

No. 1-12-2158

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

DELTA TECHNICAL PRODUCTS LABORATORY)	
INVESTMENT RECOVERY, INC., an Illinois)	
Corporation,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 09 CH 23255
)	
HARTFORD CASUALTY INSURANCE COMPANY,)	
)	Honorable
)	Richard J. Billik,
Defendant-Appellee.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices McBride and Taylor concurred in the judgment.

ORDER

¶1 *Held:* We affirm the circuit court's order granting summary judgment in favor of Hartford, denying Delta's motion for summary judgment and motion to amend the complaint, and entering judgment in favor of Hartford.

¶2 Plaintiff, Delta Technical Products Laboratory Investment Recovery, Inc., appeals from the circuit court's June 25, 2012, order granting summary judgment in favor of defendant, Hartford Casualty Insurance Company, denying Delta's motion for summary judgment and

motion to amend the complaint, and entering judgment in favor of Hartford. On appeal, Delta contends that the circuit court's decision was erroneous because the damage to its business personal property was covered under its insurance policy as it was caused by a sanitary sewer blockage, the policy language was ambiguous, and the court erroneously shifted the burden to Delta. Delta further argues that Hartford engaged in vexatious and unreasonable claims practice. For the reasons that follow, we affirm.

¶3

BACKGROUND

¶4 Delta, a manufacturer of scientific equipment, leased a building at 1777 Busse Highway in Des Plaines, Illinois. Delta brought suit on July 13, 2009, against Hartford, its commercial insurance provider, after Hartford denied its claim for \$1,496,300 in business personal property damage which Delta incurred in September 2008 during a significant rainstorm. Delta's complaint sought a declaratory judgment for coverage of its claim under the insurance policy and reimbursement for fees and costs. Delta alleged that Hartford determined that the damages and loss were caused by flooding due to the substantial rains which fell from September 12 to 14, 2008, and that Delta's policy did not cover flood damage. Delta asserted that the damage was caused by a sewer backup, and the sewer and drain back up endorsement in the policy provided coverage. Delta also asserted that the backup was due to the city of Des Plaines closing a storm sewer valve, which caused water that should have been directed to the Des Plaines River to overflow the sewers. Delta submitted a property loss form to Hartford on September 24, 2008, regarding its insurance claim. Delta indicated on the form under "description of loss & damage" that "storm caused various water damage to insured's property."

¶5 In response to Delta's complaint, Hartford raised affirmative defenses based on several provisions of the insurance policy. Hartford cited as a defense the exclusion set forth in the

special property coverage form:

"B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes or in any sequence to the loss.

* * *

f. Water

(1) Flood, including the accumulation of surface water, waves, tides, tidal waves, overflow of streams or other bodies of water, or their spray, all whether driven by wind or not;

* * *

(3) Water that backs up from a sewer or drain; or

(4) Water under the ground surface pressing on, or flowing or seeping through:

(a) Foundations, walls, floors or paved surfaces;

(b) Basements, whether paved or not

(c) Doors, windows or other openings."

¶6 In addition, Hartford argued that Delta's claim was barred by paragraph 16 in the sewer and drain back up endorsement in the policy:

"THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SUPER STRETCH FOR BUSINESS SERVICES

This endorsement modifies insurance provided under the following:

STANDARD PROPERTY COVERAGE FORM

SPECIAL PROPERTY COVERAGE FORM

Except as otherwise stated in this endorsement, the terms and conditions of the policy apply to the insurance stated below.

A. The following changes apply to the Standard Property Coverage Form, Additional Coverages, A.4., or to the Special Property Coverage Form, Additional Coverages, A.5.:

* * *

16. Sewer and Drain Back Up

The following Additional Coverage is added:

We will pay for direct physical loss or physical damage to Covered Property at the 'scheduled premises' solely caused by water that backs up from a sewer or drain.

This coverage is included within the Covered Property Limits of Insurance.

THIS IS NOT FLOOD INSURANCE

We will not pay for water or other materials that back up from any sewer or drain when it is caused by any flood. This applies regardless of the proximity of the flood to Covered Property. Flood includes the accumulation of surface water, waves, tides, tidal waves, overflow of streams or other bodies of water, or their spray, all whether driven by wind or not."

¶7 On August 26, 2011, Delta moved for summary judgment pursuant to section 2-1005 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1005 (West 2010). Delta argued that although heavy rains caused the Des Plaines River to crest above flood stage and may have contributed to the back up of Delta's sanitary sewer line, the policy nevertheless provided

coverage. Delta asserted that the only line entering its facility was the sanitary sewer line, so the rain and the separate storm sewer line could not have affected its sanitary sewer line. Delta argued that Hartford failed to prove causation due to flooding. Delta conceded that the sewer and drain back up endorsement excluded coverage for the cost of removing water and debris, but Delta maintained that the language of the endorsement nonetheless covered damage caused by water and debris. Delta asserted that to the extent the endorsement was ambiguous, it should be construed in Delta's favor. Lastly, Delta asserted that Hartford's inadequate investigations and summary denial of its claim constituted vexatious and unreasonable claims practice, and Hartford should have to pay attorney fees and statutory damages pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2008)).

