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. SHACKELFORD, MD
Respondents (Plaintiffs).

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

PETITIONER'S REPLY BRIEF

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II. RESPONSE TO RESPONDENTS' COUNTER STATEMENT OF CASE

Petitioner, State Farm Fire & Casualty Company ("State Farm"), disagrees with many factual contentions contained in Respondents' *Counter Statement of the Case*. Respondents, Nathaniel Realty, LLC and Howard L. Shackelford, M.D. ("Dr. Shackelford"), assert therein, as well as several other places in *Respondents' Brief*, that there is no evidence that the bat infestation was ongoing for years, including prior to 2015. Respondents cite to the deposition testimony of Dr. Shackelford's wife, Joyce Shackelford ("Mrs. Shackelford"), wherein she denied "seeing any bats or anything until the day that [...] we called Terminix" in 2015. *JA0160-JA0161.* Respondents further allege the bats were removed in 2015 and another "separate and distinct" bat infestation was discovered in July 2017.

However, these assertions are contradicted by the record. 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.* Thus, the bat problem was indeed ongoing prior to 2015, despite Respondents initially believing the problem to be related to mice.

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 as acknowledged by the deposition testimony of Mrs. Shackelford:

> 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.

This fact is also documented in a claim note, which documents a conversation between Mrs. Shackelford and claims representative, Alicia Davis, during an inspection of the property:

> She said that they had Terminix to the home to take care of termites and other issues and she had them look at the bedroom. [Joyce Shackelford] thought that it was mice but when Terminix saw the damage they explained that it was bats and not mice. She said that prior to learning 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. She also said that at one time they counted at least 80 bats flying out of the home. [Joyce Shackelford] explained that they continued to visit the home despite the bats and would stay out of that room.
>
> Terminix continued to try and remove the bats from the home over a couple of years. She said that they would place one way doors to allow the bats out but not back in, these did not work.

JA0171. Supervisor, Ben Sykes ("Sykes"), was also present for the inspection. In a claim note, Sykes documented that during the inspection on February 6, 2018, Mrs. Shackelford, "said that she first started noticing bat damage as long as 5 years ago" and they "had a contract with Terminix to help with other insects and rodents around the property" but they "were unable to help with the bat issue after several attempts over a period of years." *JA0171.*

Additionally, as documented in a claim note, on July 13, 2017, Dr. Shackelford advised State Farm that "Terminix came to the house 2 years ago 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.* On October 10, 2017,

State Farm, through its claims representative, Mike Matheny ("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. *JA0170.*

Respondents also allege that there was no evidence that the manner in which the home was constructed allowed the bats to enter the Property. Again, however, Respondents are simply ignoring that evidence which is counter to their position. During his deposition, Dr. Shackelford stated that he observed bats exiting the house from under the eaves of the roof. *JA0117.* During a call to State Farm on July 13, 2017, Dr. Shackelford advised State Farm that the bats were "getting in around the eaves of the roof[.]" *JA0177.* During Matheny's October 10, 2017 call with Jeremie, the Service Manager at Terminix, Jeremie advised that "the way the home is built and has been added onto so many times, there are several voids throughout the home that the bats are getting into and nesting that Terminix cannot get into without tearing out walls." *JA0175.* Jeremie further advised that the "home appears to be a home built around another home" and the roof on the Property "was not installed properly and [there are] several gaps that the bats are most likely entering." *JA0175.* Additionally, Earle Delong ("Delong"), a contractor hired by Respondents to replace the roof, told State Farm that the metal roof was replaced with a different type of roof because "that is how [the bats] were getting in." *JA0170.*

III. ARGUMENT

A. The Circuit Court erred by applying West Virginia law to the Ohio Homeowners Policy.

Respondents argue that West Virginia law should apply to the interpretation of the Policy by claiming "the Policy was not issued in Ohio, but rather, was issued to Respondents in West Virginia at 117 Edington Lane, Wheeling, WV," citing to the Declarations Page of the Policy.

Respondents' Brief at 7; JA0197. The Declarations Page of the Policy and other claims correspondence was mailed to Nathaniel Realty, LLC in care of its accountant, Gompers & Associates, at 117 Edington Lane, Wheeling, West Virginia,[1] *JA0197, JA0195.* This fact does not equate to the Policy being "issued" in West Virginia.

