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No. 19-0711

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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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.

PETITIONER'S REPLY BRIEF

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

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I. ARGUMENT

A. The Circuit Court erred in granting Plaintiffs' Motion for Summary Judgment where four witnesses testified that a clogged city sewer line caused a backup because the "Water Back Up" Exclusion bars insurance coverage for such losses.

This case arises from the entry of sewer water and sewage into the Plaintiffs' premises through a sewer drain. Plaintiffs admit that pieces of damaged terra cotta pipe "created a complete blockage of the main sewer line on 1st Street where the Plaintiffs' lateral sewer line emptied" and that this was at least one of the causes of their alleged damages." (Appx. p. 353.) The "Water Back Up" Exclusion at issue in this appeal is found in Paragraph 1.g of Section B, Exclusions of the Causes Of Loss – Special Form of the insurance policy issued by Motorists Mutual Insurance Company ("Motorists"), and it provides in relevant part:

> **1.** We will not pay for loss or damage caused directly or indirectly by any of the following. <u>Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss</u>.
>
> ***
>
> **g. Water**
>
> **(3)** <u>Water that backs up or overflows from a sewer, drain</u> or sump; …

(Appx. pp. 192-93.) (Emphasis added.)[1] This exclusion plainly bars coverage for losses that are caused in whole or only in part by the backup of a sewer regardless of the cause of the backup.

In Section V.I of their Brief, Plaintiffs repeatedly distort and misrepresent the evidence in the record in their attempt to avoid the unambiguous bar of this exclusion. Plaintiffs first incorrectly claim that Motorists denied their claim based on the "assumption … that the sewer

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[1] 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.)

damage was caused by … damage to the drains on the Plaintiffs' property."[2] (Respondents' Br, p. 11.) Without citing any legal authority, Plaintiffs then argue that the "Water Back Up" Exclusion does not apply because they contend that the alleged damage was caused by problems that occurred outside of any property owned by the Plaintiffs, *i.e.* a "freshwater leak at another residence and the pressurization of the main sewer line in Moundville" by J.R. Logsdon's use of the Moundsville Sanitary Board's ("Sanitary Board") HiVac truck. (Respondents' Br., pp. 2, 11.)[3] In short, Plaintiffs contend that they were entitled to summary judgment because: (1) Motorists failed to present evidence "that there was a problem on the Respondents' property or a sewer blockage"; and (2) Motorists has "not produced a single witness that believes the loss was caused by a sewage backup."[4] (Respondents' Br., pp. 16, 18.) Neither argument is supported by the evidence or has any merit.

With respect to Plaintiffs' first argument that the exclusion only applies to losses that arise from a "problem" with a sewer line or drain on their own property, it is well established that the 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

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[2] This is not an accurate statement. Motorists denied coverage "due to exclusion for water that backs up or overflows from sewers and/or drains." (Appx. p. 386.)

[3] No evidence exists in the record to support the Plaintiffs' contention regarding the alleged "pressurization" of the city's sewer line. J.R. Logsdon never testified that he pressurized the main sewer line from 2nd Street with the City's high pressure sewer cleaning truck. Moreover, Jacob Zukoff conceded during his deposition he could not testify that he saw the sewer line being pressurized or that Logsdon ever told him that he pressurized the sewer line. (Appx. p. 63, Dep. pp. 131-32.) Thus, the Respondents in their Brief are distorting the evidence in the record when they claim that Zukoff is able to testify "that Logsdon and Larry Bonar, the Moundsville Sanitary Board Supervisor, admitted that the line had been pressurized by them." (Respondents' Br., p, 6.)

[4] This bald assertion is belied by the deposition testimony of Jacob Zukoff, Larry Bonar, J.R. Logsdon, and Timothy Minor, which is cited in Petitioner's Brief. In fact, both J.R. Logsdon and Timothy Minor testified that as soon as Logsdon removed the clog from the sewer line sewage immediately began to flow from the sewer main into the manhole. (Appx. p. 118, Dep. p. 36; Appx. pp. 136-37, Dep. pp. 17-19.) Logsdon, in fact, testified that the sewage he had seen "squirting out from underneath the Plaintiffs' garage door" "immediately quit coming out from underneath the door" as soon as he "opened the line up." (Appx. pp. 120-21, Dep. pp. 42, 46.)