¶8 In support of its motion, Delta cited internal emails and journal entries by Hartford employees discussing Delta's claim in arguing that Hartford performed an inadequate investigation and denied coverage without direct evidence. Delta also provided letters which Hartford sent to Delta, dated October 6, 2008, and February 19, 2009, informing Delta of its decision to deny the claim. In the October letter, Hartford indicated that the investigation of its adjuster "determined that the sewer backed up due to flood" and the loss was not covered under Delta's policy of insurance. In the February letter, Hartford stated that it had again sent an adjuster to re-inspect the site and reviewed the circumstances, but again denied coverage after determining that the damage was "caused by the sewer back up was due to flooding. There was no blockage in the sewer lines at the time of the loss." Hartford noted that it had contacted the city engineer of Des Plaines, "who advised us that a flood control project in your area has not yet been completed & tied into the flood control system. Therefore – the over abundance of water in the storm sewer system caused localized flooding in the area."

¶9 Also in support of its motion, Delta provided affidavits from its president, Frank Froegel, and vice president, Michael Pizza, its neighbor Mid-States Recycling, and John LaBerg, the city engineer for the city of Des Plaines. In Pizza's affidavit, he averred that he and Froegel left the facility on the evening of Friday, September 12, 2008, and that Des Plaines received 6.43 inches of rain on September 13, 2008, and 1.12 inches of rain on September 14, 2008. He averred that when he arrived Monday morning, September 15, 2008, there was rainwater backed up on the street near the storm drain in front of the building, but it was not high enough to reach the door of the building. Pizza averred that when he opened the door to the building, water poured out, and there was about 18 inches of water inside "that had backed up from the sanitary sewer drains inside the facility." Pizza averred that the river had crested above flood stage 16 times in the 21 years he had been at the facility, but this was the first time that water backed up in the sanitary sewer drain. Pizza further averred that Mid-States Recycling, one of Delta's neighbors, experienced no sanitary sewer line back up and they shared the same sewer line. Pizza averred that all of Delta's drains went into the Des Plaines sanitary sewer, and that the storm sewer was not connected to their building. Froegel's affidavit set forth substantially similar statements.

¶10 The affidavit of Mid-States Recycling, which was located on the same side of the street as Delta at 1841 Busse Highway, indicated that they were unaware of any water backing up through their sewer line into their facility during that time period in September 2008.

¶11 LaBerg averred that the storm sewer system and sanitary sewer system along Busse Highway near Delta's building were completely separate from each other and "the storm sewer line ends with a backflow valve at the culvert near 1777 Busse Highway. When the river reaches a certain level of overflow it closes the valve so that the river water cannot back up through the storm sewer line onto Busse Highway." La Berg averred that the storm sewer system did not

connect to the drains inside 1777 Busse Highway.

¶12 In addition, Delta appended two inspection reports from Crawford & Company, prepared by adjuster Matthew Sleyko for Hartford. The first, dated October 1, 2008, indicated that the facility was inspected on September 30, 2008. Sleyko recommending denying the claim because "water backup is not covered if a flood activity has taken place." The report provided:

"During our inspection for the risk we observed that water entered the risk through floor drains and under doors of the risk. The insured informed us when they arrived at the risk after the loss and the street was flooded to a depth of two feet. The water was up against the side of the building. The insured has many floor drains at the risk. We are certain that some water did come through the floor drains of the risk due to the large amount of rainfall in the area. The insured's risk is approximately 100 yards from the Des Plaines River which did flood the area of the risk."

¶13 In the second report, dated December 1, 2008, the following remarks were included: "[W]e found that the building directly across the street from the risk did experience a water backup in the basement. The owner of the Metro Self Storage informed our office that no water came into the risk from the street. All of the water did come through the basement floor drains. This property is higher than the risk and therefore was spared from the flood waters.

The property next door to the north of the risk did experience a flood. *** When speaking [with] the owner of Hi-Tech Auto Body we were informed that they did get flood waters through the front door of the building. The water was approximately 1.5 feet high in the building. The owner informed us that they did report this claim to their broker. They were informed by their broker that this was a flood and that they were not

covered for flood. This building is right next door to the risk. Therefore we feel that the cause of the loss to this building was flood just as the cause of loss was to the risk.

It was first reported that the flood waters came from the Des Plaines River. This was not the case because the Chicago Northwestern Railroad tracks are between the risk and the river on a ten foot high berm. The waters were merely collecting in the streets because the sewers in this area could not handle the rain waters. We still believe that the waters came from the collection of rain in the street that entered the risk under the doors."

¶14 This report was accompanied by several photographs of Delta's facility and the surrounding area.

