IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

PATRICIA AND CHRISTOPHER CAMPANILE, Plaintiffs, v. THE HANOVER INSURANCE COMPANY, Defendant.	)	CIVIL ACTION NO. 2:25-cv-03028-HB

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

The Hanover Insurance Company ("Hanover") by and through its counsel, Houston Harbaugh, P.C. files the following Brief in Support of its Motion for Summary Judgment.

I. Introduction

Plaintiffs cannot establish that Hanover breached the insurance contract because Plaintiffs' claim for loss caused by concrete dust released by a contractor performing concrete work on the foundation and dispersed throughout Plaintiffs' home is excluded under the faulty workmanship and pollution exclusions contained in the policy Hanover issued to the Plaintiffs. Plaintiffs do not dispute that the direct cause of their claimed loss was the faulty workmanship of their contractor. However, they assert that their claimed loss falls within the "ensuing loss" exception to the faulty workmanship exclusion because they are not seeking coverage for the actual concrete work, but rather from the concrete dust that spread throughout their house as a result of the concrete work. This assertion is incorrect.

First, the release and dispersal of concrete dust by a contractor removing and replacing a concrete slab near an operating HVAC system without adequately protecting the HVAC system is

the natural and foreseeable result of the contractor's faulty workmanship. Pennsylvania courts have held that where damage is the natural and foreseeable result of faulty workmanship, it is not "ensuing loss," for purposes of insurance coverage.

Second, in order for damage that is clearly caused by the faulty workmanship of a contractor to be considered "ensuing loss," coverage for that damage must not be precluded by any other provision of the policy. Here, the concrete dust is excluded under the policy's pollution exclusion. Regardless of whether the dust released by the contractor's concrete work contained silica or not, that dust - which Plaintiffs' own expert called an irritant and a contaminant - is clearly a "pollutant" as defined by the unambiguous language of the pollution exclusion. For these reasons and as set forth herein, the court should grant Hanover's motion for summary judgment on Plaintiffs' only remaining claim for breach of contract.

II. Factual Background

In June 2024, the Campaniles discovered that there was a large void beneath the foundation of their home which needed to be repaired, and they hired Newtown Construction to do the repair work on the foundation. (Concise Statement of Material Facts ("CSMF") ¶ 5). The Campaniles stayed elsewhere while the contractor was working on the foundation, and returned to their home on July 4, once the work had been completed. (CSMF ¶ 6). Upon returning home they discovered that a fine white dust generated by the construction work was covering all surfaces of their home. (CSMF ¶ 4).

On July 17, 2024 the Campaniles made a claim to Hanover under the homeowners insurance policy Hanover issued to them, for the white construction dust covering the surfaces of their home. (CSMF ¶¶ 3, 7). The Campaniles reported to Hanover that the dust had come from work done by a contractor who dug up their foundation and poured a new concrete slab, and that

they were told by ServPro that the dust covering the surfaces of their home was concrete dust. (CSMF ¶ 9). The Campaniles were told by ServPro and other remediation companies that they could not reside in their home while the dust was present because concrete dust can cause health issues. (CSMF ¶ 14). In fact, after trying to clean up this dust Ms. Campanile experienced headaches, coughing, and sneezing. (Id.). By letter dated January 24, 2024, Hanover denied the Campaniles' claim based on policy exclusions for pollution and faulty workmanship. (CSMF ¶¶ 10-13).

In addition to submitting a claim to Hanover, the Campaniles also submitted a claim to Newtown Construction and its insurer – Selective Insurance – for the concrete dust. (CSMF ¶¶ 15, 17). After hiring an expert consultant to take samples of the dust and test it, Selective Insurance denied the Campaniles' claim based on a silica exclusion in the policy insuring Newtown Construction. (CSMF ¶¶ 18-20). After its insurer denied the Campaniles' claim, Newtown Construction - who acknowledged that the concrete dust came from its work - offered to pay for cleaning of the Campaniles' appliances, soft porous items, HVAC system including the ductwork and the interior of the home. (CSMF ¶¶ 20-24). After this cleanup work was completed, Pro Action Restoration tested the property and deemed it safe for the Campaniles to return home. (CSMF ¶ 25). The Campaniles did not reside in their home from the date that Newtown Construction began their work until December 2024, when they were told by Pro Action that it was safe to return home. (CSMF ¶¶ 6, 26).

