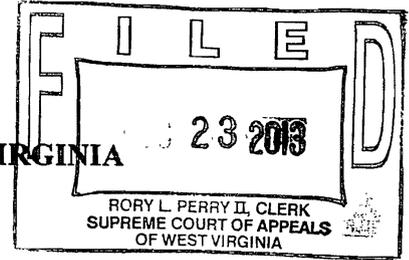


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 13-0931

(Lower Tribunal: Circuit Court of Kanawha County, West Virginia)
(Civil Action No.: 11-C-606)



STATE AUTO PROPERTY AND
CASUALTY COMPANY, Intervenor
Below,

Petitioner,

v.
BARRY G. EVANS, and ANN M. EVANS,
Plaintiffs Below,

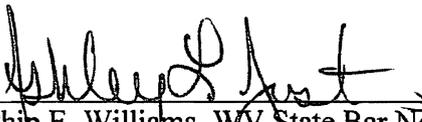
Respondents,

And

CMD PLUS, a West Virginia corporation,
Third-Party Plaintiff Below,

Respondent.

PETITIONER'S BRIEF



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ASSIGNMENT OF ERRORS

Assignment of Error No. 1

State Auto contends that it is not required to defend, insure or indemnify the Shahs or CMD, Plus, Inc. with respect to any claims in any way related to mold or fungi because any property damage or bodily injury resulting from mold or fungi is clearly excluded under the subject Commercial General Liability Insurance Policy. The Court's Order did not directly address the issue of the mold exclusion. The only reference to any mold exclusion in the Final Order was that the Court found that none of the exclusions cited by State Auto served to exclude coverage for the claims of the Evanses. This Court should review this error because the Commercial General Liability Insurance Policy clearly and unambiguously excludes any property damage resulting from any mold or fungi, which the lower court failed to specifically address.

Assignment of Error No. 2

State Auto contends that it is not required to defend, insure or indemnify the Shahs under the Homeowner's Policy issued to C.K. Shah for 204 Pembroke Sq., Charleston, WV 25314. At the hearing on April 1, 2013, counsel for the Respondents agreed, on the record, that they were not seeking coverage or compensation under the Homeowner's Policy. However, the Court erred in failing to find on the record that there is no duty on the part of State Auto to defend, insure, or indemnify the Shahs or CMD Plus, Inc. under the Homeowner's Policy. Therefore, this Court should address whether the lower court erred by failing to make a finding that State Auto owes no duty of coverage or indemnification under the Homeowner's Policy to the parties in this action.

Assignment of Error No. 3

State Auto also contends that it is not required to defend, insure or indemnify the Shahs under the Commercial General Liability Insurance Policy with respect to any of the claims or damages asserted by the Evanses because the policy does not cover property owned by the Shahs, including any damage to another's property. The Court ruled contrary to the clear and unambiguous language of the policy by holding that such an exclusion was not intended to exclude coverage for an insured's liability to third-parties. This Court should review this error because the Commercial General Liability Insurance Policy clearly and unambiguously excludes any property damage to others as a result of damage to property owned by the policy holder.

Assignment of Error No. 4.

State Auto also contends that it is not required to defend, insure or indemnify the Shahs under the Commercial General Liability Insurance Policy with respect to any of the claims or damages asserted by the Evanses because the policy does not cover damages related to CMD Plus, Inc.'s alleged poor workmanship. The Court articulated that the West Virginia Supreme Court has held that Commercial General liability Insurance Policies do not provide protection for poor workmanship. However, the Court held that the Commercial General Liability Insurance Policy of the C.K Shah d/b/a CMD Plus, Inc., did cover property damage caused to third-parties from the poor workmanship of CMD Plus, Inc. This Court should review the lower Court's application of law because the lower Court's ruling was in contradiction to the overwhelming weight of case law and the clear and unambiguous language of the Commercial General Liability Insurance Policy.

Assignment of Error No. 5

Furthermore, State Auto contends that it is not required to defend, insure or indemnify the Shahs with respect to any repairs, alterations, enhancements, maintenance, restorations, or replacements needed on the Shahs' property, even to the extent needed for prevention of injury to a person or damage to another's property. The lower Court ruled that despite the intention of the exclusion, the weight of authority favors coverage. This Court should review the lower Court's application of law because the lower Court's ruling was in contradiction to the clear and unambiguous language of the Commercial General Liability Insurance Policy.