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 that are not 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); *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 day care 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. Appx. 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). In short, the location of the blockage has no relevance in determining whether the exclusion applies.

Consistent with the holdings in the above-referenced cases, the Circuit Court of Kanawha County has acknowledged that it is "well-recognized that 'such an exclusion [concerning loss caused by a sewer backup] 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) (Citation omitted.). (Appx. p. 301.) The plain meaning of the backup exclusion, therefore, precludes 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. *Penn–America Ins. Co. v. Mike's Tailoring,* 125 Cal.Appx.4th 884, 22 Cal.Rptr.3d 918 (2005); *see also Jackson*, 299 F. Supp. at 157.

Secondly, with respect to Plaintiffs' disingenuous contention that Motorists did not "produce a single witness that believes the loss was caused by a sewer backup,"[5] Motorists submitted and filed the 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. In fact, nobody testified that there was anything but a sewer back up. Thus, the evidence in the record is that the alleged damage was caused by a sewer line clog that led to a backup, which supports the Circuit Court's finding that the "damaging substances … infiltrated [the business] through a conduit as a result of a blockage …." (Appx. 512, ¶ 15.) Ignoring this finding by the Circuit Court, Plaintiffs then contend that the, "water and sewage that infiltrated the Zukoff's business was shot directly into its lateral sewer line and up through toilets, sinks, and drains." (Respondents' Br., p. 17.) The Circuit Court never made such a finding, and there is no evidence in the record to support this contention.

Nobody testified that that sewage was shot directly into Plaintiffs' property; each witness testified that a clogged sewer caused sewage and sewer water to back up into Plaintiffs' property. J.R. Logsdon ("Logsdon"), who is a foreman for the Sanitary Board, testified that on the day of the alleged incident a resident reported "sewage blowing out of the cleanouts on Washington Avenue." (Appx. pp. 110, 114, Dep. pp. 4, 19-20.) After learning of this report, Logsdon drove

[5] See Respondents' Br., p 18.

to the area of First Avenue and Washington Avenue where he could see "sewage coming out of the cleanouts" on Washington Avenue. (Appx. pp. 114-15, Dep. pp. 19-20, 22.) Logsdon stated that he saw sewage squirting out from underneath the Plaintiffs' garage door. (Appx. p. 120, Dep. p. 42.) Because Logsdon needed assistance to open the line, he called Tim Minor ("Minor"), the Assistant Superintendent for the Sanitary Board. (Appx. p. 115, 117, Dep. pp. 22, 30-31; Appx. pp. 134, 141, Dep. pp. 8, 35.) 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.)[6]

Logsdon eventually 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.) **<u>Significantly</u>**, 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 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. 136-37, Dep. pp. 17-19.)

Larry Bonar ("Bonar"), who is the Superintendent for the Sanitary Board, testified that on the day of the incident he received a phone call from J.R. Logsdon, a foreman for the Sanitary Board, reporting, "that multiple places got flooded, had a backup." (Appx. pp. 75-76, Dep. pp. 8-9, 11.) After this call, Bonar drove to the area of the backup, and, at the time, he testified that

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

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. 75-77, 81-82, Dep. pp. 8, 12, 14, 32-34.) Moreover, Bonar specifically testified that he believes that the blocked sewer is how sewage backed up into Zukoff's business:

Q. So the broken pipe you believe is what plugged the sewer?

A. Yes.

Q. And you believe that the blocked sewer is how the sewage backed up into Jack's [Zukoff] business?

A. Yes.

(Appx. p. 94, Dep. p. 83.)

Plaintiff, Jacob Zukoff ("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.) Zukoff claims that Larry Bonar 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.)