Respondents further argue that "Respondent Dr. Shackelford, as the sole member of Respondent Nathaniel Realty, LLC makes his primary residence in West Virginia." *Respondents' Brief at 7.* However, Dr. Shackelford is not an insured under the Policy. The only Named Insured identified on the Declarations Page is Nathaniel Realty, LLC. *JA0197.* Nathaniel Realty, LLC is a limited liability company organized under Ohio law with its principal office located in St. Clairsville, Belmont County, Ohio. *JA0006 at ¶ 1.* Therefore, the fact that Dr. Shackelford "makes his primary residence in West Virginia" is irrelevant since he is not a named insured under the Policy.

Respondents fail to address State Farm's argument that even if Respondents could establish that the Policy was issued in West Virginia, Ohio law would still apply. "In 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 contract formation 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

[1]The address of 117 Edgington LN, Wheeling, West Virginia 26003 was simply the address of Nathaniel Realty's accountant, Gompers & Associates. *See https://www.gomperscpa.com/ (retrieved 9/1/2021).*

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. *JA0195, JA0197.* The location of Nathaniel Realty's accountant does not establish any significant relationship to West Virginia. Given all of the connections to Ohio and the total lack of any meaningful relationship to West Virginia, it is evident that Ohio has a more significant relationship to the transaction and the parties than West Virginia.

Furthermore, contrary to Respondent's argument, Ohio law and West Virginia law do differ with respect to the principles used to interpret insurance policies. Respondents have argued that the Policy provides coverage for the bat infestation as it constituted an "accident direct physical loss" under West Virginia law:

> An insurance policy provision providing coverage for a "sudden and accidental loss" or an "accidental direct physical loss" to insured property requires only that the property be damaged, not destroyed. Losses covered by the policy, including those rendering the insured property unusable or uninhabitable, may exist in the absence of structural damage to the insured property.

Syl. Pt. 10, *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 480, 509 S.E.2d 1, 4 (1998) (emphasis added). On the other hand, Respondents have cited no case under Ohio law that states that "accidental direct physical loss" can be proven where a loss of use of property has occurred.

Respondents argue that the bat infestation constituted an "accident direct physical loss" pursuant to *Murray* because Respondents allegedly lost the use of the Property. *JA0032.* The Circuit Court erroneously adopted Respondents argument that the bat infestation constituted an "accidental direct physical loss," relying in part on the allegation that the bat infestation purportedly caused a loss of use of the Property. *JA0002-0003.*

Ohio also law supports the application of the latent defect exclusion and design defect exclusion to bar coverage in this matter as discussed in *Petitioner's Brief* and below. *Chubb Grp. of Ins. Cos. v. Guyuron*, No. 68468, 1995 Ohio App. LEXIS 5512, at *1-2 (Ct. App. Dec. 14, 1995); *Walker v. McKinnis*, 2005-Ohio-4058 (Ct. App.); *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).

Furthermore, West Virginia law and Ohio law differ significantly with respect to the effect of an insured's failure to provide timely notice of a claim. 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 *Ferrando 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, under Ohio law, 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.* On the other hand, under West Virginia law, the insurer bears the burden of showing that it was prejudiced by the late notice of a claim. *Travelers Indem. Co. v. U.S. Silica Co.*, 237 W. Va. 540, 546, 788 S.E.2d 286, 292 (2015).

Accordingly, contrary to Respondents' contentions, there is a conflict between West Virginia law and Ohio law. The facts in this case unquestionably demonstrate that Ohio law governs Respondents' claims as the Policy was issued in Ohio through an Ohio agent for Property located in Ohio. West Virginia does not have a more significant relationship to the facts of this

case and, as such, the Circuit Court erred by concluding that West Virginia law applied to the Policy.

B. The Circuit Court erred in finding that the bat problem constituted an "accidental direct physical loss" under the Policy.

Respondents argue that the phrase "accidental direct physical loss" is ambiguous. Respondents cite no case from Ohio, West Virginia, or any other jurisdiction, which has concluded that the phrase "accidental direct physical loss" is ambiguous. Respondents assert that "accidental direct physical loss" is ambiguous because it is undefined. However, the 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 ("The mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous."). Instead, courts are to "give undefined words used in an insurance contract their plain and ordinary meaning." *Id.* 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).

