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)

RESPONDENTS' BRIEF

Scott S. Blass
West Virginia State Bar Id. 4268
Luca D. DiPiero
West Virginia State Bar Id. 13756
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: (304)242-8410
sblass@bordaslaw.com
ldipiero@bordaslaw.com

Counsel for Respondents, Nathaniel Realty, LLC and Howard L. Shackelford, MD

TABLE OF CONTENTS

I. TABLE OF AUTHORITIES iii

II. COUNTER STATEMENT OF THE CASE 1

III. SUMMARY OF ARGUMENT 4

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION 6

V. ARGUMENT 7

A. State Farm's argument that the laws of Ohio and West Virginia differ on any material issue in this case is without merit 7

B. The Circuit Court did not err in finding coverage where the bat infestation was not explicitly excluded in the all-risks insurance policy 9

1. The Circuit Court's reasoning was consistent with Ohio law's treatment of all-risks, or all-perils, insurance policies 10

2. The Circuit Court did not err in concluding that the bat infestation was "incidental," neither intended nor caused by Respondents, such that coverage would be excluded from the Policy's "accidental direct physical loss" provision 11

3. The Circuit Court did not err by reading the Policy in its entirety in interpreting the undefined phrase, "accidental direct physical loss" 13

C. The Circuit Court did not err in finding coverage where State Farm provided no substantive evidence of latent or design defect 16

D. State Farm provided no evidence of design defect to the Circuit Court, and the alleged existence of design defect did not serve the basis for State Farm's coverage denial 17

E. The Circuit Court did not err in disregarding State Farm's argument that the Respondents' claim was untimely submitted 19

F. State Farm's position that the Respondents should be denied coverage for failing to "notify" State Farm is meritless 20

VI. CONCLUSION 21

I. TABLE OF AUTHORITIES

West Virginia Cases:

Columbia Cas. Co. v. Westfield Ins. Co., 217 W.Va. 250, 617 S.E.2d 797 (2005) 12

Liberty Mut. Ins. Co. v. Triangle Industries, Inc., 390 S.E.2d 562 (1990) 7

Murray v. State Farm Fire and Casualty Co., 509 S.E.2d 1 (1998) 8, 17

National Mut. Ins. Co. v. McMahon & Sons, Inc.,
177 W.Va. 734, 356 S.E.2d 488 (1987) 14, 16, 17

Other Jurisdiction Cases:

Anderson v. Highland House Co., 93 Ohio St.3d, 547, 757 N.E.2d 329 (2001) 9

Cincinnati Ins. Co. v. CPS Holdings, Inc., 875 N.E.2d 31 (Ohio 2007) 9

Essex House v. St. Paul Fire & Marine Ins. Co., 404 F.Supp.979 (S.D. Ohio 1975) 12

Jewish Cmty. Ctr. v. St. Paul Fire & Marine Ins. Co., No: 1:95 CV 1043, 1997
U.S. Dist. LEXIS 24711 (N.D. Ohio Aug. 13, 1997 18

Laboy v. Grange Indemn. Ins. Co., 2015-Ohio-3308, ¶ 8,
144 Ohio St. 3d 234, 41 N.E.3d 1224 14

Lane v. Grange Mut. Companies, 45 Ohio St.3d 63, 543 N.E.2d 488 (1989) 13

Leibowitz v. State Farm insurance Company, 2015 WL 12698601
(Ohio Com. P. June 17, 2015) 12

Leibowitz v. State Farm Insurance Company, 2016 –Ohio- 5690,
2016 WL 4649472 (Ct. App.) 13

National Life Ins. v. Patrick, 28 Ohio App. 267 (1927) 12

Newark Gardens, Inc. v. Royal Globe Insurance Company, Inc., 1982 WL 3905
(Ohio Ct. App. 1982) 11

Shanton v. United Ohio Ins. Co., 2007 WL 4216960 (Ohio Ct. App. 2007) 17

Univ. of Cincinnati v. Arkwright Mut. Ins. Co., 51 F.3d 1277 (6th Circ. 1995) 10, 11

Walker v. McKinnis, 2005 –Ohio- 4058 (Ct. App.) 17

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256 14

I. COUNTER STATEMENT OF THE CASE

This case arises out of State Farm's refusal to pay a bat infestation claim presented by its insureds, Respondents, Nathaniel Realty, LLC and Howard L. Shackelford, MD (hereinafter collectively as "Respondents"). Dr. Shackelford is a cardiothoracic surgeon who has served patients in the Northern Panhandle of West Virginia and the surrounding tristate area for over forty years. Approximately twenty-five years ago, Dr. Shackelford acquired a home near Seneca Lake in Salesville, Ohio where he and his wife frequently spend weekends away from their Wheeling, WV, residence. Nathaniel Realty is the titled owner of the subject residence (the "Property") and was insured by a policy issued by Petitioner, State Farm Fire and Casualty Company, that policy being Policy No. 95-CJ-J527-4 (the "Policy"). *JA0007.* The Policy was an all-perils policy, also commonly referred to as an "all-risks" policy that covered all perils unless specifically excluded by the policy terms. *JA0009.*