The Campaniles filed a complaint against Hanover in the Court of Common Pleas of Philadelphia County asserting claims for breach of contract and bad faith. (ECF No. 1-1). Hanover promptly removed the case to this court. (ECF No. 1). The court subsequently dismissed the

Campaniles' bad faith claim, and only their claim for breach of contract remains. (ECF Nos. 19, 38).

There is no dispute that the dust covering the Campaniles' home came from the construction work performed by Newtown Construction. (CSMF ¶¶ 4, 32-34). There is also no dispute that the dust covering the Campaniles home was concrete dust, and that the concrete dust was an irritant and a contaminant which could and did adversely impact Ms. Campanile's breathing. (CSMF ¶¶ 33-35). The Campaniles have produced an expert report prepared by William Zisa, a public adjuster, in support of their breach of contract claim.[1] Mr. Zisa concluded in his report that "a contractor was performing work at the property while the HVAC system was operating and left exposed" and that as a result fine particulate matter generated by the construction work was "drawn into the HVAC system through return air pathways and distributed throughout the system." (CSMF ¶¶ 32-33). Mr. Zisa concluded that the fine particulate matter "contaminated the HVAC system and interior building surfaces." (CSMF ¶ 34). Mr. Zisa stated that construction dust contains recognized respiratory hazards, and that exposure to such dust is associated with respiratory irritation, exacerbation of asthma and allergies, and chronic bronchitis. (CSMF ¶ 35). Mr. Zisa's report uses some variation of the word "contaminate" thirty times when referencing the concrete dust; the word "contaminant" appears four times, "contaminate" appears eleven times, and "contamination" appears fifteen times. (CSMF ¶ 37, Ex. 6).

The Campaniles claim that Hanover breached the insurance contract by failing to pay for their claimed loss. They claim that the concrete dust that was released by the construction work

[1] In citing portions of Mr. Zisa's report within this brief, Hanover expressly does not concede that the entire report constitutes admissible evidence. Mr. Zisa's report oversteps permissible boundaries by offering opinions on the application of the insurance policy to the Campaniles' claimed loss, a determination that lies solely within the purview of the court. Such opinions are impermissible as they encroach upon legal conclusions, which are not the proper subject of expert testimony. *Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 410 F. Supp. 2d 417 (W.D. Pa. 2006).

performed by Newtown Construction and dispersed throughout their home is covered under the "ensuing loss" exception to the policy's faulty workmanship exclusion. They also claim that concrete dust is not a "pollutant" as defined by the policy's pollution exclusion. Neither of these claims have any merit.

III. The Policy

Hanover issued Homeowner's Policy Number HNY H851000 (the "Policy") to Patricia and Christopher Campanile, effective for the period of December 30, 2023 to December 30, 2024. (CSMF ¶ 3; Ex. 1). The Declarations Page of the Policy provided that the Residence Premises covered by the Policy is located at 941 Prichard Avenue, West Chester, Pennsylvania, 19382. (Id.) The Policy provides the following property coverages:

> **SECTION I – PROPERTY COVERAGES**
>
> **A. Coverage A – Dwelling**
>
> **1.** We cover:
>
> **a.** The dwelling on the "residence premises" shown in the Declarations, including structures attached to the dwelling; and
>
> **b**. Materials and supplies located on or next to the residence premises used to construct, alter or repair the dwelling or other structures on the "residence premises."
>
> ***
>
> **C. Coverage C – Personal Property**
>
> **1. Covered Property**
>
> We cover personal property owned or used by an "insured" while it is anywhere in the world. . . .
>
> ***
>
> **D. Coverage D – Loss of Use**

***

1. Additional Living Expense

If a loss covered under Section I makes that part of the "residence premises" where you reside not fit to live in, we cover any necessary increase in living expenses incurred by you so that your household can maintain its normal standard of living.

