insured under the Policy is a limited liability company formed in Ohio with its principal place of business located in Ohio. *JA0006 at ¶ 1; JA0197.* The only purported tie to West Virginia is that copies of the Declarations Page and Renewal Certificate were mailed to Nathaniel Realty's accountant at an address in West Virginia. The location of Nathaniel Realty's accountant is merely fortuitous and does not establish a significant relationship to West

Virginia. With all of the connections to Ohio, it is evident that Ohio has a more significant relationship to the transaction and the parties than West Virginia.

In light of the above, the Circuit Court erred in failing to apply Ohio law to the interpretation and application of the Policy.[4]

B. The Circuit Court erred in finding that the removal of the roof to eliminate the bat infestation was an "accidental direct physical loss".

As in West Virginia, insurance contracts in Ohio are construed as any other written contract. *Hybud Equip. Corp. v. Sphere Drake Ins. Co.*, 64 Ohio St. 3d 657, 665, 597 N.E.2d 1096, 1102 (1992). "An insurance policy will only require interpretation if the applicable language is ambiguous, that is, open to more than one interpretation." *Andray v. Elling*, 2005-Ohio-1026, ¶ 18 (Ct. App.). Ambiguities within an insurance policy are to be construed against the insurer. *Lager v. Miller-Gonzalez*, 120 Ohio St.3d 47, 2008-Ohio-4838, ¶ 15, 896 N.E.2d 666. However, "[a]mbiguity exists only when a provision at issue is susceptible of more than one reasonable interpretation." *Id.* at ¶ 16. "[A] court cannot create ambiguity in a contract where there is none." *Id.* "[I]n reviewing an insurance policy, words and phrases used therein must be given their natural and commonly accepted meaning, where they in fact possess such meaning, to the end that a reasonable interpretation of the insurance contract consistent with the apparent object and plain intent of the parties may be determined." *Tomlinson v. Skolnik*, 44 Ohio St.3d 11, 12, 540 N.E.2d 716, 717-718 (1989)(internal quotation marks omitted). The insured has the burden to prove that the loss falls within the coverage granting portions of the insurance policy. *Murray v. Auto-Owners Ins. Co.*, 2019-Ohio-3816, ¶ 17, 144 N.E.3d 1151, 1158 (Ct. App.). Thus, it is

[4]Pursuant to Rule 10(c)(7) of the Rules of Appellate Procedure, State Farm advises the Court that this issue was raised with the Circuit Court in State Farm's *Response to Plaintiffs' Motion for Summary Judgment. JA0103.*

Respondents burden to prove that the loss at issue is an "accidental direct physical loss" under the terms of the Policy.[5]

1. The Circuit Court erred in finding that because the Policy was an "all-risk" policy, it covers all losses not expressly excluded in the Policy.

The Circuit Court's Order states that the Policy is an "all-perils" insurance policy, "more commonly referred to as an 'all-risks' policy." *JA0001.* The Order also states, without citing any legal authority, that in such a policy "the insurer undertakes the risk for all losses of an incidental nature, which in the absence of fraud or other intentional misconduct of the insured, is not expressly excluded in the policy." *JA0001.* The Order further states that Respondents "purchased a first-class insurance policy that covered all risks and not a cheaper policy that would not have protected them from their home's damages caused by bats' infestation" and "[i]t was the protection of the type not ordinarily present under other types of insurance." *JA0002-JA0003.* The Court's statements are erroneous.