In July of 2017, the Respondents discovered that the attic within the Property became infested with bats. *JA0007.* As a result of the bat infestation, Respondents lost the use of their Salesville Home, and they promptly filed a claim with State Farm for coverage on the Property. *Id.*

As an initial matter, it must be noted that Petitioner has presented false and unsubstantiated information to this Court in stating that the bat infestation existed "for a number of years prior to 2015." *Petitioner's Brief* at 4. Joyce Shackelford, the wife of Petitioner Dr. Howard Shackelford, denied "seeing any bats or anything until the day that ... we called [pest control company] Terminix" in 2015. *JA0160-JA0161.* The Shackelfords became aware of the bat infestation in 2015, whereupon they contracted Terminix to remove the bats. Having removed the bats in 2015, the Shackelfords continued using the Property until another they discovered a separate and distinct

bat infestation in July of 2017. *JA0116.* Accordingly, Respondents submitted a timely claim under the Policy on July 11, 2017. *JA00179.*

In response to Respondents' claim, State Farm deemed the bat infestation to be too dangerous and, therefore, refused to conduct an inspection of the property. Instead, State Farm advised Dr. Shackelford that he and his wife were responsible for eliminating the infestation. *JA0175-JA0176.* Then and only then, would State Farm inspect the dwelling.

Thereafter, in December 2017, in accordance with State Farm's instructions, Dr. Shackelford hired a local contractor, Earl DeLong, to eliminate the bat infestation and to effect repairs to the dwelling. In order to reach the bats and eliminate the infestation, the contractor was forced to remove and replace the roof of the dwelling. *JA0174.* The charge for these services was $14,500 which was paid for by Dr. Shackelford. *JA0173.* State Farm did not dispute the reasonableness of the amount necessary to eliminate the infestation. *JA0086.*

After completing the repairs to the dwelling necessitated by the damage from the bat infestation, Dr. Shackelford notified State Farm and requested that State Farm reimburse Respondent Nathaniel Realty, LLC the costs associated with the repairs. At that point, State Farm finally sent a representative to conduct an investigation of the dwelling on February 6, 2018. *JA0171.*

By letter dated February 27, 2018, State Farm denied the claim presented by the Respondents with respect to the costs associated with the repair of the dwelling asserting that the Respondents had failed to document the damages and the costs of the repair; and further, that the Respondents did not provide State Farm an opportunity to inspect the property prior to the repairs, and thus State Farm was not obligated to pay for the same. *JA0167-JA0169.* State Farm also concluded, without meaningful basis, that the bat infestation had been ongoing for years simply

because the Respondents had a prior bat infestation in 2015.

In other words, State Farm directed the Respondents to eliminate the infestation before State Farm would conduct an investigation and then, astonishingly, denied the Respondents' claim after they did as State Farm instructed! State Farm's claim file notes that they "requested photos documentation, etc. to support their claim and allow us to see the damages" and, therefore, coverage should be disqualified outright. *JA0169.* This bad faith conduct is what necessitated the instant suit. Again, the Petitioner did not dispute the reasonableness of the charges incurred to eliminate the bat infestation. *JA0086.* Having refused to conduct its own investigation, State Farm placed the onus on its insureds to perform the insurer's investigatory duties and then utilized this improper delegation as support for its coverage denial. After learning that State Farm would not cover the infestation loss, Mr. Shackelford justifiably asked the Petitioner's representative "why he was paying for insurance for all of these years." *JA0169.*

Not only did State Farm fail to help its insureds during their time of need, State Farm also abandoned them by canceling their policy after the presentation of the initial claim, stating that the policy was being cancelled as no one was occupying the dwelling. State Farm's reason given for the cancelation of the policy was clearly pretextual.

State Farm failed to assist the Respondents with resolving the bat infestation issue and failed to cover the cost of any of the work completed, despite there being no applicable exclusions in the all-risks subject policy. Upon receipt of State Farm's denial letter, the Respondents hired the undersigned counsel. After State Farm refused to reconsider its position, Respondents filed suit against State Farm on May 31, 2018. *JA005-JA0011.*

Additionally, State Farm's claim file demonstrates that it also failed to appropriately communicate with the Respondents with respect to these timeline of events. Specifically, after the

Respondents presented a claim in July 2017, State Farm did not communicate with its insureds again until almost a month later on August 11, 2017 to inquire as to the status of the claim. *JA0176.* At that point in time, State Farm closed its file. *Id.* Two months later, State Farm sent correspondence to Respondent Nathanial Realty on October 21, 2017 advising it was not able to inspect the property until the bat infestation had been taken care of and thereafter, failed to contact Respondents for several months, thus leaving its insureds on their own to handle the matter. *JA0174.*

On May 31, 2018, Respondents instituted a civil action in the Circuit Court of Ohio County against State Farm. On November 18, 2020, Respondents moved the Circuit Court for judgment as a matter of law that the cost to eliminate the bat infestation was covered by the policy and, consequently, State Farm's refusal to pay Respondents amounted to breach of contract.