Payment will be for the shortest time required to repair or replace the damage or, if you permanently relocate, the shortest time required for your household to settle elsewhere.

***

(CSMF ¶ 27; Ex. 1, at pp. 3, 5 of form HO 37 03 08 11).

The Policy provides coverage as follows:

SECTION I – PERILS INSURED AGAINST

A. Coverage A – Dwelling and Coverage B – Other Structures

1. We insure against direct physical loss to property described in Coverages A and B.

2. We do not insure, however, for loss:

a. Excluded under Section I – Exclusions;

***

c. Caused by:

***

(6) any of the following:

***

(e) discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against named under Coverage C.

Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

***

C. Coverage C – Personal Property

We insure for direct physical loss to the property described in Coverage C caused by any of the following perils unless the loss is excluded in Section I – Exclusions.

1. Fire or Lightning

2. Windstorm or Hail

***

3. Explosion

4. Riot or Civil Commotion

5. Aircraft

***

6. Vehicles

7. Smoke

***

8. Vandalism or Malicious Mischief

9. Theft

***

10. Falling Objects

***

11. Weight of Ice, snow, or Sleet

***

12. Accidental discharge or Overflow of Water or Steam

***

13. Sudden and Accidental Tearing Apart, Cracking, Burning or Bulging

14. Freezing

***

15. Sudden and Accidental Damage from Artificially Generated Electrical Current

***

16. Volcanic Eruption

***

(CSMF ¶ 28-29; Ex. 1 at pp. 11-12 of form HO 37 08 11).

The Policy contains the following relevant exclusions:

SECTION I - EXCLUSIONS

***

B. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not precluded by any other provision in this policy is covered.

***

3. Faulty, inadequate or defective:

a. Planning, zoning, development, surveying, siting;

b. Design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

> **c**. Materials used in repair, construction, renovation or remodeling; or
>
> **d**. Maintenance;
>
> of part or all of any property whether on or off the "residence premises."
>
> ***

(CSMF ¶ 30; Ex. 1 at pp. 13-14 of form HO 37 08 11)

IV. Legal Standards

A. Standard of Review for Summary Judgment

Summary judgment may be granted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Allegheny Ludlum, LLC v. Liberty Mut. Ins. Co.*, 487 F. Supp. 3d 355, 359 (W.D. Pa. 2020). Facts are material when they "might affect the outcome of the suit under the governing law," and genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is appropriate when a party with the burden of proof fails to produce sufficient evidence to prove their claim. *Saldana v. K-Mart Corp.*, 260 F.3d 228, 232 (3d Cir. 2001). The non-moving party who bears the burden of proof on an issue may not rely on the allegations in its pleadings to survive summary judgment, but instead must set forth sufficient facts showing there is a genuine issue for trial. *Id.*

B. Policy Interpretation

Under Pennsylvania law, the interpretation of an insurance policy is generally a question of law for the court rather than the jury. *401 Fourth Street, Inc. v. Investors Ins. Grp.*, 879 A.2d 166, 171 (Pa. 2005). The court's "primary goal in interpreting a policy, as with any contract, is to ascertain the parties' intentions as manifested by the policy's terms." *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888, 897 (Pa. 2006). In ascertaining

the parties' intent, Pennsylvania courts will not consider merely individual terms, but will read the entire insurance policy as a whole. *Frog, Switch & Mfg. Co. v. Travelers Ins. Co.*, 193 F.3d 742, 746 (3d Cir. 1999).