There is no evidence in the record to support Plaintiffs' unfounded contention that the Sanitary Board was "supercharging the sewer with high pressure water" or "blasting the main sewer twice with high pressure water." (Respondents' Br., pp. 14-15.)[7] Although the nozzle and hose on the Sanitary Board's HiVac truck which is used to clear sewer line clogs is propelled by water, there is no testimony in the record that the Sanitary Board ever "blasted" any clogs with high pressure water or supercharged the sewer with high pressure water. (Appx. p. 79, Dep. p.

[7] There is no testimony in the record of supercharging the sewer with high pressure water or blasting the sewer with high pressure water. None of the deposition testimony cited by Plaintiffs support their characterization of the evidence in the record.

23; Appx. p. 116, Dep. p. 26.) The Sanitary Board's Superintendent, Larry Bonar, described the role of the water with respect to the operation of the hose and nozzle as follows:

> A. The water doesn't really doesn't do much. There's a nozzle at the end of the hose and propels the nozzle down the line, and then the nozzle hits whatever blockage it would be and free it up.

(Appx. p. 79, Dep. p. 23.)

Nevertheless, Plaintiffs claim that: (1) "immediately after using the HiVac truck at 2nd Street, water and sewage was shooting out like a geyser two feet in the air from the clean outs one block away ... directly in front of Accessories Ltd."; and (2) Mr. Logsdon "attributed the bizarre result to the water leak and supercharging the sewer with high pressure water." (Respondents' Br., p. 14.) This latter contention, however, is flatly contradicted by Mr. Logsdon's deposition testimony:

> Q. Now, you haven't really answered, as far as I recollect, whether or not there was any correlation or any significance from that initial blockage and you running the Hi-Vac truck to what happened a block away a few minutes later.
>
> A. I don't think it did.

(Appx. p. 128, Dep. p. 75.)

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. Whether any water leaking from a nearby water line rupture may have entered the sewer system or whether Logsdon allegedly "pressurized" the sewer system to remove a clog, *see* Respondents' Br., p. 11, is immaterial because clearly there was a backup of sewer water caused by the clogged sewer. 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." (Appx. pp. 192-93.) (Emphasis added.) 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 Plaintiffs' Motion for Summary Judgment.

B. The "Water Back Up" Exclusion in the Motorists Policy is clear unambiguous, and its application is not negated by any other policy terms.

Plaintiffs contend in Section V.II of their Brief that the "Water Back Up" Exclusion is "ambiguous and conflicts with other non-excluded coverages in the policy." (Respondents' Br., p. 19.) This argument is directly at odds with numerous decisions across the country which have recognized that the "Water Back Up" Exclusion at issue is unambiguous. *Mike's Tailoring,* 22 Cal.Rptr.3d at 924-25; *Haines,* 602 P.2d at 902; *Hallsted*, 595 P.2d at 575; *For Kids Only Child Development Center,* 260 S.W.3d at 656. No ambiguity or conflict exists anywhere in the Motorists Policy. In making their argument, Plaintiffs cite to Exclusion B.1.e relating to Utility Services, Section F.2 of the Additional Coverage Extensions, and the definition of "water damage" in the Definition of "Specified Cause of Loss" found in Section G.2.c of the Causes of Loss – Special Form. Respondents' Br., p. 21.) Plaintiffs' argument in Section V.II of their Brief is based upon misrepresentations of the pertinent policy provisions as well as a tortured and unreasonable reading of the policy.

Initially, Plaintiffs erroneously contend in Section V.II of their Brief that:

> This was not a passive backup where a clog sitting in a drain caused water to flow backwards. The water and sewage in this case never flowed backwards from an obstruction, rather, it was blown directly into the business without flowing backwards from an obstruction.

(Respondents' Br., p. 20.)