The Policy provides coverage for only "accidental direct physical loss" to the Property. *JA0130.* The Policy being categorized as an "all-risk" policy does not remove or negate this policy limitation. Indeed, Ohio law recognizes that a policy deemed an "all-risk" policy does not cover all types of potential loss. While it is true that an all-risk policy generally provides broader coverage than a named peril policy, "not all property risks are covered by such a policy." *Univ. of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1280 (6th Cir. 1995)(applying Ohio law); *Essex House v. St. Paul Fire & Marine Ins. Co.*, 404 F. Supp. 978, 987 (S.D. Ohio 1975)("[P]laintiffs' argument in this connection that 'all risk' is a deceptive term because plaintiff

[5]Pursuant to Rule 10(c)(7) of the Rules of Appellate Procedure, State Farm advises the Court that this issue was raised with the Circuit Court in State Farm's *Response to Plaintiffs' Motion for Summary Judgment. JA0104-JA0107.*

thought that by purchasing it he was thereby insured against literally all risks, while perhaps appealing from a layman's point of view, must be rejected. The term is one of insurance art and has been judicially recognized and dealt with as such."); *Aetna Casualty & Surety Co. v. Yates*, 344 F.2d 939 (5th Cir., 1965)(calling the term "all risk" a misnomer).

Deeming a policy an "all-risk" policy does not mean that a Court can simply disregard portions of an insurance policy. As noted above, in this case, the Policy only provides coverage for "accident direct physical loss" to the property. *JA130.* Thus, the Circuit Court erred by relying on the purported "all-risk" nature of the Policy to disregard otherwise applicable policy language.

2. The Circuit Court erred in concluding that an "accidental direct physical loss" to the Property occurred where the loss at issue occurred over an extended period of time due to the Property being improperly constructed.

The phrase "accidental direct physical loss" is not defined within the Policy. However, it is well-settled that the mere fact that a policy does not define a term or phrase does not automatically render the term or phrase ambiguous. *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 1995-Ohio-214, 73 Ohio St. 3d 107, 108, 652 N.E.2d 684, 686. In such a scenario, the Court is required to apply the plain, ordinary meaning of the term in question. Additionally, "a contract term is not ambiguous simply because parties disagree about its meaning." *Shifrin v. Forest City Enters.*, 64 Ohio St. 3d 635, 1992 Ohio 28, 597 N.E.2d 499, 501 (Ohio 1992).

In *Leibowitz*, the court applied Ohio law to determine whether a loss was considered "accidental direct physical loss." The insured's residence experienced extensive water damage due to improper design and construction. The insured noticed indications of water damage for several years but did not report the claim to his insurer because the cost of cosmetic repairs was less than the deductible in the insurance policy at issue. Eventually, the insured filed a claim with

his insurer. *Leibowitz v. State Farm Ins. Co.*, No. CV 2013-06-3179, 2014 Ohio Misc. LEXIS 707, at *2-*14 (Ct. Com. Pl. Dec. 2, 2014).

The policy in *Leibowitz* provided coverage for "accidental direct physical loss." However, the court found that "no accidental loss occurred." Rather, "water infiltrated [the insured's] residence over an extended period of time because the residence was improperly constructed and/or maintained." The court reasoned that "[t]his is not the type of fortuitous loss that is covered by insurance." *Id.* at *16-17.

Like the water intrusion in Leibowitz, the bat infiltration and resulting damage in this case has been ongoing over an extended period of time. *JA0160, JA162-JA164, JA169-JA171, JA174-JA175, JA177, JA0187.* More specifically, Mrs. Shackelford testified that Terminix was called to the property in December 2015 to handle the bat issue, but the bats continued to return to the home:

> Q. Do you recall – the Terminix information indicates Terminix was first out to the property in December of 2015.
>
> A. Yes.

JA0162.

> Q. Okay. It also says, "She had a contract with Terminix to help with other insects and rodents around the property. They were unable to help with the bat issue after several attempts over a period of a couple of years." Is that correct? [...]
>
> A. They had a little – sorry – they had a little bit of a hard time but – I mean, you know, when they – whenever they got to the point where we thought they were gone, and then they didn't – they told us this is beyond our realm.

JA0163.

> Q. Okay. The note indicates that they asked you to describe how this loss occurred. And it says, "She said that they had Terminix in the home to take care of termites and other issues. And she had them look at the bedroom.

