

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 INSURANCE COMPANY,
Intervenor Below,**

Petitioner,

v.

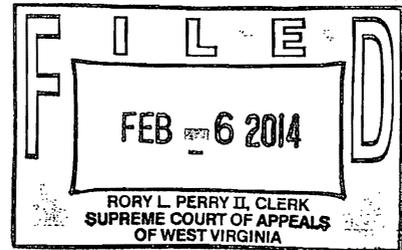
**BARRY G. EVANS and ANN M. EVANS,
Plaintiffs Below,**

Respondents,

and

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

Respondent.



Respondent's Brief

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ASSIGNMENT OF ERROR

There is no assignment of error because the circuit court did not err in finding that the Insurance Policy issued by State Auto Property and Casualty Insurance Company to CMD Plus, Inc. provides coverage to CMD Plus, Inc. in the underlying civil action, *Evans v. CMD Plus, Inc. et al.*

STATEMENT OF THE CASE

A. Procedural & Factual Background

In April 2011, the Plaintiffs, Barry G. Evans and Ann M. Evans (“Plaintiffs”) filed a lawsuit against CMD Plus, Inc. (“CMD”) alleging nuisance, trespass, and negligence. The Plaintiffs alleged that construction activity conducted by CMD in the spring of 2009 on adjacent property located at 6 Meadow Road in Charleston, WV caused surface water, storm water, mud, and debris to escape said property and inundate the Plaintiffs’ property. Said property located at 6 Meadow Road in Charleston, WV will hereinafter be referred to as the “Shah property.” As a result of the alleged incident, the Plaintiffs allege they have suffered damages. Chandrakant Shah and Kimberly Shah were also named Defendants in Plaintiffs’ Complaint. *See Appendix, Volume 1, Pages 1-6.*

At all times relevant, CMD maintained a Commercial General Liability (CGL) Insurance Policy issued by State Auto Property and Casualty Insurance Company (“State Auto”) and also maintained that said policy provided CMD coverage and a defense from the occurrences described in Plaintiff’s Complaint. The specific policy is a Commercial General Liability Insurance Policy, No. SPP 2382380 03, which provides insurance coverage up to the policy limit of One Million Dollars (\$1,000,000.00).

In response to the Plaintiffs’ property damage claims, CMD notified an authorized representative of State Auto of the Plaintiffs’ claim regarding the alleged property damage. Eventually, due to State Auto’s mishandling of the claim, CMD filed a Third-Party Complaint in

March 2012 against State Auto alleging common law bad faith, violations of the West Virginia Unfair Trade Practices Act, and breach of contract. *See Appendix, Volume 1, Pages 14-34.*

Shortly thereafter, State Auto filed a Motion to Intervene, which was granted by Agreed Order in June 2012. *See Appendix, Volume 1, Pages 35-41.* State Auto then filed its Complaint for Declaratory Judgment, seeking a determination regarding whether or not the applicable CGL policy issued to CMD provided coverage based upon the facts alleged in Plaintiffs' Complaint. *See Appendix, Volume I, Pages 42-312.* Subsequently, State Auto filed a Motion for Declaratory Judgment, arguing that it did not have a duty or obligation to provide coverage or a defense for CMD with respect to the Plaintiffs' claims. *See Appendix, Volume II, Pages 1-282.* CMD then filed its response to State Auto's Motion for Declaratory Judgment, arguing that the applicable policy covered Plaintiffs' claims and that no exclusions operated to exclude coverage to CMD. *See, Appendix, Volume II, Pages 293-322.* A hearing was also held on the matter on April 1, 2013 and all parties were given the opportunity to present oral argument. *See, Appendix, Volume II, Pages 330-363.*

At the conclusion of the hearing, the lower court requested the parties submit proposed findings of fact and conclusions of law. Said findings of fact and conclusions of law were submitted to the Court and reviewed prior to a decision being made. After thorough review of all the briefs, arguments and pleadings, the Court issued its Order denying State Auto's Motion for Declaratory Judgment on May 17, 2013. Specifically, the Court held that "the Insurance Policy used by State Auto provides coverage to CMD in this case." *See, Appendix, Volume II, Pages 364-371.* Following the lower court's decision, State Auto filed its Notice of Appeal and the current appeal was docketed.

Petitioner State Auto argues that the CGL Policy does not provide coverage to CMD based upon the facts alleged in the Plaintiffs' Complaint. Petitioner argues that its Declaratory Judgment should have been granted, and seeks a reversal of the Circuit Court's Order.