On December 21, 2020, the Circuit Court granted Respondents' Motion for Partial Summary Judgment, finding as a matter of law that the cost to eliminate the bat infestation was covered under State Farm's all-perils policy and that State Farm's refusal to pay Plaintiffs amounted to breach of insurance contract. *JA001-JA003.* The Circuit ordered that State Farm pay the Respondents $14,500, representing the value of the necessary repairs, and prejudgment interest and court costs. *Id.*

II. SUMMARY OF ARGUMENT

The Respondents purchased an all-risks insurance policy from State Farm. They did so because they hoped to obtain comprehensive coverage if something unforeseen were to cause damage to their Salesville home. The Policy that State Farm issued to the Respondents contained no exclusions for losses resulting from bat infestations. The Respondents presented a timely claim upon discovering a bat infestation in July of 2017 which State Farm denied despite there being no

applicable exclusions to withhold coverage. The Circuit Court of Ohio County properly considered the critical facts and determined that State Farm breached the insurance contract by denying coverage.

In the present appeal, State Farm has alleged numerous errors by virtue of the Circuit Court's declining to expound upon details which have no bearing on the pertinent issue. State Farm's representatives testified that the only basis for their coverage denial was due to their conclusion that a bat infestation did not constitute "accidental direct physical loss," the coverage-granting condition within the Policy.

The Policy contains no definition of "accidental direct physical loss," and State Farm's own expert testified that the phrase is ambiguous. Accordingly, it was proper for the Circuit Court to construe the Policy in favor of the policyholder and against the party who drafted the insurance contract. Both West Virginia and Ohio apply the maxim that ambiguous terms in insurance contracts shall be construed in favor of the insured. In addition, both Ohio and West Virginia place the burden on the insurer to prove facts necessary for the operation of an insurance policy exclusion.

State Farm provided no substantive basis to the Circuit Court demonstrating that the subject property harbored a design or latent defect such that would trigger the same exclusions within the Policy. The Petitioner has provided no expert to opine that the subject home was "improperly constructed." State Farm has offered no competent evidence whatsoever to disprove that the 2017 bat infestation was a discrete event. The Respondents believed that they had adequately remedied another bat infestation in 2015 and continued to use their home. Upon discovery of a new bat infestation in July 2017, the Respondents presented a timely claim to State Farm on July 11, 2017. In response, State Farm refused to conduct an inspection of the Property until the Respondents had removed the bats independently. State Farm's argument that the Petitioner's failed to provide

timely notice is wholly unsupported by the facts.

The Circuit Court's decision was properly grounded upon the fundamental facts: [1] that bat infestations were not excluded by the Policy; [2] that two State Farm representatives testified that no exclusions within the Policy served the basis for the coverage denial; [3] all-risks, or all-perils, insurance policies cover all incidental losses that are not expressly excluded; [4] the Respondents promptly submitted a timely claim having faithfully paid their premiums; and [5] protection for this sort of unforeseen loss was precisely the reason that the Respondents sought the strongest form of insurance coverage.

The Respondents oppose each of the Petitioner's asserted Assignments of Error and respectfully request that this Court affirm the Circuit Court of Ohio County's well-reasoned decision.

III. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is not necessary under Rule 18(a) of West Virginia Rules of Appellate Procedure. Examining the testimony of State Farm's representatives confirms that the sole basis for the insurer's coverage denial was State Farm's position that a bat infestation does not qualify as "accidental direct physical loss." Given that this finite issue has been thoroughly developed in the briefs and record on appeal, oral argument would not significantly aid this Court's decisional process. Moreover, the principles supporting the Circuit Court's decision, involving construction of ambiguous insurance policy language, have been authoritatively decided by this Court in the past.

IV. ARGUMENT

A. State Farm's argument that the laws of Ohio and West Virginia differ on any material issue in this case is without merit.

State Farm argues that Ohio law should apply to construction of the Policy. As will be detailed herein, Ohio law is entirely consistent with West Virginia law, and the Circuit Court's reasoning, in terms of: [1] construing ambiguous insurance policy language in favor of the policyholder and against the party who drafted the contract; [2] the nature of all-risks, or all-perils, insurance policies; and [3] applying the plain meaning of the word "accidental."