Words in an insurance policy are given their natural, plain, ordinary meaning, with a court free to consult a dictionary to inform its understanding of terms. *Kvaerner*, 908 A.2d at 897. "[S]hould the policy define certain terms, the court will apply those definitions in construing the policy." *Melrose Hotel Co. v. St. Paul Fire & Marine Ins. Co.*, 432 F. Supp. 2d 488, 495 (E.D. Pa. 2006), *aff'd*, 563 F.3d 339 (3d Cir. 2007). When, as here, the language of the policy is clear and unambiguous, the court must give effect to that language. *Travelers Property Cas. Co. of Am. v. Chubb Custom Ins. Co.*, 864 F. Supp. 2d 301, 312 (E.D. Pa. 2012). Pennsylvania courts will not torture policy language to create ambiguities where none exist, *Sikirica v. Nationwide Ins. Co.*, 416 F.3d 214, 220 (3d Cir. 2005), and a court should read a policy to avoid ambiguities and give effect to all of its provisions. *Melrose Hotel Co.*, 432 F. Supp. 2d at 495.

V. Argument

A. Plaintiffs' Loss is Excluded Under the Faulty Workmanship Exclusion

1. The release of concrete dust is the natural and foreseeable consequence of Newtown Construction's faulty work and does not fall within the "ensuing loss" exception to the faulty workmanship exclusion

The Hanover Policy's faulty workmanship exclusion (B.3.b) excludes coverage for loss caused by faulty, inadequate or defective design, specifications, workmanship, repair, construction, renovation, remodeling, grading compaction. (CSMF, ¶ 30; Ex. 1). The exclusion contains an "ensuing loss" exception that states that "any ensuing loss to property described in Coverages A and B not precluded by any other provision in this policy is covered." (Id.) There is no dispute that Newtown Construction performed faulty work, and that the faulty work caused the

release of concrete dust into the Campanile's home. (*See* CSMF ¶¶4, 16, 32-34). Plaintiffs are not seeking coverage for the concrete work performed by Newtown Construction, but instead argue that the concrete dust that was dispersed throughout their home as a result of Newtown Construction's work is covered under the "ensuing loss" exception to the faulty workmanship exclusion.

Courts have characterized "ensuing loss" provisions as excluding coverage for the costs of correcting the faulty workmanship, but providing coverage for loss caused to other property wholly separate from the defective property itself." *See, e.g. GTE Corp. v. Allendale Mutual Ins. Co.*, 372 F.3d 598, 613 (3d Cir. 2004); *Montefiore Med. Center v. Am. Protect. Ins.*, 226 F. Supp. 2d 470, 479 (S.D. N.Y. 2002)("an ensuing loss provision does not cover loss caused by the excluded peril, but rather covers loss caused to other property wholly separate from the defective property itself."). However, not all damage to property other than the defective work itself is considered "ensuing loss."

The Supreme Court of Pennsylvania has not ruled on the interpretation of the "ensuing loss" provision within the context of a faulty workmanship exclusion contained in a homeowners insurance policy. However, the Superior Court of Pennsylvania has examined the "ensuing loss" exception in the context of the faulty maintenance exclusion (subparagraph d of the exclusion here) and stated that damages that are a natural and foreseeable result of the excluded loss, even if they result to property other than the defective property, are not covered under the "ensuing loss" exception. *See Ridgewood Group, LLC v. Millers Capital Insurance Company*, No. 1138 EDA 2016, 2017 WL 781620, at *5 (Pa. Super. Feb. 28, 2017).

In *Ridgewood*, the insured had purchased an all-risks policy to cover a residential rental property. *Id.* The Policy contained an exclusion for damage arising from faulty, inadequate, or

defective maintenance, but like the Hanover Policy, the exclusion contained an exception for "ensuing loss." *Id.* at *1. The insured had sustained water damage following a storm which all parties agreed was the result of the insured's faulty or inadequate maintenance of the roof, gutters, and downspouts, as the state of disrepair allowed rainwater and melting snow to overflow the debris-clogged gutter and to flow into the air well and enter the basement of the property. *Id.* at *4. The insured argued that although the rotted state of the roof, gutters, and downspouts caused water to infiltrate the property, the resulting water damage was covered as "ensuing loss" since the property otherwise covered water damage. *Id.* at * 4.