Respondents further contend that State Farm's expert, Terry Irvine ("Irvine"), acknowledged that the phrase "accidental direct physical loss" is ambiguous during his deposition. In support of this argument, Respondents cite to a colloquy between Plaintiff's counsel and Irvine discussing that if the phrase were defined in insurance policies, it "would make our job a lot easier[.]" *JA0081-JA0082.* During this exchange, Irvine agreed with Respondents' counsel's statement that there "can be" some ambiguity with respect to undefined terms in insurance policies. *JA0081-JA0082.* Clearly, this is not an admission that the phrase "accidental direct physical loss" is *ipso facto* ambiguous as applied to the facts of any loss. Regardless, Irvine's testimony on this

topic is irrelevant to the Court's analysis because the interpretation of the Policy is a question of law for the Court to decide. *Midwest Specialties v. Westfield Ins. Co.*, No. 14027, 1994 Ohio App. LEXIS 1370, at *16-17 (Ct. App. Apr. 1, 1994)(holding claims adjuster's testimony regarding policy interpretation not binding because policy interpretation is a matter of law).

The phrase "accidental direct physical loss" is not ambiguous simply because it is undefined in the Policy and is not ambiguous because there is a disagreement between State Farm and Respondents as to the meaning of the phrase. Therefore, the Circuit Court erred by finding the phrase "accidental direct physical loss" ambiguous.

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.

As noted in *Petitioner's Brief*, the Circuit Court relied on the "all-risk" nature of the Policy at several places in its Order, stating:

- "An 'all-perils' insurance contract is more commonly referred to as an 'all-risks' policy, and it is one in which 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."

- "The [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. It was the protection of the type not ordinarily present under other types of insurance."

JA0001-JA0003.

Respondents argue that the Circuit Court's statements that an all-risk policy covers all losses of an incidental nature not expressly excluded by the policy is consistent with the Sixth Circuit Court of Appeals' statement in *Arkwright* that "[a]n all-risk policy does not cover risks that are either specifically excluded from coverage by a provision in the policy or losses that occur as a result of the insured's fraud or other misconduct." *Univ. of Cincinnati v. Arkwright Mut. Ins.*

Co., 51 F.3d 1277, 1280 (6th Cir. 1995). Respondents then assert that based on this language, the Circuit Court correctly found that in all-risk policies, "risks not specifically excluded are afforded coverage." However, this argument ignores that the insured must first establish that the loss at issue constitutes an "accidental direct physical loss" under the Policy. *Murray v. Auto-Owners Ins. Co.*, 2019-Ohio-3816, ¶ 17, 144 N.E.3d 1151, 1158 (Ct. App.)(insured has the burden to prove that the loss falls within the coverage granting portions of the insurance policy). Thus, regardless of whether the policy was an "all-risk" policy or not, Respondents were required to demonstrate that the bat infestation constituted an "accidental direct physical loss," which Respondents failed to do.

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

Respondents argue that coverage should be afforded under the Policy because the bat infestation was "accidental" under Ohio law. Respondents argue that under Ohio law, "accidents" have been "held to mean an unexpected happening without intention or design; a casualty-something out of the usual course of events ... and without design on the part of the insured party." *Newark Gardens, Inc. v. Royal Globe Ins. Co.*, No. 81AP-618, 1982 Ohio App. LEXIS 12184, at *18-19 (Ct. App. Feb. 11, 1982). However, Respondents have only included a portion of the definition of the term "accident" from *Newark Gardens*:

> Thus, "accident" has been held to mean an unexpected happening without intention or design; a casualty -- something out of the usual course of events and which happens suddenly and unexpectedly, and without design on the part of the insured party. And, the fact that the insured, by his voluntary acts, contributes to the injury, will not preclude there being an "accident," so long as the result is unforeseen and without design, unusual, unexpected.

Newark Gardens, Inc., 1982 Ohio App. LEXIS 12184, at *18-19 (internal citations omitted)

(emphasis added). Thus, in order for a loss to be considered an "accident," it must be "sudden," "unforeseen," and "unexpected."