This contention, however, is not supported by the evidence in the record or by the Circuit Court's findings. The Circuit Court found that there was an obstruction and that the blockage caused the water to flow into the business:

> 4. The main sewer had collapsed and became non-functioning a 1st Street and was blocking the flow of the sewer line from Washington Avenue into the 1st Street sewer at the manhole.
>
> ***
>
> 7. The evidence proves that the water from the sewer main was the cause of the Plaintiffs' damages.
>
> ***
>
> 15. Therefore, it would be reasonable for Jacob Zukoff dba Accessories Ltd. to expect coverage under the facts of this case where the damaging substances did not originate from inside the premises **but rather it infiltrated through a conduit as a result of a blockage that was not located on the premises**.

(Appx. 511-12.) (Emphasis added.) Based upon the Circuit Court's findings, the "Water Back Up" Exclusion bars coverage under these facts because the Circuit Court found that the water "infiltrated through a conduit as a result of a blockage." The Circuit Court, therefore, erred in failing to apply the unambiguous terms of the exclusion and erred in granting the Plaintiffs' Motion for Summary Judgment.

1. Exclusion B.1.e, which relates to Utility Services, does not provide for coverage for losses that are otherwise excluded by Exclusion B.1.g relating to Water.

Plaintiffs advance the unfounded and incomprehensible argument that Exclusion B.1.e, which excludes coverage for losses relating to Utility Services, somehow provides coverage for losses that are not otherwise covered by the policy or which are otherwise excluded by Exclusion B.1.g relating to Water. (Respondents' Br., p. 21.) This position is based upon Plaintiffs' apparent misreading of the policy and their resulting misrepresentation that "in Section (B)(e) [sic], the policy explicitly states that the damages caused by the failure of the City of

Moundsville sewer system will be covered by the above clause."[8] (Respondents' Br., p. 21.) In fact, the Motorists Policy states the exact opposite, *i.e.* that such damages are **not** covered.

The "Utility Services" Exclusion is found in Paragraph 1.e 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.
>
> ***
>
> **e. Utility Services**
>
> The failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises. Failure includes lack of sufficient capacity and reduction in supply.
>
> But if the failure of power or other utility service results in a Covered Cause of Loss, we will pay for the loss or damage caused by that Covered Cause of Loss.
>
> This Exclusion does not apply to the Business Income Coverage or to Extra Expense coverage. Instead the exclusion in Paragraph B.4.a.(1) applies to these coverages.

(Appx. pp. 192-93.) (Emphasis added.)

Section (B)(1)(e) of the Motorists Policy plainly states that damages caused as a result of the failure of a utility service **will not** be covered by the policy. It is well established that an exclusionary provision does not create coverage. *Nautilus Ins. Co. v. Johnny Clark Trucking, LLC*, No. 2:12-CV-06678, 2014 WL 1365836, at *8 (S.D. W. Va. Mar. 20, 2014); *Helfeldt v. Robinson,* 170 W. Va. 133, 290 S.E.2d 896, 901 (1981). Plaintiffs' reliance upon the "Utility Services" Exclusion to try to fabricate coverage, therefore, is nonsensical. Plaintiffs' claims are

[8] In support of this statement, Plaintiffs cite to page 193 of the Appendix, which is a copy of one of the pages of the Motorists Policy. The actual provision cited by the Plaintiffs states that: "We [Motorists] will not pay for loss or damage caused directly or indirectly by … [t]he failure of power or other utility service supplied to the described premises, however caused, if the failure occurs away from the described premises."

not covered by the Motorists Policy and, in fact, are barred by the express terms of the "Water Back Up" Exclusion.

2. Section F.2 of the Additional Coverage Extensions does not cover losses arising from sewer back ups.

Section F, titled Additional Coverage Extensions, of the Motorists Policy provides as follows:

> **2. Water Damage, Other Liquids, Powder Or Molten Material Damage.** If loss or damage caused by or resulting from **covered** water or other liquid, powder or molten material damage loss occurs, we will also pay the cost to tear out and replace any part of the building or structure to repair damage to the system or appliance from which the water or other substance escapes. This Coverage Extension does not increase the Limit of Insurance.