Noting the absence of any binding authority interpreting the 'ensuing loss" provision, the court looked to case law from the Sixth Circuit analyzing a similar "ensuing loss" clause. *Id.* In that case, the Sixth Circuit focused on foreseeability as the purpose of the "ensuing loss" clause, stating:

> The "ensuing loss" clause also fairly could be construed as a causation-in-fact-breaking link in coverage exclusions, establishing that independent, non-foreseeable losses caused by faulty construction are covered.
>
> While the faulty workmanship exclusion applies to loss or damage "caused by or resulting from" the construction defect, the "ensuing loss" provision clarifies that the insurance company could not use the exclusion to avoid coverage for losses remotely traceable to an excluded cause. . . . If, say, the water leak in this case had shorted an electrical socket and started a fire, any fire damage would be covered in light of the "ensuing loss" clause. Thus, if, on the one hand, the damage came "naturally and continuously" from the faulty workmanship, "unbroken by any new, independent cause," the exclusion applies and the ensuing loss provision does not. *But if, on the other hand, the later-in-time loss flows from a non-foreseeable and non-excluded cause, it is covered. In this instance, because defective wall construction naturally and foreseeably leads to water infiltration, the language of the exclusion, not the exception to the exclusion, ought to apply*.

Id. at *4, (quoting *TMW Enterprises, Inc. v. Federal Ins. Co.*, 619 F.3d 574, 579 (6th Cir. 2010) (emphasis added)). The Superior Court agreed with this interpretation, stating "[w]e believe that [the] Sixth Circuit's interpretation of an ensuing loss clause is the correct one. Foreseeability is the

lynchpin of the analysis." *Id.* at *5. The court stated that under this interpretation, the insured's loss would be excluded from coverage if it was a natural and foreseeable loss arising from deficient maintenance, but would be covered if it was not foreseeable. *Id.* The court ultimately concluded that water infiltration was a natural and foreseeable loss arising from the rotted state of the roof and clogged gutter and downspout system (i.e. the faulty maintenance), and therefore was not covered under the Policy. *Id.*

Other courts applying Pennsylvania law have continued to apply this standard. For example, in *Burgunder v. United Specialty Ins. Co.*, No. 17-1295, 2018 WL 2184479, at * 5 (W.D. Pa. May 11, 2018) the court stated that:

> The ensuing loss provision limits the applicability of the maintenance exclusion to only those damages that naturally and foreseeably arose from the exclusion. Thus, if the loss was foreseeable due to defective design, construction, or maintenance, then the loss is excluded from coverage; if, however, the loss was not foreseeable, then there is coverage.

(internal citations omitted). *See also, Stella Prop. Dev. and Event Prod., LLC v. Auto-Owners Ins. Co.,* No. 3:24-cv-60, 2026 WL 221489, at * 10, n. 21 (W.D. Pa. Jan. 28, 2026) ("Moreover, in Pennsylvania, '[f]orseeability is the lynchpin' for applying an ensuing loss provision. Under that framework, 'if a loss was foreseeable due to [an excluded cause], then the loss is excluded from coverage. . . .").

Here, all parties agree that the concrete dust came from the work of Newtown Construction. Ms. Campanile testified that the entire house was covered in a fine white dust that had come from Newtown's Constructions work. (CSMF ¶ 4). She also testified that Newtown Construction acknowledged that the dust came from their work. (CSMF ¶ 16). Plaintiffs' expert also confirmed that the dust came from Newtown Construction's work. He states in his report that "a contractor was performing work at the property while the HVAC system was operating or left exposed," and

that particulates generated from the construction activities were "drawn into the HVAC system through return air pathways and distributed throughout the system." (CSMF ¶¶ 32-43; Ex. 6).

The generation of generation of fine particulate matter such as concrete dust, is a natural and foreseeable result of the concrete work performed by Newtown Construction. The Campaniles told Hanover that Newtown Construction told the work would be noisy and dusty. (CSMF ¶ 8). Plaintiffs' expert agrees that construction work generates dust, stating that "[c]onstruction activities of this nature routinely generate fine particulate matter, including drywall dust, joint compound residue, silica-based particulates from masonry or concrete materials, insulation fibers, and general construction debris." (CSMF ¶ 30; Ex. 6 at p.4). Indeed, litigation over dust generated from construction operations exists across many jurisdictions. *See Love Lang v. FCCI Ins. Co.*, 530 F. Supp. 3d 1299 (N.D. Ga. 20201); *Clarendon Am. Ins. Co. v. Bay Inc.*, 10 F. Supp. 2d 736 (S.D. Tex. 1998); *Devcon Intern. Corp. v. Reliance Ins. Co.*, 609 F.3d 214 (3d Cir. 2010).