She though that it was mice, but when Terminix saw the damage, they explained that it was bats not mice. She said prior to learning that it was bats, she thought that they just had mice in the house and would clean up the mess every time that she found it. She said that Terminix initially identified the bat issue in 2015, and started to try to remove the bats." Did you have that conversation with them?

A. I might have said that, because when I saw the bat crap, I probably thought it was mice crap until we saw the bats.

Q. Okay.

A. You know? I mean, and even after seeing the bats, I wouldn't think that the crap would be inside the house.

Q. Did Terminix, were they the ones that told you that it was from the bats?

A. They said it was – yes, and that it was coming through, yes. [...]

Q. So that portion of the conversation may have occurred?

A. Yeah. Part of that might – may sound right, yes.

JA0164-JA0165. The fact that the bats had been an ongoing problem for years was also confirmed through State Farm's conversations with Terminix as well as the contractor who removed and replaced the roof to eradicate the bats. *JA0170, JA0175.*

Also, as in *Leibowitz*, the bats did not enter the home due to a sudden, calamitous event such as a storm damaging the property to allow the bats access to the home. Instead, by all accounts, the Property was improperly constructed, which allowed the bats access to the roof. *JA0175, JA0177, JA0116-JA0117.* Therefore, as the Court found in *Liebowitz*, this is not the type of fortuitous loss that is covered by the Policy as there was no "accidental direct physical loss."

3. The Circuit Court erred by relying on the unrelated definition of "property damage" within the Policy to determine that an "accidental direct physical loss" had occurred.

The Circuit Court adopted Respondents' argument that although the Policy does

not provide a definition for "accidental direct physical loss," the Policy does define "property damage" as "physical damage to or destruction of tangible property, including loss of use of this property." The Circuit Court found that because Respondents allegedly lost the use of the property due to the bats, they sustained "property damage" as defined by the Policy and therefore incurred an "accidental direct physical loss" to the Property.[6] *JA0002.* However, the Circuit Court's holding conflates two (2) separate, unrelated portions of the Policy.

The phrase "accidental direct physical loss" is not dependent upon the definition of "property damage." Section I of the Policy sets forth the three (3) types of first-party coverage provided by the Policy: Coverage A – Dwelling; Coverage B – Personal Property; and Coverage C – Loss of Rents.[7] *JA0127-JA134.* The insuring agreement portion of the Policy, which requires an "accidental direct physical loss to the property," does not utilize the term "property damage" at all:

> **SECTION I – LOSSES INSURED**
>
> **COVERAGE A – DWELLING AND COVERAGE B – PERSONAL PROPERTY**
>
> We insure for accident direct physical loss to the property described in Coverage A and Coverage B, except as provided in Section I – Losses Not Insured.

JA0130. In fact, the phrase "property damage" does not appear anywhere within Section I of the Policy, which is the portion of the Policy under which Respondents seek coverage.

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[6]Plaintiffs assert that they lost the use of the Property as a result of the bats. However, during a call on July 13, 2017, Dr. Shackelford advised State Farm that the bats were confined to one (1) bedroom so Dr. Shackelford simply kept the door to that room closed. *JA0176-JA0177.* Joyce Shackelford also testified that they continued to stay at the home periodically and would simply close the door to confine the bats to one (1) room. *JA0076-JA0077.* Regardless, as explained herein, the phrase "accidental direct physical loss" is unrelated to the definition of "property damage" in the Policy.

[7]Plaintiffs seek coverage under Section I, Coverage A - Dwelling, which provides coverage for "the dwelling on the residence premises," subject to the terms and conditions of the Policy. *JA0127.*

Instead, the term "property damage" is used at various times in "Section II – Liability Coverages", such as:

> **SECTION II – LIABILITY COVERAGES**
>
> **COVERAGE L – BUSINESS LIABILITY**
>
> If a claim is made or suit is brought against any **insured** for damages because of **bodily injury, personal injury,** or **property damage** to which this coverage applies [...]