To start, the Policy was not issued in Ohio, but rather, was issued to Respondents in West Virginia at 117 Edington Lane, Wheeling, WV. *JA0197.* The Policy declarations page and subsequent claims correspondence were issued to Nathaniel Realty at the same West Virginia address. *JA0195, JA0197.* Respondent Dr. Shackelford, as the sole member of Respondent Nathanial Realty, LLC, makes his primary residence in West Virginia. Since the Policy was issued to the Respondents in West Virginia, it was proper for the Circuit Court to apply West Virginia law. *See Liberty Mut. Ins. Co. v. Triangle Industries, Inc.*, 390 S.E.2d 562, 567 (W.Va. 1990) (finding location where policy was issued controlled, not where the insured risk was located nor where the damage occurred).

In any event, State Farm's contention that the Circuit Court must have engaged in a redundant conflict of laws analysis is a red herring. West Virginia and Ohio law are acutely aligned on the critical issues on this case. As confirmed by State Farm's representatives at deposition, the finite element supporting State Farm's denial of coverage was its determination that a bat infestation, although not excluded anywhere within the all-risks policy, does not constitute "accidental direct physical loss." State Farm chose not to define "accidental direct physical loss"

when it drafted the Policy. *JA-0079.*

The Petitioner now contends that Ohio courts have provided guidance on the interpretation of "accidental direct physical loss" such that should have been examined in detail by the Circuit Court. Upon extensive review, the Respondents have located no Ohio decision where the insurance policy phrase was considered in the context of an infestation. Moreover, there are less than a handful of published Ohio cases where the insurance term "accidental direct physical loss" was analyzed in *any* context!

The reason that State Farm's arguments are supported only by a few cases involving *water intrusion*, and not infestation, is due to the sparsity of Ohio law on this issue. The notion that the Circuit Court disregarded some authoritative precedent in Ohio in rendering its decision has no legitimate basis.

Further, the Petitioner has supplied no Ohio authority that conflicts with the guidance by this Court as outlined in *Murray v. State Farm Fire and Casualty Co.*, 509 S.E.2d 1 (1998):

> An insurance policy provision providing coverage for a "sudden and accidental loss" or an "accidental direct physical loss" to the 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*, 509 S.E.2d 1 (1998).

As properly acknowledged by the Circuit Court, the bat infestation caused property damage to the Respondents' dwelling by rendering the Property uninhabitable. *JA-0002*. Consistent with *Murray* and pursuant to the maxim that ambiguities within insurance policies are construed in favor of the policyholder, it was not error for the Court to conclude that a bat infestation constituted "accidental direct physical loss" within this all-risks insurance policy.

B. The Circuit Court did not err in finding coverage where the bat infestation was not explicitly excluded in the all-risks insurance policy.

The Petitioner concedes that ambiguities within an insurance policy are to be strictly construed against the insurer. *Petitioner's Brief* at 15. The same principle applies pursuant to the laws of both West Virginia and Ohio. *Cincinnati Ins. Co. v. CPS Holdings, Inc.*, 875 N.E.2d 31, 34 (Ohio 2007). The crux of the Petitioner's position is that there is absolutely no plausible way to read the phrase "accidental direct physical loss" as including losses resulting to bat infestation – that the phrase leaves no room for ambiguity in this context.[1] In fact, State Farm's own expert witness disagrees.

At his deposition, State Farm expert Terry Lee Irvine acknowledged that "accidental direct physical loss" is not defined by the Policy:

> Q. Is the term "accidental direct physical loss" a defined term in the State Farm policy?
>
> **A. No.**

Mr. Irvine's opinion is that the bat infestation went on "over a long period of time" and that "the industry standard would be that it's not considered a direct physical loss." *JA0212*. Setting aside these purported "industry standards," State Farm's own expert expressly acknowledged that the undefined phrase "accidental direct physical loss" is ambiguous:

> Q. Damage to the home constitutes direct physical loss, does it not? Regardless of how it's – how it happens, if your home is damaged, that's a direct physical loss. Whether it's covered is another question.

---

[1] "Policies of insurance, which are in language selected by the insurer and which are reasonably open to different interpretations, will be construed most favorably for the insured. It is not the responsibility of the insured to guess whether certain occurrences will or will not be covered based on nonspecific and generic words or phrases that could be construed in a variety of ways. In order to defeat coverage, the "**insurer must establish not merely that the policy is capable of the construction it favors, but rather that such an interpretation is the only one that can fairly be placed on the language in question**." *Anderson v. Highland House Co.*, 93 Ohio St.3d, 547, 549, 757 N.E.2d 329 (2001) (citations omitted) (emphasis added).

A. Well, it's damage. You know, if it's – that doesn't mean it's a direct physical loss. But otherwise the policy would say "damage" and not say "direct physical loss." I think – I'm sure that that phrase is in the policy for a reason.