Given the fact that construction work ***routinely*** generates fine particulate matter including dust, it was clearly foreseeable that concrete dust would spread throughout the home when Newtown Construction performed concrete work, especially when that work was done in proximity to an operating and exposed HVAC system. Accordingly, the concrete dust was a natural and foreseeable result of an excluded cause of loss – faulty workmanship – and as such, there is no coverage for the Campaniles' claim.

2. The concrete dust release by Newtown Construction's work is a pollutant and therefore does not fall within the "ensuing loss" exception to the faulty workmanship exclusion

Additionally, in order to fall within the "ensuing loss" exception to the faulty workmanship exclusion, the damage must not be precluded by any other provision in the Policy. (CSMF, ¶ 30; Ex. 1). Here, the concrete dust is precluded by the pollution exclusion – exclusion 2.c.(6). The

pollution exclusion excludes coverage for "discharge, dispersal, seepage, migration, release or escape of pollutants. . . ." (CSMF ¶ 23; Ex. 1). The Policy defines a pollutant as any "solid, liquid, gaseous or thermal ***irritant or contaminant***, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. (Id.) (emphasis added).

The Superior Court of Pennsylvania has defined an "irritant" as a "biological, chemical, or physical agent that stimulates a characteristic function or elicits a response, especially an inflammatory response." *Matcon Diamond, Inc. v. Penn Nat. Ins. Co.*, 815 A.2d 1109, 1113 (Pa. Super. 2003) (quoting *Municipality of Mt. Lebanon,* 778 A.2d 1228, 1231-1232 (Pa. Super. 2001). A "contaminant" has been defined as something which renders another thing impure or unsuitable by contact or mixture. *Id.*; *see also, Mt. Lebanon*, 778 A.2d at 1233 (a "contaminant" has been defined as "something that contaminates" while the verb to "contaminate" is defined as "to render impure or unsuitable by contact or mixture with something unclean, bad, etc.") (quoting Webster's New Universal Unabridged Dictionary (1989)).

Plaintiffs and their expert have argued that Hanover cannot rely on the pollution exclusion because the pollution exclusion does not contain the word "silica," or "dust." However, the fact that the exclusion does not contain these words does not mean the exclusion does not apply. "Pennsylvania courts . . . have consistently construed pollution exclusions to be unambiguous even when the pollutant at issue is not listed in the exclusion." *Travelers Prop. Cas. Co. of America v. Chubb Custom Ins. Co.*, 864 F. Supp. 2d 301 (E.D. Pa. 2012). Here it is irrelevant that the exclusion does not list "silica" or "dust" in the definition of "pollutant" because the policy specifically defines a "pollutant" to include any solid, liquid, or gaseous ***irritant or contaminant***, and the dust at issue here clearly was both an irritant and a contaminant.

The Supreme Court of Pennsylvania has held that pollution exclusions like those contained in the Policy here are unambiguous and operate to preclude coverage for property damage arising out of the discharge, dispersal, or similar movement of irritants and contaminants. For example, *in Madison Constr. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 109-110 (Pa. 1999), the insured was sued by an employee of the insured's subcontract, who was injured when he fainted and fell after being overcome by fumes from a concrete sealer being used in an enclosed area. The insurer argued that the claim arose from the release of the fumes from the sealant, and was therefore excluded under the policy's pollution exclusion, which contains language identical to the pollution exclusion contained in the Hanover Policy. *Id.* at 107. The court noted that the material safety data sheets on the product advised that the product's vapors may be irritating, that exposure to such vapors may cause central nervous system effects, vertigo, muscular weakness, narcosis, and confusion, and that inhalation of dusts and vapors from the product should be avoided. *Id.* at 607. The court accordingly found that "the definition of pollutant in the Harleysville policy, ***including as it does 'any . . . irritant***,' clearly and unambiguously applies to the product in question." *Id.* at 607- 608 (emphasis added).