Here, the bat infestation that was reported to State Farm in July 2017 was not sudden, unforeseen, or unexpected from the standpoint of Respondents. As set forth above, there was substantial evidence presented to the Circuit Court establishing that Respondents had been aware of the damage being caused by the bats for years prior to 2015 and were specifically aware as of 2015 that such damage was being caused by bats. Moreover, the evidence demonstrates that the bats were a recurring, ongoing problem since before 2015. Thus, the bat infestation in July 2017 was not "sudden," "unforeseen," or "unexpected" as bat infestations had been ongoing at the property for a number of years prior.

Additionally, the Policy at issue refers to "accidental direct physical loss" not merely an "accident." *JA0130.* In *Leibowitz*, the policy at issue contained the same phrase, "accidental direct physical loss." Respondents argue that in *Leibowitz*, the Policy specifically excluded coverage for rot. While the rot exclusion was an alternative basis for the Court's determination that there was no coverage, the Court also separately found that there was no "accidental direct physical loss" because the water intrusion occurred over an extended period of time:

> [T]he State Farm policy covers only certain "accidental direct physical loss." Here, no accidental loss occurred. Rather, water infiltrated Mr. Leibowitz's residence over an extended period of time because the residence was improperly constructed and/or maintained. This is not the type of fortuitous loss that is covered by insurance. Accordingly, Mr. Leibowitz's loss does not fall within the State Farm policy's insuring agreement in the first instance.

Leibowitz v. State Farm Ins. Co., No. CV 2013-06-3179, 2014 Ohio Misc. LEXIS 707, at *16 (Ct. Com. Pl. Dec. 2, 2014)(citations to record omitted).

The decision of the Magistrate Judge in *Leibowitz* was subsequently affirmed by the Court of Common Pleas. *Leibowitz v. State Farm Ins. Co.*, No. CV 2013-06-3179, 2015 Ohio Misc. LEXIS 29287 (Ct. Com. Pl. Apr. 22, 2015). On appeal, the Court of Common Pleas held that the claim was untimely and was also "not a compensable loss under the policy because it was not accidental or even if it was, the exclusions for rot would not permit it to be made compensable." *Id.* at *3. The court found that the water damage to the house was caused by "design and maintenance defects over a long period of years" that "led to water infiltration that led to the rot and other water damage."[2] *Id.*

Respondents argue that, in *Leibowitz*, experts testified as to the cause of the water intrusion and that State Farm has no such expert in this case. However, *Leibowitz* never stated that there was a requirement for such an expert. Plaintiff has not cited any legal authority from Ohio or West Virginia requiring an expert witness to testify as to whether damage was caused by an "accident direct physical loss." In fact, the *Leibowitz* decision arose from a bench trial before a Magistrate. It was in this context that the Court of Common Pleas on appeal stated that it found the testimony of two experts "more persuasive" than other evidence and, therefore, affirmed the Magistrate Judge's decision. On the other hand, in this case, the Circuit Court granted summary judgment in favor of Respondents despite there being more than sufficient evidence to at least

[2]The decision of the Court of Common Pleas was then appealed to the Court of Appeals of Ohio County, Ninth Appellate District. *Leibowitz v. State Farm Ins. Co.*, 2016-Ohio-5690 (Ct. App.). The decision was affirmed on the basis that the plaintiff did not give timely notice of the claim to his insurer and, therefore, the court declined to address any additional assignments of error. The plaintiff appealed to the Supreme Court of Ohio, but the appeal was not accepted by review. *Leibowitz v. State Farm Ins. Co.*, 2017-Ohio-4038, 149 Ohio St. 3d 1418, 75 N.E.3d 236

create a question of fact as to whether the bat infestation was considered an "accidental direct physical loss" under the Policy.[3]

Respondents also state that State Farm is "making an unfounded presumption that any infestation must result from the presence of a home's structural defect." *Respondents' Brief at 13.* However, Respondents are simply ignoring the evidence State Farm presented to the Circuit Court set forth above, which demonstrates that the bat infestation occurred over a long period of time as a result of the manner in which the home was constructed. *Leibowitz*, 2014 Ohio Misc. LEXIS 707 at *16.