Q. What phrase?

A. Accidental direct physical loss. And it's in almost all property policies?

Q. And it's not defined?

A. It's not defined, that's correct. I wish it were. I'll agree with you. I wish all insurance companies would define it. It would make our job a lot easier, but...

Q. Yeah. Because there can be some ambiguity with that, can't there?

A. Certainly. No doubt about it.

Deposition of Terry Irvine; *JA0081-JA0082.*

Contrary to the Petitioner's assertions, the Circuit Court did not "create ambiguity in a contract where there is none." *Petitioner's Brief* at 15. State Farm's own expert believes that "accidental direct physical loss" is open to ambiguous interpretation. Accordingly, the Circuit Court could not have erred by construing this undisputedly ambiguous policy language in favor of the policyholder as required by West Virginia and Ohio law.

1. The Circuit Court's reasoning was consistent with Ohio law's treatment of all-risks, or all-perils, insurance policies.

Petitioner cites *Univ. of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1280 (6th Circ. 1995) (applying Ohio law) for the proposition that the Ohio County Circuit Court erred in concluding that 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." *JA-0001*. Compare the Circuit Court's conclusion in the present matter with the following

excerpt from *Univ. of Cincinnati*:

> An 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.*
>
> *Id* (emphasis added).

The corresponding principles are virtually identical in substance and language. Further, in *Univ. of Cincinnati*, the insured voluntarily elected to remove asbestos containing materials from one of its residential properties as part of its plan to demolish the building. The court determined that these "deliberate actions" could not be deemed a "fortuitous event" and, therefore, no coverage applied. The *Cincinnati* case does not support the proposition that the unexpected intrusion of bats into a property could be construed as a "deliberate" action. To the extent that Respondents took "deliberate action" in removing the bats, they only did so at the express direction of State Farm.

Accordingly, the Circuit Court did not "disregard" any portion of the Policy; it merely noted the principle applicable to both Ohio and West Virginia all-risks, or all-perils, insurance policies, *i.e.*, that risks not specifically excluded are afforded coverage. *Univ. of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d at 1280 (6th Circ. 1995) (applying Ohio law).

2. The Circuit Court did not err in concluding that the bat infestation was "incidental," neither intended nor caused by Respondents, such that coverage would be excluded from the Policy's "accidental direct physical loss" provision.

As illustrated above, even Petitioner's expert witness concedes that the phrase "accidental direct physical loss" is ambiguous. Even if the Circuit Court had expounded in great detail as to why a bat infestation is a fortuitous, or accidental, incident under Ohio law, the result would remain the same. 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 Insurance Company, Inc.*,

1982 WL 3905 (Ohio App. Ct. 1982) (*citing National Life Ins. v. Patrick*, 28 Ohio App. 267 (1927)).

West Virginia law is identical in substance to Ohio law as to the meaning of "accident" within insurance policy language. In Syllabus Point 1 of *Columbia Cas. Co. v. Westfield Ins. Co.*, 217 W.Va. 250, 617 S.E.2d 797 (2005), this Court provided:

> In determining whether under a liability insurance policy an occurrence was or was not an "accident"—or was or was **not deliberate, intentional, expected, desired, or foreseen**—primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue.
>
> *Id* (emphasis added).

Notably, in West Virginia, "primary consideration, relevance, and weight" should be given to the perspective of the Respondents, as the insured, in analyzing "accidental direct physical loss." However, the benefit of this interpretive advantage is not necessary to determine that the bat infestation was an "unexpected happening without intention or design."

Obviously, Respondents did not expect that a bat infestation would render the Property uninhabitable. Therefore, the Petitioner's argument that the Circuit Court erred in acknowledging that the loss was "incidental" is meritless. *See Essex House v. St. Paul Fire & Marine Ins. Co.*, 404 F.Supp.979 (S.D. Ohio 1975) (finding that an all-risks insurance policy "created a **special broadened form of coverage which extended to *every conceivable loss* or damage, unless specifically excluded**.") (emphasis added).

The Petitioner relies on the Ohio case of *Leibowitz v. State Farm insurance Company*, 2015 WL 12698601 (Ohio Com. P. June 17, 2015) (confirming magistrate's decision) [2] to support its

[2] The *Leibowitz* opinion cited by Petitioner is a magistrate's decision which is not available by WestLaw.

position that the bat infestation did not constitute an "accidental" loss. Critically, in *Leibowitz*, the trial court was persuaded by the "testimony of two experts," an architect and structural forensic engineer, that opined that the water damage to the home was attributable to "design and maintenance defects that existed over a long period of years." *See Leibowitz v. State Farm Insurance Company*, 2016 –Ohio- 5690 ¶ 12, 2016 WL 4649472 at *3 (Ct. App.). The trial court also noted that the policy *specifically* excluded coverage for rot and emphasized that "even if [the water damage] was "accidental," the "exclusions for rot would not permit it to be made compensable." *Leibowitz*, 2015 WL 12698601 at *1.