Respondent asserts that the Circuit Court correctly found that none of Petitioner's referenced exclusions precluded coverage to CMD in the underlying civil action, *Evans v. CMD Plus, Inc. et al.*

SUMMARY OF THE ARGUMENT

Petitioner alleges that the CGL Policy affords no coverage to CMD for the Plaintiffs' claims. As will be explained more fully herein, the Petitioner relies on policy language in the CGL Policy that encompasses what are commonly referred to as "own, rent or occupy" and "your work" exclusions. Despite the clear intention of such exclusions and the facts present in this case, Petitioner attempts to argue that coverage is excluded for CMD in this matter. Petitioner's arguments are not in accord with applicable law, and are at complete odds with the facts of this case. As such, The Circuit Court's Order should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent submits, in accordance with Rule 18(a)(4) of the West Virginia Rules of Appellate Procedure, that the facts and legal arguments involved in this matter have been adequately presented herein and that the decisional process of this Court would not be significantly aided by oral argument. However, if the Court is inclined to grant oral argument in this matter, Respondent requests an opportunity to present its argument.

ARGUMENT

I. STANDARD OF REVIEW.

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). Thus, the standard of review is de novo.

II. THE CIRCUIT COURT ORDER SHOULD BE AFFIRMED AS THERE ARE NO EXCLUSIONS THAT SERVE TO EXCLUDE COVERAGE FOR THE CLAIMS OF THE PLAINTIFFS.

Petitioner State Auto asserts five (5) separate assignments of errors. It is of significance that CMD is not responding to Petitioner's assignments of error regarding coverage under the homeowner's policy and/or the mold exclusion. Respondent did not address such arguments in the lower court proceeding, and it is Respondent's assertion that there is no disagreement regarding coverage under the policy/exclusion.

As is shown herein, the Circuit Court correctly found that none of Petitioner's referenced exclusions precluded coverage to CMD Plus, Inc. in the underlying civil action, *Evans v. CMD Plus, Inc. et al.* The Petitioner's arguments are based upon false assumptions, and there is absolutely no relevant legal authority to supports their assertions. Therefore, the Circuit Court's Order should be affirmed.

A. The allegations in the Plaintiffs' Complaint fall squarely within the purview of coverage under the CGL Policy.

The applicable CGL Policy is intended to cover the exact type of damages alleged in this case. The Plaintiffs' Complaint states in relevant part:

COMPLAINT

FACTUAL ALLEGATIONS

5. Beginning in the spring 2009 and continuing to the present, Defendants have engaged and continue to engage in activities on the Shah property which has disturbed the

surface of the Shah property and caused surface water, storm water, mud and debris to escape the Shah property and to inundate the Evans property.

6. Defendants' activities on the Shah property are the sole and proximate cause of the escape of surface water, storm water, mud and debris from the Shah Property onto the Evans property.

21. Defendants' negligent and careless acts and omissions proximately caused and continued to proximately cause injury and damage to the Evans Property and to Plaintiffs. (Emphasis added)

See Appendix, Volume 1, Pages 1-6.

As is made clear from the Complaint, the Plaintiffs are third-parties alleging that the negligence of another party (i.e. CMD) has caused them property damages. This is the *exact type* of damage that the CGL Policy is designed to cover. West Virginia case law is clear: “the commercial general liability policy is specifically designed to insure against the risk of tort liability for physical injury to persons or property sustained by third parties as a result of the product or work performed or damages sustained by others from the complete product of finished work.” (Emphasis added). *Webster County Solid Waste Authority v. Brackenridge and Associates, Inc.*, 217 W.Va. 304, 617 S.E.2d 851 (2005), *overruled on other grounds by, Cherrington v. Erie Ins. Property and Cas. Co.*, 231 W.Va. 470 (2013).

Recently, this Court, in the *Cherrington* decision took an even further step, and expanded such coverage for CGL policies by holding that defective workmanship causing bodily injury or property damage constitutes an “occurrence” under a policy of commercial general liability insurance. Syl. Pt. 1, *id.* Regardless of such an expansion, the damages in this case are alleged to have occurred on the Plaintiff Evanses' property. (Emphasis added). There has also been no allegation that any “work” of CMD must be repaired or replaced.

Apart from the allegations in the Complaint, Plaintiffs have reiterated in their discovery responses that the construction activities performed by CMD on the Shah property located at 6 Meadow Road is what has caused Plaintiffs' property damages. In response to Interrogatory No. 4, requesting that Plaintiffs describe each item of real property, personal property, or tangible property allegedly damaged as a result of the incident giving rise to this lawsuit, the Plaintiffs stated:

“Generally speaking, *the primary property damage caused by the surface water is to the interior, finished basement walls and basement floor beneath the rear of Plaintiffs’ residence. Silt and debris were washed over much of Plaintiffs’ back yard damaging or destroying the landscaping on that portion of Plaintiffs’ property.* On defendants’ behalf, representative(s) from Associated Adjusters, LLC prepared an estimate of the cost to repair the aforesaid damages and itemized the materials necessary to perform the repairs and replacements.” (Emphasis added).