(Appx. p. 193.) (Emphasis added.)[9] Before this Additional Coverage – which only covers the cost to access a system or appliance in order to perform repairs on that system or appliance – can be triggered there must first be a Covered Cause of Loss.

This coverage extension only applies where there has been a **covered** water loss. Without citing to any legal authority and taking this Additional Coverage out of context, Plaintiffs contend that, "[t]his coverage [Section F.2] explicitly covers damages caused by water or other liquid." (Respondents' Br., p. 21.) The fatal flaw in the Plaintiffs' argument is that there must ***first*** be a Covered Cause of Loss before the coverage extension can be triggered. *See Ken Tu v. Dongbu Ins. Co.*, No. 17-cv-3495, 2018 WL 4219238, at *8 (N.D. Cal. Sept. 9, 2015) (holding that the Additional Coverage for "Water Damage, Other Liquids, Powder Or Molten Material Damage" does not apply in the absence of a Covered Cause of Loss); *General Star Indemnity Co. v. Sherry Brooke Revocable Trust*, 243 F. Supp.2d 605, 642 (W.D. Tex. 2001) (adopting Magistrate's report and granting summary judgment in favor of an insurer for water

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[9] This Additional Coverage is inapplicable on its face because Plaintiffs did not present any claim for the costs to access any system or appliance from which water escaped in order to perform repairs on such system or appliance.

damage claims because the Additional Coverage for "Water Damage, Other Liquids, Powder Or Molten Material Damage" is "predicated upon a showing that the damage resulted from covered water damage").

The Additional Coverage Extension for "Water Damage, Other Liquids, Powder Or Molten Material Damage" does not apply in this case because there is no covered damage in the first instance because the Motorists Policy simply does not cover losses resulting from sewer backups. *See Ruffin Road Venture v. Travelers Property Cas. Co. of America*, No. 10-CV-11, 2011 WL 2463291 (S.D. Cal. June 20, 2011) (holding that the Additional Coverage for "Water Damage, Other Liquids, Powder Or Molten Material Damage" did not apply where the alleged damage was barred by the terms of an exclusion for losses caused by water); *Commerce Center Partnership v. Cincinnati Ins. Co.*, No. 265147, 2006 WL 1236745, at *4 (Mich. Appx. May 9, 2006) (holding that the Additional Coverage for "Water Damage, Other Liquids, Powder Or Molten Material Damage" did not apply where the alleged damage was barred by the "Water" Exclusion).

In *Ruffin Road, supra*, the insured suffered damage as a result of a broken pipe in their office building. The damage caused by the broken pipe was excluded by an exclusion for "loss or damage caused directly or indirectly by ... [w]ater under the ground surface pressing on, or flowing through ... [f]oundations, walls, floors or paved surfaces." *Id.*, 2011 WL 2463291 at *3. The insured claimed that the loss was covered by the Additional Coverage for "Water Damage, Other Liquids, Powder Or Molten Material Damage." The District Court rejected this argument, explaining:

> A straightforward reading of the Policy terms supports Travelers' position. It is undisputed that an underground pipe buried beneath the Building ruptured on or around May 25, 2008, and that as a result water leaked or seeped upwards through the first floor.... Any damage that resulted from this leakage is excludable under

> the Policy coverage exception for water damage quoted above. The water from the pipe was undeniably "under the ground surface" and "pressing on, or flowing or seeping through" the foundation and floor of the Building. Moreover, the Policy makes this exception applicable regardless of whether the water is "naturally occurring or due to man made or other artificial causes." ... In addition, because the underground water leakage is not covered, the provision cited by Ruffin Road is inapt, as it only describes "loss or damage caused by or resulting from ***covered*** water ... damage." (Emphasis added.) Because the water seepage is not covered, this section does not extend to any resulting loss or damage to the Building.

Ruffin Road Venture, 2011 WL 2463291 at *3.