STATEMENT OF THE CASE

Respondents, Barry G. Evans and Ann M. Evans own real property described as Lot 34, Section C, Phase II of Highland Meadows Subdivision and having an address of 1128 Shamrock Road, Charleston, Kanawha County, West Virginia. *See Appendix, Volume I, Page 1.* Respondent, C.K. Shah (also known as Chandrakant Shah) and/or Respondent, Kimberly Shah own real property which abuts the Evanses' property and is located at 6 Meadow Road in Charleston, Kanawha County, West Virginia. *Id.* Respondent, C.K. Shah is a homebuilder or residential contractor who subdivided or caused to be subdivided the Shah property. *Id.*

On or about April 13, 2011, Respondents, Barry G. Evans and Ann M. Evans, filed a civil action in the Circuit Court of Kanawha County, West Virginia, naming CMD Plus, Inc., C.K. Shah, Chandrakant N. Shah, and Kimberly S. Shah as Defendants. The Evanses allege that beginning in the spring of 2009 and continuing to the present, C.K. Shah d/b/a CMD Plus, Inc. has engaged and continues to engage in construction and development activities which disturb the surface of the Shah property and cause water, storm water, mud and debris to inundate the Evanses' property. *See Appendix, Volume I, Page 2.* The Evanses allege that a shallow slope failure developed on the Shah property as the result of construction activity of C.K. Shah and

CMD Plus, Inc., and the slope failure and other disturbances to the surface of the Shah property have diverted surface water over the Evanses' retaining wall and onto Evanses' property. *Id.* The Evanses are seeking damages for nuisance, trespass, and negligence.

On or about September 26, 2011, CMD Plus, Inc., filed a Motion for Leave to File a Third-Party Complaint. In its Motion, CMD Plus, Inc. asserts that it had a Commercial General Liability Insurance Policy, issued by State Auto Property Insurance Companies d/b/a State Auto Property and Casualty Insurance Company ("State Auto") which protected CMD Plus, Inc. from occurrences such as those complained of in the Evanses' Complaint. *See Appendix, Volume I, Pages 14-34.* On or about March 20, 2012, CMD Plus, Inc. filed a Third-Party Complaint against State Auto alleging common law bad faith, violation of the West Virginia Unfair Trade Practices Act, and breach of contract. *Id.*

State Auto filed a Motion to Intervene on or about May 1, 2012, which was granted by Agreed Order on or about June 7, 2012. On or about June 14, 2012, State Auto filed its Complaint for Declaratory Judgment. In its Motion for Declaratory Judgment, State Auto sought a determination regarding whether or not the Commercial General Liability Insurance Policy (CGL) issued to CMD Plus, Inc. and the Homeowner's Policy issued to C.K. Shah for his residence at 204 Pembroke Square, Charleston, WV, provide coverage based upon the facts alleged in the Complaint. *See Appendix, Volume II, Pages 1-282.* On January 17, 2013, Petitioner State Auto Property and Casualty Insurance Company filed its Motion for Declaratory Judgment and Memorandum of Law in Support of its Motion for Declaratory Judgment. State Auto sought a judicial declaration, pursuant to Chapter 55, Article 13, *et seq.* of the West Virginia Code, that it does not have the duty or obligation to provide coverage or a defense for CMD Plus, Inc., C.K. Shah (also known as Chandrakant Shah) and Kimberly Shah with respect to the claims of

Respondents, Barry and Ann Evans, in Civil Action No. 11-C-606. *See Appendix, Volume II, Page 283-286.*

On April 1, 2013, the parties presented oral arguments on State Auto's Motion for Declaratory Judgment. At the conclusion of the hearing, the lower tribunal instructed the parties to submit proposed findings of fact and conclusions of law. On May 17, 2013, the lower tribunal issued its Order denying State Auto's Motion for Declaratory Judgment.