JA0134. "Property damage" is defined, in pertinent part, within the Policy as "physical damage to or destruction of tangible property, including loss of use of this property." *JA0127.* Respondents do not seek coverage under Section II of the Policy and, therefore, whether they have suffered a "loss of use" is completely irrelevant as to whether there has been an "accidental direct physical loss."

The phrase "accidental direct physical loss" is clearly unrelated to the definition of "property damage" in the Policy. Thus, regardless of whether or not a loss falls within the definition of "property damage" which includes loss of use, the loss must constitute "accidental direct physical loss" in order to be afforded coverage under Section I. Therefore, the Circuit Court's reliance on the definition of "property damage" to conclude that the bat infestation was an "accidental direct physical loss" was clearly erroneous.

C. The Circuit Court erred by failing to find that the "latent defect" exclusion bars coverage for Respondents' claim.

As noted above, the Policy excludes from coverage any loss to the property "consisting of, or directly and immediately caused by [...] wear, tear, marring scratching deterioration, inherent vice, latent defect and mechanical breakdown[.]" *JA0131.*

In *Guyuron*, the insured constructed an underground tunnel on his property that

connected his home to his recreational complex. Years later, the insured discovered that the waterproofing membrane on the tunnel was improperly installed, which lead to water damaging the interior of the tunnel. *Chubb Grp. of Ins. Cos. v. Guyuron*, No. 68468, 1995 Ohio App. LEXIS 5512, at *1-2 (Ct. App. Dec. 14, 1995). The policy under which the insured sought coverage contained an exclusion for "wear and tear, marring, deterioration, inherent vice, latent defect[.]" *Id.* at *3.

In addressing this exclusion, the court declined to interpret the phrase "latent defect" to mean only "inherent defects in materials, and not defects caused by negligent design or construction. *Id.* at *13. Instead, the court held that "negligent design and construction will fall under the latent defect exclusion if the defects were not discoverable upon reasonable inspection." Further, the court found that "[r]easonable inspection does not include intensive or in-depth expert testing or post-failure destructive testing by experts." *Id.* at *14.

Along the same lines, in *Walker*, the insureds sustained damage to their dwelling and personal property due to water intrusion. The policy contained an exclusion for losses caused by "latent defect." It was determined that the water intrusion was caused by the geometry of the roof and gutter system. The court noted that the defect was not manifest at the time the insureds purchased the property. The court found that water intrusion and subsequent damage was caused by a latent defect and was thus excluded from coverage. *Walker v. McKinnis*, 2005-Ohio-4058 (Ct. App.).

In this case, as in *Guyuron*, the defect in design or construction of the Property (*i.e.* the roof allowing bats to enter through the eaves) was not discovered until Respondents hired experts to attempt to remedy the problem (Terminix and/or the roofing contractor who replaced the roof). *JA0171, JA0164-JA0165.* Moreover, as in *Walker*, the defect which allowed the bats to

enter the roof was not discovered until years after Respondents purchased the property. *JA0115, JA0171, JA0164-JA0165.*

Despite this evidence, the Circuit Court did not provide any analysis as to the "latent defect" exclusion in its Order. *JA0001-JA0003.* The Circuit Court clearly erred in failing to find that the "latent defect" exclusion bars coverage under the Policy in light of the evidence provided above.[8]

D. The Circuit Court erred in failing to find that the "design defect" exclusion bars coverage for Respondents' claim.

As set forth above, the Policy contains an exclusion for "defect, weakness, inadequacy, fault or unsoundness in [...] design, specifications, workmanship, construction, grading, compaction[.]" *JA0132.*

In *Jewish Cmty. Ctr.*, the insured discovered water damage, which was precipitated by a design defect in the construction of a building some years earlier. The defect was the omission of a waterproof barrier under the ceramic shower tiles, which over time resulted in water damage. *Jewish Cmty. Ctr. v. St. Paul Fire & Marine Ins. Co.*, No. 1:95 CV 1043, 1997 U.S. Dist. LEXIS 24711, at *6 (N.D. Ohio Aug. 13, 1997). The policy at issue excluded losses caused by "faulty, inadequate or defective [...] design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction[.]" The court easily concluded that coverage for the loss was precluded by this exclusion:

> The sole cause of [the insured's] water damage was the omission of a waterproof barrier in the design of [the insured's] showers, which the parties agree was a design defect. The design defect exclusion, therefore, applies and excludes [the insured's] claim.