The same conclusion follows here. The obvious flaw in the Plaintiffs' argument is that there must first be a Covered Cause of Loss before the Additional Coverage Extension for "Water Damage, Other Liquids, Powder Or Molten Material Damage" can be triggered. *See Ken Tu, supra; Ruffin Road Venture, supra*; *Sherry Brooke Revocable Trust, supra*, *Commerce Center Partnership, supra.* Based upon the express terms of the Motorists Policy, the Additional Coverage for "Water Damage, Other Liquids, Powder Or Molten Material Damage" is not triggered in this case because no covered cause of loss exists in the first place since a sewer back up is not a covered cause of loss. A covered cause of loss does not include losses that are "Excluded in Section B., Exclusions ...." (Appx. p. 192.) Section B., Exclusions excludes coverage for "[w]ater that backs up or overflows from a sewer, drain or sump[.]" (Appx. p. 193.) Because Plaintiffs' claims arise from the backing up of the clogged sewer main located near the manhole at First Street and Washington Avenue and regardless of whether this backup is the sole cause of their alleged loss, Plaintiffs' claims are excluded from coverage, and the Additional Coverage Extension is not applicable.

3. The term "water damage" as used in the Definition of "Specified Causes of Loss" cannot create coverage for losses that are otherwise excluded by the Exclusion B.1.g relating to "Water" losses.

Plaintiffs' next argument is premised upon the term "water damage," which is found in the definition of "Specified Causes of Loss."[10] (Respondents' Br., p. 21.) The Definition of "Specified Cause of Loss" is used in several exceptions to certain exclusions. However, neither the term "water damage" nor "Specified Cause of Loss" is used anywhere in Exclusion B.1.g., the "Water Back Up" Exclusion. The term "water damage" in Section G.2.c of the Cause of Loss – Special Form of the Motorists Policy is not a grant of insurance coverage. *Praetorian Ins. Co. v. Arabia Shrine Ctr. Houston*, No. 4:14-CV-3281, 2016 WL 687564, at *8 (S.D. Tex. Feb. 19, 2016) (rejecting an insured's argument that the definition of "water damage from Section G.2.c of the policy" creates a universal grant of coverage and holding the Water Exclusion Endorsement barred coverage). It would require a complete re-writing of the Motorists Policy in order to conclude that the term "water damage" somehow grants coverage for losses which are clearly excluded from coverage by the "Water Back Up" Exclusion which states: "[Motorists] will not pay for loss or damage caused directly or indirectly by … [w]ater that backs up or overflows from a sewer, drain or sump[.]" This Court will not rewrite the terms of an insurance policy to create coverage for uncovered losses. *Blake v. State Farm Mut. Auto.*

[10] The term "Specified Cause of Loss" is not used in Section A, Covered Causes of Loss of the Cause of Loss – Special Form, **and** the term is not synonymous with the phrase a "Covered Cause of Loss." A Covered Cause of Loss means:

A. COVERED CAUSES OF LOSS

When Special is shown in the Declarations [which is shown in the Motorists Policy Declarations], Covered Causes of Loss means RISKS OF DIRECT PHYSICAL LOSS unless the loss is:

1. Excluded in Section B., Exclusions; or
2. Limited in Section C., Limitations;

That follow.

(Appx. p. 192.)

Ins. Co., 224 W. Va. 317, 322, 685 S.E.2d 895, 900 (2009) ("We will not rewrite the terms of the policy; instead, we enforce it as written.").

The Definitions Section of the Cause of Loss – Special Form of the Motorists Policy provides in relevant part as follows:

> **G. Definitions**
>
> ***
>
> **2.** "Specified Causes of Loss" means the following: Fire; lightning; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakage from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage.
>
> ***
>
> > **c.** Water damage means accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of any part of a system or appliance (other than a sump system including its related equipment and parts) containing water or steam.

(Appx. pp. 200-01.)