The Petitioner contends that coverage should be excluded as the Commercial General Liability (CGL) Insurance Policy clearly excludes coverage for any personal or property damage caused by mold. The Evanses are asserting that they did have some property damage as the result of mold. Also, it is clear that any damages or claims that may have been sustained by the Evanses are not covered under the Homeowner's Insurance Policy for the Shahs' residence located at 204 Pembroke Square, Charleston, West Virginia. The Petitioner further contends that the CGL policy does not cover property damage to any property owned by C.K. and Kimberly Shah, including preventing any damage to another's property, i.e. the Evanses' property in this case. Furthermore, any measures that would have to be taken to remediate any sort of water or mud infiltration, trespass, or nuisance caused by CMD Plus, Inc. would have to occur on the Shah property. Coverage under the subject CGL policy is excluded for any work that has to be performed on the policyholder's property (i.e. the Shahs' property) to prevent damage to another's property (i.e. the Evanses' property). Therefore, because any work that would be necessary to eliminate water or mud infiltration, trespass, or nuisance to the Evanses would have to be performed on the Shahs' property, coverage should be excluded under the subject CGL policy. Also, coverage should be excluded as the CGL policy states that damages caused to a third-party as the result of the poor workmanship of CMD Plus, Inc., should be excluded from

coverage pursuant to the policy language. Thus, the Petitioner contends that the subject insurance policies do not provide coverage to the Shahs or CMD Plus, Inc. based upon the facts alleged in the Complaint and that its Motion for Declaratory Judgment should have been granted.

SUMMARY OF THE ARGUMENT

The exclusions set forth in CMD Plus, Inc.'s Commercial General Liability Insurance Policy effectively exclude coverage as to the allegations asserted by Respondents, Barry and Ann Evans, in their Complaint in the lower tribunal. More specifically, coverage as to the allegations of the Evanses are excluded because: (1) damages sustained by the Evanses as the result of mold or fungi are clearly and expressly excluded under the Commercial General Liability Insurance Policy, (2) damages sustained by the Evanses and to the Evanses' property as the result of damage to the Shahs' property is excluded under the Commercial General Liability Insurance Policy, (3) damages sustained by the Evanses as the result of CMD Plus, Inc.'s incorrect work is clearly and expressly excluded under the Commercial General Liability Insurance Policy, and (4) repairs necessary to remediate any water or debris inundation issue on the Evanses' property caused by the construction of the home on the Shahs' property is clearly and expressly excluded under the Commercial General Liability Insurance Policy. The arguments set forth below also show that coverage for the claims asserted by the Evanses are not covered under the Homeowner's Insurance Policy issued to the Shahs for their residence located at 204 Pembroke Square, Charleston, WV.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner respectfully requests oral argument on this matter pursuant to Rule 19(a)(1) of the West Virginia Rules of Appellate Procedure because this case involves assignments of error in the application of settled law.

ARGUMENT

I. STANDARD OF REVIEW

“[B]ecause the purpose of a declaratory judgment action is to resolve legal questions, a circuit court's ultimate resolution in a declaratory judgment action is reviewed de novo; however, any determinations of fact made by the circuit court in reaching its ultimate resolution are reviewed pursuant to a clearly erroneous standard. Accordingly, we hold that a circuit court's entry of a declaratory judgment is reviewed de novo.” *Cox v. Amick*, 195 W.Va. 608, 612, 466 S.E.2d 459 (1995); *Mitcheson v. Harris*, 955 F.2d 235, 237 (4th Cir. 1992).

II. THE COMMERCIAL GENERAL LIABILITY INSURANCE POLICY EXCLUDES COVERAGE FOR MOLD DAMAGES ALLEGED BY THE EVANSES.

CMD Plus, Inc. is not entitled to insurance coverage under the Commercial General Liability Insurance Policy, issued by State Auto Property Insurance Companies d/b/a State Auto Property and Casualty Insurance Company, for any bodily injury or property damage related to mold because the Commercial General Liability Insurance Policy unambiguously, clearly, and explicitly excludes coverage for damages related to mold. Courts do not rewrite the terms of an insurance policy but instead enforce it as written: “[w]here the provisions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended.” E.g., syl. *Keffer v. Prudential Ins. Co.*, 153 W. Va. 813, 172 S.E.2d 714 (1970); syl. pt. 1, *Miller v. Lemon*, 194 W. Va. 129, 459 S.E.2d 406 (1995); syl. pt. 1, *Russell v. State Auto. Mut. Ins. Co.*, 188 W. Va. 81, 422 S.E.2d 803 (1992). “Language in an insurance policy should be given its plain, ordinary meaning.” Syl. pt. 1, *Soliva v. Shand, Morahan & Co.*, 176 W. Va. 430, 345 S.E.2d 33 (1986); syl. pt. 2, *Russell*, 188 W. Va. at 81, 422 S.E.2d at 803.