[8]Pursuant to Rule 10(c)(7) of the Rules of Appellate Procedure, State Farm advises the Court that this issue was raised with the Circuit Court in State Farm's *Response to Plaintiffs' Motion for Summary Judgment. JA0107-JA0108.*

Id. at *8.[9]

In this case, the evidence shows that the bats entered the home due to the defective design and/or construction of the Property. More specifically, as set forth above, the manner in which the roof and/or home was constructed allowed bats to enter the property. *JA0175, JA0177, JA0116-JA0117.* In a call to State Farm on July 13, 2017, Dr. Shackelford stated that the bats were "getting in around the eaves of the roof and then come out into the home at night." *JA0176-JA0177.* Terminix also advised that the metal roof was not properly installed and there were several gaps that the bats were most likely entering. *JA0175.* Dr. Shackelford testified that he observed bats "coming out of the house, out from under the eaves of the roof." *JA0117.*

Therefore, the Circuit Court erred in refusing to apply the "design defect" exclusion as the eradication of the bats from the property (including the alleged need to remove the roof to eliminate the bats) is excluded from coverage.[10]

[9]The policy in *Jewish Cmty. Ctr.* also contained a "resulting loss" provision which served as an exception to the design defect exclusion and stated that "if a loss not otherwise excluded results" from a design defect, the insurer would pay for that resulting loss. However, the court rejected the insured's argument that the water damage was a covered "resulting loss":

> The sole cause of [the insured's] water damage was the omission of a waterproof barrier in the design of [the insured's] showers, which the parties agree was a design defect. The design defect exclusion, therefore, applies and excludes [the insured's] claim. It would offend common sense to hold that "water intrusion" is a distinct and separate cause of [the insured's] loss.

Jewish Cmty. Ctr. v. St. Paul Fire & Marine Ins. Co., No. 1:95 CV 1043, 1997 U.S. Dist. LEXIS 24711, at *8-9 (N.D. Ohio Aug. 13, 1997).

[10]Pursuant to Rule 10(c)(7) of the Rules of Appellate Procedure, State Farm advises the Court that this issue was raised with the Circuit Court in State Farm's *Response to Plaintiffs' Motion for Summary Judgment. JA0108-JA0109.*

E. The Circuit Court erred by failing to find that Respondents' failure to provide timely notice of loss under the Policy precludes coverage.

Under Ohio law, a two-step analysis is used to determine whether late notice bars an insured's recovery under an insurance policy. First, the court must determine whether the insured breached the notice provision by failing to provide timely notice. *LTF 55 Props. v. Charter Oak Fire Ins. Co.*, 2020-Ohio-4294, ¶ 52 (Ct. App.)(citing F*errando v. Auto-Owners Mut. Ins. Co.*, 2002-Ohio-7217, 98 Ohio St. 3d 186, 781 N.E.2d 927). Next, if a breach of the notice provision is shown, the court must determine whether the breach prejudiced the insurer so that coverage must be forfeited. *Id.* at ¶ 53. Importantly, breach of a notice provision "gives rise to a presumption of prejudice to the insurer, which the insured bears the burden of presenting evidence to rebut." *Id.*

In this case, the Policy required that Respondents provide "immediate notice" of a loss under the Policy to State Farm or its agents. "A requirement of 'immediate notice' in a contract for insurance means notice within a reasonable time under the circumstances of the case." *Patrick v. Auto-Owners Ins. Co.*, 5 Ohio App. 3d 118, 119, 449 N.E.2d 790, 791 (1982)(citing *Zurich Ins. Co. v. Valley Steel Erectors, Inc.*, 13 Ohio App. 2d 41, 233 N.E.2d 597 (1968)).