Here, unlike in *Leibowitz*, the Petitioner supplied no experts to demonstrate that the home harbored a latent or design defect. It merely seeks to assign error to the Circuit Court for not granting the unfounded presumption that any infestation must result from the presence of a home's structural defect. Moreover, the *Leibowitz* court noted that the specific exclusion of rot would have barred the plaintiff's coverage claim. Had Petitioner wanted to exclude coverage for bat infestations within this all-risks insurance policy, it could have done so. *Lane v. Grange Mut. Companies*, 45 Ohio St.3d 63, 543 N.E.2d 488 (1989) ("The insurer, **being the one who selects the language in the contract, must be specific in its use**; an exclusion from liability **must be clear and exact** in order to be given effect.") (emphasis added).

Given Ohio's and West Virginia's standard for construing ambiguous policy language in favor of the insured as well as the standards applicable to all-risks insurance policies, it was not error for the Circuit Court to find that losses resulting from a bat infestation fell within the meaning of "accidental direct physical loss."

3. The Circuit Court did not err by reading the Policy in its entirety in interpreting the undefined phrase, "accidental direct physical loss."

Ohio law provides that the "fundamental goal when interpreting an insurance policy is to

ascertain the intent of the parties from a reading of the policy in its entirety and to settle upon a reasonable interpretation of any disputed terms in a manner designed to give the contract its intended effect." *Laboy v. Grange Indemn. Ins. Co.*, 2015-Ohio-3308, ¶ 8, 144 Ohio St. 3d 234, 236, 41 N.E.3d 1224, 1227.

Here, the Policy does not provide a definition for "accidental direct physical loss." First, the Petitioner's position that the bat infestation was not "accidental" is meritless. Obviously, the Respondents did not intend or take any deliberate action to cause the bat infestation. Therefore, the notion that the Circuit Court erred in concluding that the infestation was accidental, or arose out of fortuitous circumstances, is absurd. As the remaining portion of the phrase, "direct physical loss," is not defined by the Policy, it is appropriate to read "the policy in its entirety" to ascertain the intent of the parties. *See Laboy* 2015-Ohio-3308, ¶ 8; *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, ¶ 11 ("When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement.")

Unlike "accidental direct physical loss," the phrase "property damage" is defined by the Policy as "physical damage to or destruction of tangible property, including loss of use of this property." *JA-0041.* The Petitioner contends that because the phrase "property damage" only appears within Section II of the Policy, it is "completely irrelevant" to interpreting insurance language appearing anywhere else within the Policy. *Petitioner's Brief* at 21. *This* specious argument is inconsistent with Ohio law principles as outlined in *Laboy*: where policy terms are disputed, reading the contract in its entirety is proper to determine the *intent* of the parties. *Laboy* 2015-Ohio-3308, ¶ 8.

Obviously, the Respondents, like any purchasers of homeowner's insurance, intended to obtain coverage for *damage to their property. See* Syl Pt. 9, *National Mut. Ins. Co. v. McMahon*

& Sons, Inc., 177 W.Va. 734, 356 S.E.2d 488 (1987) (overruled on other grounds by *Parson v. Halliburton Energy Services Inc.*, 237 W.Va. 138 (2016)) ("Where ambiguous policy provisions would largely nullifying the purpose of indemnifying the insured, the application of those provisions will be severely restricted.") Notwithstanding the phrase appearing solely under Section II, the definition of "property damage" bears at least some relevance towards understanding the meaning of "accidental direct physical loss," given that the Petitioner elected not to define the latter term.

The Petitioner further claims that the Circuit Court's considering the definition of "property damage" as bearing some relationship to "accidental direct physical loss" was "clearly erroneous." *Petitioner's Brief* at 21. If that be the case, then the State Farm's expert witness is evidently confused on the same issue. At his deposition, Terry Irvine testified that "property damage can be direct physical loss" providing as follows:

> Q. Does property damage involve accidental – is that accidental 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 accidental, 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. <u>Property damage can be direct physical loss.</u>**

Q. All right. And you know property damage is a defined term in the State Farm policy?

A. I do.

Q. And you know that includes loss of use?

A. Correct.

Q. Did the Shackelfords lose the use of their property while it was infested with bats?

A. Yes.

Deposition of Terry Irvine; JA-0080.

The Circuit Court did not err in reading the entirety of the Policy to ascertain the intent of the parties, particularly given that the critical coverage granting term, "accidental direct physical loss," was not defined. *See* 43 American Jurisprudence, Second Edition § 289 (Aug. 2021) ("In construing a policy of insurance, a court should consider the instrument as a whole and endeavor to ascertain the intention of the parties from the language used, taking into account the situation of the parties, the nature of the subject matter, and the purpose to be accomplished.").