State Auto Policy No. SPP-2382380, issued to C.K. Shah d/b/a CMD Plus, Co., states in relevant part, as follows:

MOLD OR BACTERIA EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph 2. **Exclusions of Section I- Coverage A- Bodily Injury And Property Damage Liability:**

2. Exclusions

This insurance does not apply to:

Fungi Or Bacteria

- a.** “Bodily injury” or “property damage” which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any “fungi” or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.
- b.** Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, “fungi”

This exclusion does not apply to any “fungi” or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.

C. The following definition is added to the **Definitions** Section:

“Fungi” means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

See Appendix, Volume II, Page 33.

The Commercial General Liability Insurance Policy expressly excludes coverage for “bodily injury” or “property damage” caused by exposure to mold, fungi, or bacteria. The exclusion states that insurance does not apply to any loss, cost, or expense arising out of the

abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, “fungi.” Thus, any sort of damage being sought as the result of mold or fungi is excluded from coverage under the Commercial General Liability Insurance Policy.

In *Hathaway*, the United States Court of Appeals of the Eleventh Circuit held that the mold exclusion in the insured’s commercial general liability policy excluded coverage for any property damage resulting from the threat of or presence of mold, bacteria, or fungi pursuant to the clear and unambiguous policy language. *Hathaway Development Company, Inc. v. Illinois Union Insurance Company*, 274 Fed. Appx. 787, 792 (2008). In *Hathaway*, the appellant sought review of the lower tribunal’s finding that coverage to it was excluded under the mold exclusion and various other exclusions contained within the commercial general liability insurance policy. *Id.* at 788-790. The appellate court held that the commercial general liability policy did exclude coverage for property damage “which would not have occurred...but for the...presence of any fungi or bacteria on or within the building or structure...” as well as costs “arising out of the abating,...cleaning up, removing,...remediating or disposing of, or in any way responding to fungi or bacteria...” *Id.* at 792. “Fungi” is defined in the policy as “any type or form of fungus, including mold or mildew...” *Id.* The appellate court determined that insured was seeking damages for the expenses it incurred as a result of mold and therefore, determined coverage was excluded under the policy. *Id.* Here, the Petitioner contends that coverage should be excluded under the mold exclusion in the subject Commercial General Liability Insurance Policy as it was to the insured in *Hathaway*.

Here, CMD Plus, Inc. is seeking coverage for damages sustained by the Evanses resulting from mold. The subject Commercial General Liability Insurance Policy states that “insurance

does not apply to...“bodily injury” or “property damage” which would not have occurred...but for the...presence of, any “fungi” or bacteria on or within a building or structure...” or “any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, ‘fungi’.” *See Appendix, Volume II, Page 33.* “Fungi” is defined as “any type or form of fungus, including mold or mildew....” *See Appendix, Volume II, Page 33.*

It is clear that the Evanses are asserting allegations against the Shahs and CMD Plus, Inc. resulting from mold damage. In response to Chandrakant N. Shah’s First Set of Interrogatories and Requests for Production of Documents, Respondents Barry and Ann Evans allege that they suffered loss of use of their backyard and basement due to the presence of mold caused by surface water entering the house and that Respondent Barry Evans’ pre-existing asthma is exacerbated by musty, moldy conditions which resulted from the flow of surface water into the Evanses’ residence. *See Appendix, Volume II, Pages 187-188.* Furthermore, the Evanses state in their response to State Auto Property and Casualty Insurance Companies’ Motion for Declaratory Judgment that they are seeking damages for their expenses for repairing the inside of their house, repeated clean up of the property, four (4) years of annoyance and inconvenience, and diminution of value of their property. *See Appendix, Volume I, Pages 1-6; See Appendix, Volume II, Page 289.* Thus, pursuant to the clear and unambiguous language of the Commercial General Liability Insurance Policy, the Shahs and CMD Plus, Inc. are not afforded coverage for damages to the Evanses resulting from mold.