In this case, it is undisputed that the bat infestation had been an ongoing problem at the property since at least December 2015. Terminix returned to the property multiple times over a period of years to try to prevent the bats from returning. *JA0160-JA0161, JA0162, JA0163, JA0164, JA0171, JA0177.* Despite the fact that the bats had been an issue for years, Respondents did not report any claim to State Farm until July 11, 2017. *JA0182.*

Plainly, Respondents failed to give notice of the bat infestation to State Farm within a reasonable time under the circumstances. Therefore, prejudice to State Farm is presumed and Respondents bear the burden of presenting rebuttal evidence. Respondents are unable to rebut the

presumption of prejudice in this case. The bat infestation and resulting damage clearly worsened and accumulated during the period in which Respondents failed to provide timely notice of the claim. Moreover, Respondents' failure to provide timely notice of a claim deprived State Farm of the opportunity to conduct an inspection of the Property prior to the bat problem rising to a health and safety hazard.

At the Circuit Court level, Respondents did not even attempt to rebut the presumption of prejudice arising from Respondents' failure to provide timely notice. *JA0214-JA0287.* Instead, Respondents only argued that "[t]he date of the bat infestation was Sunday July 9, 2017" and the loss was reported on July 11, 2017. *JA0216.* However, this assertion simply ignores the undisputed fact that Respondents were aware of the bat problem since December 2015.

Therefore, the Circuit Court erred in failing to find that Respondents' lack of timely notice of the bat problem operates as a bar to coverage under the Policy.[11]

F. The Circuit Court erred by not concluding that Respondents' failure to notify State Farm of the removal of the roof and failure to document the same bars coverage under the Policy.

As noted above, the Policy requires that in the event of a loss, the insured is required to "exhibit the damaged property" and "provide [State Farm] with records and documents [State Farm] request[s][.]" *JA0132.* Dr. Shackelford was advised to take photographs during any work that was completed on the Property in relation to the bats. *JA0174, JA0188.* However, Respondents later had the roof removed and did not notify State Farm of the same until the repairs had been completed, which did not provide State Farm with the opportunity to inspect the roof.

[11]Pursuant to Rule 10(c)(7) of the Rules of Appellate Procedure, State Farm advises the Court that this issue was raised with the Circuit Court in State Farm's *Response to Plaintiffs' Motion for Summary Judgment. JA0110-JA0111.*

Moreover, no photographs were taken during the course of the roof replacement. *JA0121, JA0122.*

Thus, the Circuit Court erred by finding that coverage existed under the Policy despite Respondents' failure to notify State Farm of the removal of the roof and failure to document the same bars coverage under the Policy.[12]

VIII. CONCLUSION

For all the foregoing reasons, State Farm respectfully requests that this Honorable Court reverse the Circuit Court of Ohio County's *Order Granting Plaintiffs' Motion for Partial Summary Judgment and Continuing the January 19, 2021 Trial Scheduled in this Case.*

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[12]Pursuant to Rule 10(c)(7) of the Rules of Appellate Procedure, State Farm advises the Court that this issue was raised with the Circuit Court in State Farm's *Response to Plaintiffs' Motion for Summary Judgment. JA0111.*

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 21-0044

STATE FARM FIRE AND CASUALTY COMPANY,
Petitioner (Defendant),

v.
NATHANIEL REALTY, LLC and HOWARD L. SHACKLEFORD, MD
Respondents (Plaintiffs).

(On Appeal from the Circuit Court of Ohio County,
West Virginia, Civil Action No. 18-C-116)

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Petitioner, State Farm Fire and Casualty Company, does hereby certify on this 30th day of June, 2021, that a true copy of the foregoing ***PETITIONER'S BRIEF*** was served upon opposing counsel by e-mail and U.S. First Class Mail, addressed as follows:

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