See, Appendix Volume II, pages 309-310.

Moreover, in response to Interrogatory No. 5 requesting that Plaintiffs describe the alleged occurrences, the Plaintiffs stated:

“At a time period unknown to the Plaintiffs, a shallow slope failure developed on the property at 6 Meadow Road owned by Defendants Chandrakant N. Shah and Kimberly S. Shah. This slope failure resulted from the construction activity of Mr. Shah and his company, CMD Plus, Inc. on 6 Meadow Road which abuts the Plaintiffs’ property on 1128 Shamrock Road. Since the spring 2009, the slope failure and other disturbances to the surface of the lot at 6 Meadow Road have *periodically and repeatedly diverted surface water during periods of precipitation from the normal drainage courses on and from 6 Meadow Road over Plaintiffs’ retaining wall and onto Plaintiffs’ property* at 1128 Shamrock Road. The flow of surface water onto Plaintiffs’ property from 6 Meadow Road is not consistent but occurs repeatedly at times of heavy rainfall or melting snow cover.” (Emphasis added)

See, Appendix Volume II, pages 309-310.

It is unmistakably clear from both the Complaint and the Interrogatories that all of Plaintiffs' alleged damages relate to construction activities that took place on the Shah property. As a result of such construction activities, the Plaintiffs allege that they have suffered property damage to their home and land. There are no allegations that CMD performed any work on the

Plaintiffs' property itself. As such, there is no applicable exclusion under the CGL Policy and the Circuit Court correctly found that State Auto was not entitled to Declaratory Judgment.

B. The “own, rent or occupy” exclusion is not intended to exclude coverage for an insured’s liability to third-parties.

Petitioner argues that the following policy language precludes coverage to CMD in this case:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section I – 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.

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

The above policy language is commonly referred to as the “own, rent or occupy” exclusion. The “own, rent, or occupy” exclusion is common to commercial general liability policies. *9 Couch, Insurance* § 126:16 (3d ed. 1997). Such exclusion is intended to prevent liability insurance from operating as casualty insurance for damage to an insured’s own property. (Emphasis added). As has already been made clear, in this case there are no allegations that the insured’s are seeking coverage to apply to the Shah property.

The exclusion is not intended to exclude coverage for the insured’s liability to third-parties, such as the Evanses. This reasoning has been confirmed in multiple jurisdictions. *See, e.g., Porter v. Clarendon Nat. Ins. Co.*, 76 Mass.App.Ct.655, 925 N.E.2d58 (2010) (Damage caused by insured property owner's trespass was to neighbor's property, not to insured's property, and thus coverage for damage was not excluded under general liability policies' exclusions for property damage to property owned, rented, or occupied by insured.); *Auto-Owners Ins. Co. v. Madison at Park West Property Owners Ass’n, Inc.*, 834 F.Supp.2d 437 (2011) (Under South Carolina law, “owned property” exclusion of commercial general liability insurance policy issued to condominium complex's property owners association did not operate to exclude coverage for liabilities incurred by association); *Rubenstein v. Royal Ins. Co. of Am.*, 44 Mass.App.Ct. 842, 853, 694 N.E.2d 381 (1998). (“What the exclusion means is that the [general liability] policy was intended to cover only liability of the insured to third parties and not [damage to] the property of the insured.”); *Massachusetts Bay Ins. Co. v. Ferraiolo Const. Co.*, 584 A.2d 608, 611 (Me.1990), (“[Exclusion’s] purpose is to prevent liability insurance from operating as casualty insurance for damage to the insured's own property. We read it to exclude from coverage only damage to property lawfully occupied by the insured.”)

Accordingly, the Petitioner is unable to cite any applicable case law to support its position and instead attempts to relate the “own, rent or occupy” exclusion in a CGL Policy to an

“owned but not insured” exclusion in any automobile liability policy. Petitioner relies on the case *Imgrund v. Yarborough*, 199 W.Va. 187 (1997), which upheld the validity of an “owned but not insured” exclusion in an uninsured motorist policy.