In *Hathaway*, the court determined that the Commercial General Liability Insurance Policy did not provide coverage for property damage resulting from mold. The Commercial

General Liability Insurance Policy in the instant case excludes coverage for any “bodily damage,” “property damage,” or “any loss” arising from the presence of mold. Therefore, the Petitioner asks the Court to reach the same conclusion as the court in *Hathaway* and conclude that the subject Commercial General Liability Insurance Policy does not provide coverage to the Shahs or CMD Plus, Inc. for any damages sustained by the Evanses resulting from the presence of mold.

The exclusion states that insurance does not apply to any loss arising from mold or fungi. Therefore, it does not matter if the Evanses are seeking damages for property damage or bodily injury due to mold or fungi because all of the previous claims are excluded under the applicable Commercial General Liability Insurance Policy. Where exclusions of an insurance policy contract are clear and unambiguous they are not subject to judicial construction or interpretation, but full effect will be given to the plain meaning intended. *Cherrington v. Erie Insurance Property & Casualty Company*, 745 S.E.2d 508, 524 (W.Va. 2013).

Because the Evanses are asserting damages for mold and because the subject Commercial General Liability Insurance Policy excludes coverage for mold, State Auto is under no duty to provide a defense or indemnity to CMD Plus, Inc. with respect to any claim by the Evanses resulting from the presence of mold. Therefore, to the extent that any of the aforementioned damages are or were the result of any mold or fungi, coverage to CMD Plus, Inc. should be excluded pursuant to the clear and unambiguous language of the Commercial General Liability Insurance Policy. Thus, the Petitioner contends that the subject Commercial General Liability Insurance Policy does not provide coverage to the parties resulting from the presence of mold on the Evanses’ property and that its Motion for Declaratory Judgment should have been granted.

III. THE SHAH'S HOMEOWNER'S INSURANCE POLICY DOES NOT PROVIDE COVERAGE FOR THE DAMAGES SUSTAINED BY THE EVANSES.

State Auto issued a Homeowner's Insurance Policy to C.K. Shah for his residence located at 204 Pembroke Square in Charleston, West Virginia. *See Appendix, Volume II, pg. 211.* On the record, counsel for the Shahs and CMD Plus, Inc. and counsel for the Evanses acknowledged that no coverage is afforded to the parties in this case under the Homeowner's Policy; however, the lower tribunal failed to include that stipulation or a ruling regarding the Homeowner's Policy into its Final Order. *See Appendix, Volume II, Pages 339-340.*

The error by the lower tribunal with respect to this issue was in its failure to address the fact that the Evanses, Shahs, and CMD Plus, Inc., are not seeking coverage under the subject Homeowner's Insurance Policy. The Petitioner requests that this Court order the lower tribunal to make a finding that the aforementioned Homeowner's Insurance Policy does not provide coverage to the Shahs or CMD Plus, Inc. for the claims asserted by the Evanses' in their Complaint, as this relief was requested by the Petitioner in its Motion for Declaratory Judgment.

IV. THE COMMERCIAL GENERAL LIABILITY INSURANCE POLICY ISSUED TO CMD PLUS, INC., EXCLUDES COVERAGE FOR PROPERTY DAMAGE ASSOCIATED WITH PROPERTY OWNED BY THE POLICY HOLDER.

It is undisputed that the property on which the work was performed by C.K. Shah d/b/a CMD Plus, Inc. is owned by the Shahs. *See Appendix Volume I, Page 1; See also Appendix Volume I, Page 7.* The commercial policy at issue excludes coverage for property damage associated with property owned by the policy holder. Accordingly, regardless of whether the work performed by CMD Plus, Inc. and/or C.K. Shah caused damage to the Shahs' property or the Evanses' property and regardless of the type of relief sought by the Evanses, there is no

coverage for any claims asserted by the Evanses in this matter because the property is owned by the Shahs.

State Auto Policy No. SPP-2382380, issued to C.K. Shah d/b/a C.M.D. Plus, Co., states in relevant part, as follows:

CG 00 01 12 04

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION 1- COVERAGES

2. Exclusions

This insurance does not apply to:

j. Damage to Property

“Property damage” to:

- (1) **Property you own**, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property, for any reason, **including prevention of injury to a person or damage to another’s property**;

SECTION IV- COMMERCIAL GENERAL LIABILITY CONDITIONS

17. “Property damage” means:

- a.** Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b.** Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

See Appendix, Volume II, Page 39-40(emphasis added); See Appendix, Volume II, Page 49-50.