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

Respondents first argue that because they did not intentionally cause the bat infestation, it must be considered "accidental." However, a loss is not "accidental" where it occurs over a long period of time as a result of defects in the construction or maintenance of a home as such a loss is not sudden, unexpected or unforeseen. *Newark Gardens, Inc.*, 1982 Ohio App. LEXIS 12184 at *18-19 (stating that an accident is something that occurs suddenly and unexpected).

Respondents further argue that because the phrase "accidental direct physical loss" is not defined, the Circuit Court did not err by relying on the completely unrelated definition of "property damage" in a different section of the Policy to find that an "accidental direct physical loss" had been shown. As set forth in *Petitioner's Brief*, the phrase "accidental direct physical

[3]"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." Syl. Pt. 1, *Williams v. Precision Coil*, 194 W. Va. 52, 56, 459 S.E.2d 329, 333 (1995).

loss" is not dependent upon the definition of "property damage." 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. Instead, the term "property damage" is used at various times in Section II of the Policy, relating to Liability Coverages. Respondents do not seek coverage under Section II of the Policy and, therefore, whether the bat infestation meets the definition of "property damage" under Section II is completely irrelevant as to whether there has been an "accidental direct physical loss" under Section I. The fact that a policy should be interpreted as a whole does not permit a court to utilize completely unrelated terms and definitions to find coverage under a different portion of the Policy.

Respondents further argue that State Farm's expert, Irvine, testified that "property damage can be direct physical loss:

> Q. Does property damage involve accidental – is that accident physical loss?
>
> A. That would be case specific.
>
> Q. All right. Well, because you understand property damage is a defined term in the policy.
>
> A. Correct, yes.
>
> Q. Wouldn't you think that property damage would generally constitute direct physical loss, whether it's accidental -- maybe if you go in and break your own window, it's not accident, I understand that, but if you have a definition at least of property damage in the policy, that's going to be commensurate with what constitutes direct physical loss?
>
> A. Damage can be direct physical loss, correct.
>
> Q. Okay. Property damage?
>
> A. Property damage can be direct physical loss.

JA0080. Thus, Irvine testified that whether a loss could constitute both "property damage" and an

"accident direct physical loss" is a "case specific" determination and that in some circumstances property damage "can be" an accidental direct physical loss. Irvine did not testify that any loss which meets the definition of "property damage" must also be considered an "accidental direct physical loss." Moreover, even if Irvine did so testify, the interpretation of the Policy is a question of law for the Court, not for an expert witness. *Midwest Specialties v. Westfield Ins. Co.*, No. 14027, 1994 Ohio App. LEXIS 1370, at *16-17 (Ct. App. Apr. 1, 1994)(holding claims adjuster's testimony regarding policy interpretation not binding because policy interpretation is a matter of law).

The definition of "property damage" under Section II of the Policy is wholly unrelated to Section I of the Policy under which Respondents seek insurance coverage. Thus, the Circuit Court erred in shoehorning the unrelated definition of "property damage" into the phrase "accidental direct physical loss."

C. The Circuit Court erred in ignoring the exclusion for latent defects in the Policy.

Respondents assert that State Farm did not provide "any evidence as to the actual construction of the home in question" and "presented no facts to disprove that the July 2017 bat infestation was a new infestation and not 'ongoing for years.'" However, as set forth above, Respondents are simply ignoring the wealth of evidence which demonstrated that the home had been infested with bats since prior to 2015, the bat problem continued through 2017 despite Respondents attempts to remedy the problem, and the bats were able to enter the Property due to the manner in which the roof and Property were constructed.

Respondent also argues that *Walker* involved a water intrusion case and, therefore, "has no bearing on the present dispute." While it was true that *Walker* arose from a water intrusion,

the fact that the damage was caused by water was not the basis for the court's decision that the latent defect exclusion barred coverage. Instead, the basis of the court's decision was that the latent defect exclusion applied because "the geometry of the roof and gutter system" caused the water intrusion. *Walker v. McKinnis*, 2005-Ohio-4058, ¶ 7 (Ct. App.). Respondents assert that in *Walker*, the appellate court relied upon the report of an expert in reaching this conclusion. However, the court did not state that an expert witness is required to assert a "latent defect" exclusion. In this case, State Farm presented ample evidence to establish that the bats were able to enter the home due to the manner in which the Property and its roof were constructed; Respondents presented no evidence to establish that the bats were able to enter the home due to anything other than the manner the Property and roof were constructed.[4] Last, Respondents assert that in *Walker*, the policy specifically excluded coverage caused by "flood" or "surface water." However, this exclusion in the policy was related to coverage for personal property and was separate from the court's discussion related to the latent defect exclusion for coverage to the dwelling.