C. The Circuit Court did not err in finding coverage where State Farm provided no substantive evidence of latent or design defect.

The Petitioner baselessly asserts that the Circuit Court "clearly erred" in failing to find that the "latent defect" exclusion bars coverage under the Policy. *Petitioner's Brief* at 23. The Petitioner contends as much without providing any evidence as to the actual construction of the home in question. Syl Pt. 7, *National Mut. Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734 ("An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.").

In essence, the Petitioner argues: "Any time that a home suffers an infestation, it must have originated from some defect in the home itself. Therefore, no coverage applies." If the Petitioner wanted to specify such a blanket exclusion, it could have done so within this all-risk policy.

Notwithstanding, the Petitioner asserts that the Circuit Court should have determined that the home was defectively designed or maintained a latent defect merely by virtue of the infestation itself.

The Petitioner has relied exclusively on case law involving water damage to support its position that all bat infestations must have resulted from a latent defect. Again, Petitioner cites a water intrusion case, *Walker v. McKinnis*, 2005 –Ohio- 4058 (Ct. App.), which has no bearing on the present dispute. In *Walker*, the Ohio Court of Appeals upheld the trial court's finding that a home harbored a latent defect. Notably, the appellate court relied upon the report of the appellant's expert architect in affirming this conclusion. Moreover, the *Walker* court affirmed the denial of coverage by emphasizing that the policy *specifically* excluded damage caused by "flood" or "surface water." *Id* at ¶ 11. No such express exclusion exists in the instant matter.

Further, Petitioner has presented no facts to disprove that the July 2017 bat infestation was a new infestation and not "ongoing for years." Having provided no basis to the Circuit Court as to the existence of any alleged latent defect and, consequently, failing to meet its burden of proving a policy exclusion, it was not error for the lower court to find coverage for the Respondents.

D. State Farm provided no evidence of design defect to the Circuit Court, and the alleged existence of design defect did not serve the basis for State Farm's coverage denial.

State Farm's position is that an insurer can establish that a structure contains a design defect, or latent defect, merely by its saying so. On the contrary, an insurance company basing its defense on an exclusion is an affirmative defense and the insurer carries the burden to establish that the defense is applicable. *Shanton v. United Ohio Ins. Co.*, 2007 WL 4216960 at *3 (Ohio Ct. app. 2007); Syl. Pt. 6, *Murray*, 509 S.E.2d at 3. The identical principle applies in Ohio and West Virginia. *See* Syl Pt. 7, *National Mut. Ins.*, 177 W.Va. 734 ("An insurance company seeking to avoid liability through the operation of an exclusion has the burden of proving the facts necessary to the operation of that exclusion.").

Notably, the Petitioner cites *Jewish Cmty. Ctr. v. St. Paul Fire & Marine Ins. Co.*, No: 1:95 CV 1043, 1997 U.S. Dist. LEXIS 24711 (N.D. Ohio Aug. 13, 1997) for the proposition that an insurer can establish a design defect without providing substantive evidence to satisfy its burden. The case simply does not support this argument. In *Jewish Cmty.*, the insured actually conceded that its building's damages were "precipitated by a design defect," and since there was no dispute in this regard, the court resolved a legal issue as to the meaning of the subject policy. Nothing within *Jewish Cmty* suggests that an insurer can evade its burden to prove facts demonstrating the policy exclusion of design defect.

In any event, the Petitioner's witnesses have acknowledged that no exclusions, design defect or otherwise, apply to deny coverage, and the only remaining issue is whether the bat infestation constitutes "accidental direct physical loss." State Farm adjuster Michael Matheny testified under oath that no policy language excluded coverage for the costs to remove the bat infestation:

> Q. As we sit here today, as far as you know, there's no language in the policy itself upon which State Farm relied to support its refusal to pay for the costs associated to remove the bats?
>
> Petitioner Counsel. Object to the form.
>
> **A. To my knowledge, no.**
>
> [...]
>
> Q. So there's nothing in the policy as far as you know...that it would be considered exclusionary language that excludes coverage for the costs associated with bat removal, correct?
>
> **A. Correct.**
>
> Q. It just apparently isn't a covered peril?
>
> **A. Correct.**

Q. Even though this is an all-perils policy?

A. Correct.

Deposition of Michael Matheny; *JA0092-JA0093, JA0095.*

Petitioner's designated Rule 30(b) witness, Michael Seebauer, also testified that no exclusions apply to bar coverage for the bat infestation.