The policy at issue clearly does not cover property damage to any property owned by the Shahs, including any damage to another’s property, i.e. the Evanses’ property in this case. The exclusionary language is clear and unambiguous. Here, the Shahs and CMD Plus, Inc. are

seeking coverage under the Commercial General Liability Insurance Policy for the claims made by the Evanses as a result of the subsurface slip or scarp that occurred on the Shah property and continued to cause surface water, storm water, mud and debris to escape from the Shah property and inundate the Evanses' property. See *Appendix, Volume II, Pages 183-184*. Thus, coverage under the applicable Commercial General Liability Insurance Policy is excluded because the Respondents are seeking coverage under the subject Commercial General Liability Insurance Policy for property damage to property owned by the Shahs and damage to another's property allegedly originating from the Shahs' property.

Such exclusion is akin to the "owned but not insured" exclusion in an automobile liability policy. In *Imgrund v. Yarborough*, 199 W.Va. 187 (1997), the West Virginia Supreme Court upheld the "owned but not insured" exclusion in an uninsured motorist policy finding that the exclusion was clear and unambiguous, not against public policy and that the insured could have paid additional premiums for coverage but chose not to. In *Imgrund*, the court articulated that exclusions of uninsured and underinsured insurance coverage were valid so long as they did not run afoul of West Virginia statutes requiring uninsured insurance coverage and the option of underinsured coverage. *Imgrund*, 199 W.Va. at 194; See, e.g., *Williams v. State Farm Mut. Auto. Ins. Co.*, 992 F.2d 781 (8th Cir. 1993) (concluding exclusion to *uninsured* motorist coverage does not violate Iowa statutory law because exclusion applies only to those amounts in excess of minimum statutorily mandated *uninsured* coverage); *Crawford v. Emcasco Ins. Co.*, 294 Ark. 569, 745 S.W.2d 132 (1988) (finding that legislature did not intend to permit insured to purchase *uninsured* motorist coverage for one vehicle and extend such coverage to all vehicles owned by insured); *Lumbermens Mut. Casualty Co. v. Stern*, 433 So. 2d 48 (Fla. Dist. Ct. App. 1983) (per curiam) (upholding validity of exclusion to *uninsured* motorist coverage pursuant to statute);

Powell v. State Farm Mut. Auto. Ins. Co., 86 Md. App. 98, 585 A.2d 286 (1991) (validating exclusion to *uninsured* motorist coverage and determining that exclusion is not contrary to public policy of mandatory *uninsured* motorist coverage); *Johnson v. Hanover Ins. Co.*, 400 Mass. 259, 508 N.E.2d 845 (1987) (holding exclusion to *uninsured* motorist coverage valid only with regard to benefits sought in excess of minimum statutory limits of *uninsured* motorist coverage). When discussing that the insured driver could only recover up to the amount of coverage required by West Virginia statute, the West Virginia Supreme Court stated, it's common sense that "a party cannot get something for nothing." *Id.* at 195. Meaning, that if the Plaintiff wished to receive money above the limit required by the West Virginia statute under uninsured motorist coverage he or she could have purchased underinsured insurance for an additional premium. Similarly, in the instant case, the Shahs could have purchased homeowner's coverage for the property they own; however, they apparently chose not to do so. The Commercial General Liability Insurance Policy is not designed to insure against property damage to property owned by C.K. and Kimberly Shah or damage to another's property caused by work performed on the Shahs' property.

Because the Shahs owned the property from which the damage allegedly originated and because the Evanses' claims fall squarely outside of the policy issued to CMD Plus, Inc., Petitioner requests this Court to issue Declaratory Judgment finding that State Auto is not required to insure, defend or indemnify the Shahs for the claims of the Evanses.