Apart from the obvious difference between a commercial general liability policy and an uninsured motorist automobile policy, neither the facts nor the reasoning in *Imgrund* provide Petitioner support. In *Imgrund*, the claimant was attempting to collect additional uninsured motorist coverage benefits under his parents’ insurance policy. The court reasoned that the claimant’s attempts to recover such additional amounts coincide with an insured’s ability to purchase additional insurance coverage. *Id.* at 193. Petitioner argues that this line of reasoning is present in the current case because the Shahs could have purchased additional homeowner’s coverage to insure against property damage to their own property. That may be true, but it is entirely irrelevant in this case.

While it is true that “own, rent or occupy” exclusions are intended to prevent liability insurance from operating as casualty insurance for damage to the insured’s own property, in this case Plaintiffs’ claims are for their property and neither CMD nor the Shahs are asking for coverage to correct damages to their own property. In this case, the alleged damage caused by the nuisance and trespass was to a third-party’s property, i.e. the Plaintiffs, not the property of the insured. Thus, the overwhelming weight of relevant legal authority and the facts of this case favor coverage. The Circuit Court’s Order should be affirmed.

C. The Plaintiffs in this case are not seeking a “repair, restoration, or replacement” be performed on the Shah property.

In conjunction with the previously stated policy language, Petitioner argues that the following policy language also precludes coverage to CMD in this case:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Section I – COVERAGES

2. Exclusions

This insurance does not apply to:

j. Damage to Property:

“Property damage” to:

- (5) That particular part of real property on which you or any contractor 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.

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.

Petitioner incorrectly argues that the above-mentioned “your work” exclusions are applicable to deny CMD coverage. Petitioner first asserts that since work was allegedly

performed negligently on the Shah property, that coverage is somehow not available. However, Petitioner's argument is flawed in that there are no allegations and there is no evidence in this case that any work was performed on the Plaintiffs' property. All of the alleged work was performed on the Shah property. (Emphasis added). See *Appendix, Volume 1, Pages 1-6*. The Circuit Court correctly found that the exclusion was obviously inapplicable. Again, the policy is clear that it provides coverage for claims of negligence causing third-party damages. In this case, the Plaintiffs are alleging damages to their own property, not the insured's property.

In addition, as previously discussed, this Court in *Cherrington v. Erie Ins. Property and Cas. Co.*, 231 W.Va. 470 (2013), expanded coverage under CGL policies by holding defective workmanship causing bodily injury or property damage is an "occurrence" under a policy of commercial general liability insurance. Therefore, the Petitioner's argument fails either way and coverage stands under the CGL policy.

Petitioner also argues that the CGL policy excludes coverage for "repair, replacement, enhancement, restoration or maintenance" of the Shah property. Petitioner then takes a giant, inaccurate leap and argues that the only way to correct the alleged property damage is to construct a pile and lagging structure uphill from the alleged slope failure on the Shah property.

This entire argument is based upon a failed misconception that the Plaintiffs are even seeking such a remedy. The record in this case is clear that the Evanses are affirmatively not seeking recovery of damages for the installation of a "pile and lagging" wall on the Shah property. See, *Appendix, Volume II, pages 287-290*. ("The Evanses do not and never have sought to recover money to be used for repairs or modifications on the Shah property. The Evanses have no standing to seek such relief"). Counsel for the Plaintiffs has also made it clear on the record to the Circuit Court that the Plaintiffs are not seeking such a remedy. See, *Appendix, Volume II, pages 351-352*.

Moreover, the report which Petitioner relies upon in its Brief was prepared and submitted by an engineer hired and paid for by State Auto. *See Appendix, Volume II, Pages 201-208.* Obviously the report is in no way absolute or compulsory as to what repairs should be made to correct the property damage, and it is disingenuous to make such a representation to the Court. The Circuit Court correctly found that none of the referenced “your work” exclusions precluded coverage to CMD Plus, Inc. in the underlying civil action, *Evans v. CMD Plus, Inc. et al.* The Circuit Court’s Order should be affirmed.

CONCLUSION

For the reasons set forth above, it is clear that there are no applicable exclusions which serve to exclude Petitioner from insuring or indemnifying the Plaintiffs and CMD Plus, Inc. from the claims of the Evanses.

WHEREFORE, Respondent, CMD Plus, Inc. respectfully requests that this Honorable Court affirm the Order of the Circuit Court of Kanawha County and deny Petitioner, State Auto Property and Casualty Insurance Company’s Declaratory Judgment. Respondent also respectfully requests any and all other relief which the Court deems appropriate, including an award of attorney’s fees and costs.

Respectfully Submitted,

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Respondent.

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Respondent, CMD Plus, Inc., does hereby certify this 6th day of February, 2014, that a true copy of the foregoing "RESPONDENT'S BRIEF" was served upon all counsel of record by depositing same to them in the U.S. Mail, postage prepaid, sealed in an envelope, and addressed as follows:

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