The definition of "water damage" simply does not and cannot create coverage for losses that are otherwise excluded by an insurance policy's water exclusion. *CCRD, LLLP v. Landmark Am. Ins. Co.*, No. 8:12-CV-933, 2012 WL 13106429, at *2 (M.D. Fla. Sept. 20, 2012). In the *CCRD* case, a toilet on the insured's property overflowed. *Id.*, 2012 WL 13106429 at *1. As a result of the overflow, "the septic tank backed up, causing water damage to the premises." *Id.* Like the Motorists Policy, the policy at issue in *CCRD* contained an exclusion for "water that backs up or overflows from a sewer, drain or pump." *Id.* The insured argued that the "definition of 'water damage' in one of the exceptions to the 'mechanical breakdown' exclusion provide[d] coverage since the premises suffered water damage." *Id.* The District Court rejected this argument, explaining:

> CCRD's first argument is contrary to general rules of policy construction and coverage in Florida, however. In Florida, "an exclusion does not provide coverage but limits coverage." *LaMarche v. Shelby Mut. Ins. Co.*, 390 So. 2d 325, 326 (Fla. 1980); *State Farm Fire & Cas. Co. v. CTC Development Corp.*, 720 So.2d 1072,

> 1074 -1075 (Fla. 1998) (exclusionary clauses cannot be relied upon to create coverage). The definition of "water damage" in the "mechanical breakdown" exclusion cannot, therefore, provide coverage which is otherwise expressly excluded by the water overflow exclusion. Accordingly, contrary to CCRD's argument, the policy contains no specific grant of coverage for "water damage" as that term in [sic] defined in the policy.

CCRD, 2012 WL 13106429, at *2. This same conclusion follows here.

Like Florida law, West Virginia law also provides that an exception to an insurance policy exclusion does not create coverage for losses that are otherwise excluded from coverage by other exclusions contained in an insurance policy. *See Syllabus Helfeldt v. Robinson*, 170 W. Va. 133, 290 S.E.2d 896 (1981); *see also Taylor-Morley-Simon v. Michigan Mut. Ins. Co.*, 645 F.Supp. 596, 601 (E.D. Mo. 1986) (citing *Helfeldt* for the proposition that an "exclusion does not create coverage where ... the policy contains other exclusions clearly precluding coverage"); *Commercial Union Ins. Co. v. John Massman Contracting*, 713 F.Supp. 1403 (D. Kan. 1989) (citing *Taylor-Morley-Simon* and *Helfeldt* and stating "numerous other states have also declined to hold that an exception to an exclusion may be used to endow coverage"). Accordingly, it is immaterial that the term "water damage," as part of the definition of "Specified Causes of Loss," is used in certain exceptions to exclusions that are not at issue in the Plaintiffs' Motion for Summary Judgment. Merely because the policy defines the term "water damage" does not result in the creation of insurance coverage that is otherwise lacking by operation of the "Water Back Up" Exclusion for sewer backups.

In short, the term "water damage" in the definition of a "Specified Causes of Loss" is not a grant of insurance coverage and must be read in the context of the insurance policy. Other courts have already rejected similar arguments by insureds that the term "water damage" somehow defeats insurance policy exclusions that exclude coverage for certain losses caused by water. *See Arabia Shrine Ctr. Houston, supra; CCRD, LLLP, supra.* As discussed above, West

Virginia courts will not re-write the terms of an insurance policy and will not look to exceptions to other insurance policy exclusions to create insurance coverage that is otherwise lacking. Because the "Water Back Up" Exclusion bars coverage for Plaintiffs' losses, the Circuit Court erred in granting summary judgment in favor of Plaintiffs.

C. The Circuit Court erred in applying the doctrine of reasonable expectations because the "Water Back Up" Exclusion is clear and unambiguous.

The Respondents' reliance upon *Murray v. State Farm Fire & Cas. Co.*, 203 W. Va. 477, 485, 509 S.E.2d 1, 9 (1998), for the proposition that the doctrine of reasonable expectations is applicable here is completely misplaced. Unlike the present case, the *Murray* decision involved the interpretation and application of an earth movement exclusion. "The majority of courts that have considered earth movement exclusions have found them to be ambiguous." *Id.*, 509 S.E.2d at 9. Unlike the earth movement exclusion, the majority of Courts across the country have recognized that the "Water Back Up" Exclusion at issue in the present appeal is unambiguous. *Mike's Tailoring,* 22 Cal.Rptr.3d at 924-25; *Haines,* 602 P.2d at 902; *Hallsted*, 595 P.2d at 575; *For Kids Only Child Development Center,* 260 S.W.3d at 656.