V. **THE COMMERCIAL GENERAL LIABILITY INSURANCE POLICY ISSUED TO CMD PLUS, INC., EXCLUDES COVERAGE FOR PROPERTY DAMAGE CAUSED BY C.K. SHAH D/B/A CMD PLUS, INC.'S, INCORRECT WORK AND EXCLUDES REPAIRS TO PREVENT INJURY TO ANOTHER PERSON OR THE PERSON'S PROPERTY.**

CMD Plus, Inc. is not entitled to insurance coverage under the Commercial General Liability Insurance Policy, issued by State Auto Property Insurance Companies d/b/a State Auto Property and Casualty Insurance Company, for property damage that is alleged to have arisen from CMD Plus, Inc.'s, contractors' and/or subcontractors' work because the Commercial General Liability Insurance Policy unambiguously, clearly, and explicitly excludes coverage for property damage to that particular part of any property that must be restored, repaired or replaced because CMD Plus, Inc.'s work was incorrectly performed on it.

State Auto Policy No. SPP-2382380, issued to C.K. Shah d/b/a CMD Plus, Co., states in relevant part, as follows:

CG 00 01 12 04

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION 1- COVERAGES

2. Exclusions

This insurance does not apply to:

j. Damage to Property

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property, for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;
- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are

- performing operations, if the “property damage” arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to “property damage” (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage to Premises Rented To You as described in Section III-Limits of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are “your work” and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to “property damage” included in the “products-completed operations hazard.”

SECTION IV- COMMERCIAL GENERAL LIABILITY CONDITIONS

17. “Property damage” means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the “occurrence” that caused it.

SECTION V- DEFINITIONS

22. “Your work”:

- a. Means:
 - (1) Work or operations performed by you or on your behalf; and
 - (2) Materials, parts or equipment furnished in connection with such work or operations.

- b. Includes
 - (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work”, and
 - (2) The providing of or failure to provide warnings or instructions.

See Appendix, Volume II, Page 39-40; See Appendix, Volume II, Page 49-50.

In the Complaint, the Evanses allege that the Shahs and CMD Plus, Inc., engaged in activities on the Shah property which have disturbed the surface of the Shah property and continue to cause surface water, storm water, mud and debris to escape the Shah property and inundate the Evanses’ property. *See Appendix, Volume I, Pages 1-6.* In their Discovery responses, the Evanses contend that a shallow slope failure developed on the property owned by the Shahs and CMD Plus, Inc., as a result of the construction activity of C.K. Shah and his company, CMD Plus, Inc., causing water and debris to inundate the Evanses’ property. *See Appendix, Volume II, Pages 183-184.* According to the Evanses, this slope failure has periodically and repeatedly diverted surface water over the Evanses’ retaining wall and onto Evanses’ property. *Id.* Further, the Evanses contend that the primary property damage caused by the surface water is to the interior, finished basement walls and basement floor of the Evanses’ residence. *See Appendix, Volume II, Pages 183.* The Evanses further contend that silt and debris were washed over much of their backyard, damaging and destroying the landscaping on that portion of their property. *See Appendix, Volume II, Pages 183-184.* The report produced in discovery by the Evanses indicates that the shallow slope failure necessitates a repair, restoration, or enhancement of the property owned by the Shahs by way of a pile and lagging wall being placed on the Shah property uphill from the downhill slope failure at 6 Meadow Road, Charleston, West Virginia. *See Appendix, Volume II, Pages 201-208.*

All of the claims made by the Evanses in the subject lawsuit stem from the property damage that has allegedly occurred to the Evanses' property due to the incorrect work performed by C.K. Shah d/b/a CMD Plus, Inc. The Evanses allege in their Complaint that C.K. Shah and CMD Plus, Inc. had a duty to perform their work in a manner to avoid exposing adjoining properties to injury or harm. *See Appendix, Volume I, Page 5.* The Evanses further assert that C.K. Shah and CMD Plus, Inc. breached their duty by conducting their activities on the Shah property in a negligent and careless manner. *See Appendix, Volume I, Page 5.* Therefore, it is clear that the Evanses are asserting any damages that have they may have sustained are the result of work that was negligently or incorrectly performed by C.K. Shah d/b/a CMD Plus, Inc., on property owned by the Shahs.

Under the Commercial Liability Insurance Policy, State Auto is not required to provide coverage for this type of damage. With regard to the initial slope failure, this failure is, according to the Evanses, directly associated with the construction activities performed by C.K. Shah and CMD Plus, Inc. and/or their contractors and subcontractors. *See Appendix, Volume I, Pages 1-6; See Appendix Volume II, Pages 183-184.* These activities were performed by individuals working directly or indirectly for C.K. Shah d/b/a CMD Plus, Inc. when the damages to the Evanses' property occurred. The policy language, cited above, expressly and unambiguously excludes coverage for the damages to the Evanses' property due to the work that was incorrectly performed.