The Third Circuit has specifically found that construction dust is a an irritant and therefore a "pollutant" despite the fact that the word "dust" did not appear in the policy's definition of a "pollutant." In *Devcon Intern. Corp. v. Reliance Ins. Co.*, V.I. Cement was hired to act as general contractor on a project to extend the sole runway at the Virgin Islands Port Authority's airport. 609 F.3d 214 (3d Cir. 2010).[2] Construction generated large quantities of dust which drifted over property belonging the plaintiffs in the underlying action and allegedly contaminated their drinking

[2] Although the court applied Virgin Islands law it cited to and relied upon Pennsylvania case law, including its decision in *Reliance Ins. Co. v. Moessner*, 121 F.3d 895 (3d Cir. 1997) which applied Pennsylvania law, noting that both Pennsylvania and the Virgin Islands follow the same guiding principles for the interpretation of insurance contracts. *See,* 609 F.3d 214, at 219.

water and cisterns and caused breathing disorders. *Id.* at 216. The insured argued that the scope of the pollution exclusion was ambiguous and that it must be construed to provide coverage. *Id.* at 217.

The court rejected this argument. *Id.* at 222. The court noted that the underlying claimants alleged that particulate dust generated at the airport construction site caused a variety of personal and property injuries, namely breathing disorders, and groundwater contamination, which were directly caused by the dust's alleged tendency to irritate the plaintiffs' respiratory systems. *Id.* at 220. It stated:

> The policy excludes coverage for injuries that result from the "release" of any "solid . . . irritant or contaminant." The plaintiffs in the underlying action allege that particulate dust generated at the airport site has caused a variety of personal and property injuries, namely breathing disorders and groundwater contamination. Those injuries are directly caused by the dust's alleged tendency to irritate plaintiffs' respiratory systems. . . We conclude that the exclusion means what its plain language says: that the policy provides no insurance coverage when bodily injury or property damage results from airborne solids and fumes such as the dust clouds and engine exhaust complained of in the underlying action.

Id. at 219-20.

Plaintiffs alternatively argue that Hanover cannot rely on the pollution exclusion because Hanover did not test the dust to determine if it contained silica. However, as set forth above, the Policy's definition of "pollutant" does not hinge on the presence of silica; any solid irritant or contaminant qualifies. (*See* CMSF ¶28). Even naturally occurring substances can be considered "pollutants." For instance, in *Devcon,* the insured argued that the dust was a naturally occurring byproduct of the construction work, and because dust was "the stuff St. Croix is made of" it was not a pollutant. *Id.* at 222. The court rejected this argument, noting that whether a substance is a pollutant depends on the context, including whether the substance causes harm once dispersed. *Id.* at n. 7. It stated: "[t]he clouds of dust that engulfed parts of the American Midwest during the

Great Depression were no less choking because they were the stuff that Oklahoma was made of than had they been something other than dust." *Id.*

Numerous courts in other jurisdictions have also held that dust, and more specifically concrete dust, is a pollutant within the context of a pollution exclusion, regardless of whether the dust was found to affirmatively contain silica. For example, in *Clarendon America Ins. Co. v. Bay, Inc.*, the court found that claims against the insured - alleging bodily injury as a result of contacting and inhaling dust, sand, gravel, and other particulates - fell within the exclusion for discharge, dispersal, migration, release or escape of pollutants, because the dust, sand, gravel, tile, concrete, cement, silica, fumes, and other particulates qualified as solid or gaseous irritants or contaminants. 10 F. Supp. 2d 736, 744 (S.D. Tex. 1998); *see also, Mt. Hawley Ins. Co. v. Wright Materials, Inc.*, No. 3-03-CV-2729- BD, 2005 WL 2805565, at *3-4 (N.D. Tex. Oct. 27, 2005)("The court has little difficulty in concluding" that injuries caused by the exposure to dust generated by cement and ready-mix concrete were excluded from coverage because "the cement dust and any toxins contained therein are irritants or contaminants under the terms of the pollution exclusion.").