> Q. My question is: Are there any exclusions in the policy that would exclude costs associated with the elimination of bat infestation?
>
> **A. No.**
>
> Q. All right. So would I be correct that the sole and exclusive reasons for the refusal to pay for the cost to eliminate the bat infestation is State Farm's position that the bat infestation does not constitute accidental direct physical loss.
>
> **A. The mere presence of the bats does not constitute direct – accidental direct physical loss. [...]**
>
> Q. [Aside from State Farm's position that the bat infestation does not constitute accidental direct physical loss], Is there anything else State Farm relied upon in support of its decision to refuse to pay the cost associated with the elimination of the bat infestation?
>
> **A. For the – the bat infestation and the removal of the bats, no.**
>
> *Deposition of State Farm 30(b) witness, Michael Seebauer, JA-0228.*

As both Ohio and West Virginia recognize that the burden is on the insurer to establish an exclusion applies, and Petitioner has acknowledged under oath that no exclusion applies, Petitioner may not now contend otherwise.[3]

E. The Circuit Court did not err in disregarding State Farm's argument that the Respondents' claim was untimely submitted.

The Petitioner speciously argues that Respondents "fail[ed] to provide timely notice of a

[3] Additionally, State Farm's Rule 30(b) representative, Michael Seebauer, unequivocally stated that Defendant State Farm is in agreement with all the testimony provided by Michael Matheny and Benjamin Sykes. *JA0229-JA0230.*

claim [which] 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." First, Petitioner has no firsthand basis to state how any bat infestation problem might have developed because it refused to conduct its own investigation in the first place. Second, Petitioner contends, again without any evidentiary basis, that "[t]he bat infestation and resulting damage clearly worsened and accumulated during the period in which Respondents failed to provide timely notice of the claim."

Notably, Petitioner offered no substantive evidence to the Circuit Court, or to this Court, that either: (1) the bat infestation had been ongoing vaguely "for a number of years prior to 2015"; or (2) that the bat infestation "worsened" over an undefined period of time. *Petitioner's Brief* at 26. Respondents contracted with Terminix in 2015 to remove a bat infestation which constituted the first time that they were made aware of the bat problem. *JA0160-JA0161.* In the summer of 2017, a new and distinct bat infestation occurred and, consequently, Respondents filed a timely claim for coverage under the Policy on July 11, 2017. *JA00179.* Notwithstanding the fact that Petitioner instructed the Respondents to remove the bat infestation independently before it would conduct its own investigation, Petitioner seeks to persuade this Court that it was somehow prejudiced by its insured's actions. The argument that Respondents "deprived State Farm of the opportunity to conduct an inspection of the Property" is without merit. *Petitioner's Brief* at 26.

F. State Farm's position that the Respondents should be denied coverage for failing to "notify" State Farm is meritless.

The Petitioner's final argument is also meritless. State Farm seeks to punish its insured for following the insurer's own instructions in removing the bat infestation. Within the Petitioner's own Statement of Facts, State Farm acknowledges that its representative instructed Dr. Shackelford that the bats needed to be removed before a State Farm employee could inspect the property. State Farm deemed the situation to be too dangerous to conduct an inspection, yet,

astoundingly, the Petitioner now seeks to disclaim coverage for the loss because its insureds did that which they were instructed to do.

Dr. Shackelford facilitated the necessary repairs to the Property to remove the infestation per State Farm's instruction. State Farm did not dispute the reasonableness of these charges and was provided ample opportunity to perform its investigatory functions. *JA0085-JA0086; JA0088-JA0090.* Therefore, the Circuit Court did not err.

V. CONCLUSION

For all the foregoing reasons, the Respondents respectfully request that this Honorable Court affirm in all respects the Circuit Court of Ohio County's *Order Granting Plaintiff's Motion for Summary Judgment and Continuing the January 19, 2021 Trial Scheduled in this Case.*

Respectfully Submitted,

NATHANIEL REALTY, LLC and
HOWARD SHACKELFORD, MD,
Respondents/Plaintiffs

By: _____

SCOTT S. BLASS (#4628)
LUCA D. DIPIERO (#13756)
BORDAS & BORDAS, PLLC
1358 National Road
Wheeling, WV 26003
Telephone: (304) 242-8410
Fax: (304) 242-3936
sblass@bordaslaw.com
ldipiero@bordaslaw.com
Counsel for Respondents/Plaintiffs

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

Service of the foregoing RESPONDENTS' BRIEF was had upon the parties herein by serving a true and correct copy thereof upon counsel of record herein at their last known address by electronic mail and U.S. mail this 16th day of August 2021, as follows:

Tiffany R. Durst, Esquire
Pullin, Fowler, Flanagan, Brown & Poe, PLLC
2414 Cranberry Square
Morgantown, WV 26508
tdurst@pfflaw.com

SCOTT S. BLASS (#4268)
LUCA D. DIPIERO (#13756)
BORDAS & BORDAS, PLLC
1358 National Road, Wheeling, WV 26003
Telephone: (304)242-8410
sblass@bordaslaw.com
ldipiero@bordaslaw.com
Counsel for Respondents/Plaintiffs