Furthermore, the policy excludes coverage for repair, replacement, enhancement, restoration or maintenance of such property, for any reason, including prevention of injury to a person or damage to another's property. The only way to make the Evanses whole and to ensure that their property does not continue to be inundated by mud, water, and debris as a result of

water runoff from the Shah property is to construct a pile and lagging structure. *See Appendix, Volume II, Pages 201-208.* The only way for the Evanses to be made whole is by correcting the subsurface slip or scarp that occurred on the Shah property.

The Evanses have asserted in their response to the Petitioner's Motion for Declaratory Judgment that they are not seeking that a pile and lagging structure or any other sort of repair, restoration, or replacement be performed on the Shah property. *See Appendix, Volume II, Pages 288-290.* Also, in the Evanses' response to the Petitioner's Motion for Declaratory Judgment the Respondents state that they are only seeking monetary damages from the Shahs for nuisance, negligence, trespass, and diminution of the value of their home. *See Appendix, Volume II, Pages 288-290.* However, the Evanses do seek equitable relief in their Complaint. *See Appendix, Volume I, Pages 1-6.* The only way to correct the slope failure is by constructing a pile and lagging structure uphill from the slope failure. *See Appendix, Volume II, Pages 201-208.* Because the slope failure is on the Shah property, any pile and lagging structure that is constructed to eliminate inundation of the Evanses' property would have to be constructed on the Shah property. *Id.*

The pile and lagging wall required to address the damage to the Evanses' property falls within the express language of this section of the policy. The wall would be placed on the Shahs' property in order to repair the alleged damage caused by CMD Plus, Inc.'s incorrect work and to prevent further injury to the Evanses' property due to the construction activities performed by the C.K. Shah and CMD Plus, Inc., which is expressly excluded under the policy issued by State Auto. As a result, State Auto requests this Court to enter declaratory judgment determining that State Auto is not obligated to defend or indemnify the Shahs or CMD Plus, Inc. with respect to the claims of the Evanses.

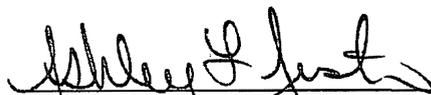
CONCLUSION

Based upon the above reasons, and the terms, conditions, limitations, and exclusions set forth in the aforementioned State Auto Policy No. SPP-2382380 and State Auto Policy No. HWV 0029750, State Auto is entitled to a judicial declaration that it does not have the duty and obligation to provide coverage or a defense for CMD Plus, Inc., C.K. Shah (also known as Chandrakant Shah) and Kimberly Shah with respect to the claims of Respondents, Barry and Ann Evans in Civil Action No. 11-C-606.

WHEREFORE, State Auto Property and Casualty Insurance Company respectfully requests that this Honorable Court grant declaratory judgment and order that State Auto is excluded from insuring or indemnifying the Shahs and CMD Plus, Inc. from the claims of the Evanses. The Petitioner also requests any and all other relief, in equity or otherwise, that this Court sees fit to grant.

Respectfully Submitted,

STATE AUTO PROPERTY AND CAUSALTY
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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET NO.: 13-0931

**(Lower Tribunal: Circuit Court of Kanawha County, West Virginia)
(Civil Action No.: 11-C-606)**

**STATE AUTO PROPERTY AND
CASUALTY COMPANY, Intervenor
Below,**

Petitioner,

**v.
BARRY G. EVANS, and ANN M. EVANS,
Plaintiffs Below,**

Respondents,

And

**CMD PLUS, a West Virginia corporation,
Third-Party Plaintiff Below,**

Respondent.

CERTIFICATE OF SERVICE

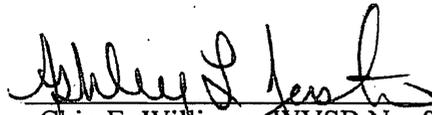
The undersigned, counsel of record for Petitioner, State Auto, does hereby certify on this 23rd day of December, 2013, that a true copy of the foregoing "**PETITIONER'S BRIEF**" was served upon opposing counsel by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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