The issue in *Murray* involved whether the earth movement exclusions in two insurers' policies barred coverage for damage to several homes caused by a rock fall where there was a dispute as to whether it was caused by natural events or by a combination of natural and man-made causes. This determination was important because many jurisdictions have held, "that earth movement exclusions are ambiguous, and limited in application only to naturally-occurring catastrophic events." *Id.*, 509 S.E.2d at 17. Consistent with those jurisdictions, this Court "conclude[d] that both earth movement exclusions must be read to refer only to phenomena resulting from natural, rather than man-made, forces." *Id.*, 509 S.E.2d at 10. This consideration, however, is absent here.

The Water Back Up Exclusion excludes coverage for a loss "caused directly or indirectly by … [w]ater that backs up or overflows from a sewer, drain or sump." (Appx. pp. 192-93.) How the water entered the sewer system is immaterial – whether by naturally occurring rainfall, the draining of water from a bathtub or sink, the flushing of a commode, or from a ruptured water line. *See Smigielski v. Aetna Cas. & Sur. Co.*, 285 Cal. Rptr. 898, 901-02 (Ct. App. 1991) ("We also consider the source of the water to be irrelevant" because the exclusion "[a]s written … is not limited to any one cause, but rather expressly excludes damage resulting from the backup of water through sewers or drains *without specifying the cause of the backup.*"). Thus, losses that are caused by water that backs up from a clogged or blocker sewer line simply are not covered.

The Plaintiffs claim that their version of "the cause of the water and sewer damage to Respondents' business is undisputed," and they cite a letter from Larry Bonar, the Superintendent for the Moundsville Sanitary Board. (Respondents' Br., p. 24.) However, his letter does not support their version of the cause of the loss. Significantly, Mr. Bonar wrote:

> Where the 8 inch main entered the manhole either a piece of pipe broke and blocked the water and sewage going into the manhole.

(Appx. 434.) Thus, the evidence in the record supports the Circuit Court's finding that the "damaging substances … infiltrated [the business] through a conduit as a result of a blockage[.]"

The Plaintiffs, however, claim that their damages "would never have occurred had it not been for the freshwater leak at another residence <u>and</u> the pressurization of the main sewer …." (Respondents' Br., p. 25.) This argument ignores the evidence in the record that as soon as the obstruction in the manhole was removed the sewage and water resumed flowing and stopped backing up. (Appx. p. 121, Dep. p. 46; Appx. pp. 136-37, Dep. pp. 17-19.) As previously noted, 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.) Logsdon testified as follows about what happened when he cleared the clog:

> Q. And when you unclogged everything, then the water wasn't shooting out of that cleanout pipe?
>
> A. It instantly went away.
>
> Q. Pardon me?
>
> A. It instantly went away.

(Appx. p. 120, Dep. p. 43.) Logically, the blocked sewer was the cause of Plaintiffs' damages when the flow of sewage and water immediately resumed after the removal of the obstruction.

In conclusion, 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.)[11] 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. 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

[11] The cited testimony of these witnesses directly contradicts the Respondents' unsupported contention in Section V.IV of its Brief that the "method of ingress into the Respondents business was not a 'backup' and that "all witnesses agree with this statement" (Respondents' Br., p. 27.) Even Respondent Zukoff admitted that there was a "back up," stating, "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." (Appx. pp. 61-62, Dep. pp. 124-25.)

water from the sewer main migrated into the Plaintiffs' lateral sewer line which served as a conduit into the Plaintiffs' business" as a result "of a blockage that was not located on the insured premises." (Appx. p. 511, ¶¶ 6, 15.) 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.

II. 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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