D. State Farm presented evidence of a design defect and the Circuit Court erred in failing to address the design defect exclusion in any manner.

Respondents assert that State Farm presented no evidence of a design defect to the Circuit Court. Once again, however, Respondents are simply choosing to ignore evidence that is contrary to their position. As set forth above, State Farm presented ample evidence to establish that the bats were able to enter the home due to the manner in which the Property and its roof were

[4]Even if Respondents did present any such evidence, a dispute of material fact would have precluded summary judgment in Respondents' favor.

constructed. The Circuit Court's Order simply failed to address this evidence or the design defect exclusion in any manner whatsoever.

Respondents further argue witnesses have acknowledged that no exclusions apply to deny coverage. However, as noted above, under Ohio law, the interpretation of an insurance policy is a question of law and witnesses' testimony interpreting policy provisions are not binding. *Midwest Specialties v. Westfield Ins. Co.*, No. 14027, 1994 Ohio App. LEXIS 1370, at *16-17 (Ct. App. Apr. 1, 1994) ("[T]he interpretation of an insurance contract is a matter of law [...] and therefore, neither the trial court nor this court is bound by Smith's admissions concerning the proper construction of the policy.").

E. The Circuit Court erred by ignoring Respondents' lack of timely notice under the Policy.

As set forth above, Respondents were aware of the damage being caused by the bats since before 2015, learned that such damage was caused by bats in 2015, and continued to experience problems with bats damaging the property until the issue was eventually reported to State Farm on July 11, 2017.

Once State Farm established that Respondents failed to give timely notice of loss to State Farm, prejudice to State Farm is presumed under Ohio law. *LTF 55 Props. v. Charter Oak Fire Ins. Co.*, 2020-Ohio-4294, ¶ 52 (Ct. App.). Respondents have cited to no evidence to rebut the presumption of prejudice created by their failure to give lack of timely notice under the Policy. Instead, Respondents simply argue that the bat infestation in 2017 was "a new and distinct" bat infestation from the pre-2015 infestation. However, as noted above, there is substantial evidence that Respondents were not able to remedy the 2015 infestation and continued to experience problems related to the bats until July 2017 when the claim was reported. At the very least, this

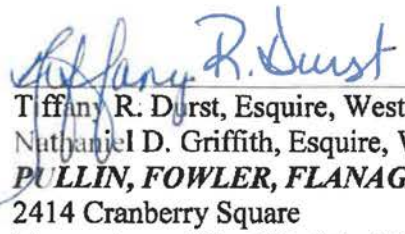
evidence creates a question of fact as to whether Respondents gave timely notice of the loss to State Farm, which should have precluded summary judgment in Respondents' favor. Thus, the Circuit Court erred in disregarding Respondents' lack of timely notice under the Policy.

F. The Circuit Court erred by failing to conclude that Respondents' failure to document the removal of the roof 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.* As documented in a claim note, on October 16, 2017, Dr. Shackelford was advised to take photographs during any work that was completed on the Property in relation to the bats: "Explained to take photos as demo progresses to help support any additional damages outside feces and urine on walls and floors." *JA0174, JA0188.* In *Respondents' Brief*, Respondents ignore the above-referenced Policy language and requirement to submit photographs of the roof removal. Instead, Respondents assert that State Farm had already advised that the bats were too dangerous to complete an inspection. However, this would not have prevented Respondents from taking photographs during the roof removal as required by the terms of the Policy. As such, the Circuit Court erred by finding that coverage existed under the Policy despite Respondents' failure to notify State Farm of the roof removal, moreover, the failure to document the same bars coverage under the Policy.

III. CONCLUSION

For all the foregoing reasons and those previously set forth in *Petitioner's Brief*, 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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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. SHACKELFORD, 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 7th day of September, 2021, that a true copy of the foregoing ***PETITIONER'S REPLY BRIEF*** was served upon opposing counsel by e-mail and U.S. First Class Mail, addressed as follows:

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