In *Allen v. Scottsdale Ins. Co.*, the court found that dust particles released by the insured's concrete crushing operations were pollutants as defined by the policy's unambiguous pollution exclusion. 307 F. Supp.2d 1170 (D. Haw. 2004), Similarly, in *Broome County v. Travelers Indem. Co.*, the court found that the coverage for property damage caused by the insured's failure to erect adequate dust barriers while performing construction work on a parking garage resulting in the spread of dust throughout the plaintiff's property was excluded under the policy's faulty workmanship exclusion as well as the policy's pollution exclusion. 125 A.D.3d 1241, 1241-42 (N.Y. App. Div. 2015).

Here, it would be an illogical argument indeed for Plaintiffs to claim that the substance that they claim made residing in their property unsafe because of its potential to cause health hazards including respiratory irritation and inflammation, was somehow not an irritant and contaminant, especially where their own expert has said that it is. Plaintiffs' expert unequivocally stated that the concrete dust present in the Campanile's home was an irritant and "a recognized respiratory hazard that is associated with respiratory irritation, exacerbation of asthma and allergies, and chronic bronchitis." (CSMF ¶ 35). In his expert report he called the concrete dust a "contaminant," multiple times, and characterized the concrete dust as "contaminating" surfaces in the Campanile's home. (CSMF ¶ 33-36; Ex. 6).

For example, Mr. Zisa argued that the HVAC system in the Campanile's home had to be replaced because attempts to clean the residential HVAC components cannot guarantee complete removal of embedded material, and that "[c]ontinued circulation and settlement of ***contaminated*** dust therefore presents an ongoing health and safety risk to occupants, particularly children, elderly individuals, and those with pre-existing respiratory conditions." (Ex. 6, p. 4) (emphasis added). He opined that replacing the HVAC system alone would not be enough because construction dust and fine particulate matter settled throughout the interior of the residence during the period in which the HVAC circulated the "***contaminated air***" and normal activities would reintroduce the dust into new HVAC system. (Id. p. 5) (emphasis added). Accordingly, he opined that the Campanile's personal property had to be replaced because:

> Attempted cleaning may leave residual ***contamination*** and creates a risk of re-aerosolization during normal use, handling, or laundering. Given the hazardous nature of the dust . . . . contents and personal property that were exposed to and ***contaminated*** by construction dust must therefore be considered non-salvageable and replacement of these items is necessary to eliminate ongoing health risks, prevent reintroduction of ***contaminants*** into the indoor environment and fully remediate the loss.

(Id.)(emphasis added). Ms. Campanile also testified that every single restoration company she spoke with told her that it was not safe to reside in her home because the dust could cause adverse health effects. (CSMF ¶ 14). She testified that she began feeling ill after inhaling the concrete dust, including experiencing coughing, sneezing, headaches, and fatigue. (Id.).

Since both the Campaniles and their expert have stated that the construction dust was a "contaminant" and an "irritant" which did cause irritation to Ms. Campanile's respiratory system (i.e. coughing, sneezing), the construction dust generated and released by Newtown Construction during its work on the Campaniles' property is clearly a "pollutant" as defined in the pollution exclusion. Accordingly, there is no coverage for the Campaniles for their claim.

VI. Conclusion

For the reasons set forth herein, Plaintiffs cannot meet their burden of establishing that Hanover breached the insurance contract. The Campaniles' claimed loss was caused by the faulty workmanship of the contractor hired to do concrete work at their property. The release of concrete dust throughout their home was a natural and foreseeable result of the construction work and thus the exception for "ensuing loss" does not apply. Even if the release of this dust could be considered "ensuing loss" there is no coverage because the dust is a pollutant and therefore excluded by the pollution exclusion. Hanover accordingly respectfully requests that the court grant its motion and enter summary judgment in its favor and against Plaintiffs.

Dated:

Respectfully submitted,

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