¶15 Hartford submitted a combined response to Delta's motion for summary judgment and a cross-motion for summary judgment, asserting that there was no genuine issue of material fact in dispute and no coverage existed as a matter of law. Hartford objected to the affidavits of Pizza and Froegel, arguing that their statements were not based on personal knowledge and constituted inadmissible hearsay. Hartford contended that during the period from September 13 to September 14, 2008, Busse Highway and the building flooded due to the heavy rainfall and if the interior drains backed up, this was caused by the storm-related flooding, and Delta failed to provide any evidence that there was a blockage in its drains. Hartford argued that the policy excluded coverage for damage caused directly or indirectly by flood; the endorsement specifically provided that it was not flood insurance and would cover damage solely caused by water that backed up from a sewer or drain. Hartford pointed out that the highway was under approximately 1 ½ feet of water, which was approximately 10 inches above the level of Delta's first floor elevation, the city received hundreds of complaints about flooding, Delta's neighbor Hi-Tech also experienced flood damage and the manager saw the water in the street, and LaBerg

indicated that during a storm with a large accumulation of surface water, the city storm sewer system would become overrun with rain water and would enter into the sanitary sewer system.

With respect to Delta's contention that Hartford's denial was unreasonable and vexatious, Hartford countered that this claim was not included in the complaint or in a motion to amend the complaint, and that Hartford's decision was based on reasonable and legitimate policy defenses.

¶16 In support of its response and cross-motion, Hartford provided several photographs of the area dated September 15, 2008. Hartford also appended a December 2011 report prepared for Hartford for purposes of the litigation by Christopher B. Burke Engineering, Ltd., regarding the September 13, 2008, flooding of Delta's building. The report indicated that an inspection of Delta's building and the surrounding area was performed on September 16, 2011, with Delta staff present. The report noted that there were numerous floor drains inside the building, and there were several entry doors that would have allowed water from Busse Highway to enter the building during the flooding, including the front door, a garage door, a side door, and the rear door. There was a storm sewer across from Delta's building on Busse Highway and another one next door at 1765 Busse Highway. The catchbasin in front of Delta's building drained across the street into the storm sewer, which flowed northwest until the intersection of Busse Highway and US 14, where it turned and crossed under the railroad embankment, and discharged into a culvert on the other side of the railroad. There was a tide flex valve at that location to prevent floodwater from the Des Plaines River from entering the storm sewer. The sanitary sewer system, which served four buildings in that area, drained to the Metropolitan Water Reclamation District sewer.

¶17 Further, the report related that 6.43 inches of rainfall were recorded at O'Hare International Airport from late September 12 to the end of September 13, 2008, and 1.4 inches of

rainfall were recorded on September 14, 2008. Based on this information and the photographs, Burke calculated that the peak flood elevation on Busse Highway reached approximately 630 feet. The building's first floor elevation was 629.16 feet, which was a difference of 0.84 feet, or approximately 10 inches. The report indicated that the Des Plaines River reached a peak height of 631.3 feet on September 14, 2008, and that before 5 a.m. on September 13, 2008, the river "reached an elevation that would start restricting the outflow from the Busse Highway storm sewer." Burke reasoned that the sanitary sewer was operating normally and there had been "no blockage or collapse of the sewer during the flood event" because "of the limited number of buildings that discharge to the Busse Highway sanitary sewer" and it was still functioning "after the September 13, 2008, flood event." Additionally, Burke reported that

"The Busse Highway floodwaters also were on top of at least two of the sanitary sewer manholes with a depth of approximately 1.7 feet. Because of the substantial storm water volume on top of the sanitary sewer system, infiltration of floodwaters into the sanitary sewer manholes and cracks in the sanitary sewer clay pipes occurred. Because of the small diameter of the sanitary sewer, the Busse Highway floodwaters that entered the sanitary sewer caused it to quickly fill to capacity. This condition resulted in the sanitary sewer backing up storm water through the Building's various flood drains. This backup was induced by the storm water located on Busse Highway."

¶18 Burke concluded that due to the intense rainfall and the river's flood elevation restricting the storm sewer capacity, the rainfall began to flood Busse Highway. Thus, Burke estimated that the floodwaters on Busse Highway reached an elevation of 630 feet on September 13, 2008, at which point the water entered Delta's building "through its various doors since the floodwaters were 10 inches above the Building's first floor elevation." In addition, the "storm water that

inundated Busse Highway infiltrated the sanitary sewer through the manholes and clay pipe cracks causing storm water to backup through the Building's floor drains." Burke indicated that the conclusions and opinions in the report were "based upon the available information, my education, training and experience, and are expressed to a reasonable degree of engineering certainty."

¶19 Hartford also appended the deposition testimony of Eugene Tsurkis (a manager and co-owner of Hi-Tech), LaBerg, Froegel, and Pizza to its response and cross-motion. Tsurkis testified that Delta was about two or three yards from Hi-Tech's building. Tsurkis testified that he drove to the area after an employee reported water around the building because of the storms. He could not drive up to the building or down Busse Highway because of the water, and there was a sign indicating that the street was closed. Tsurkis indicated that he could not walk up to the building because there was water around the building and "the street was under water." Tsurkis testified that "[p]robably the next building was under water, too. I mean, not building but it's mostly the street was under water. I am not sure if buildings was *[sic]* but street. We got all buildings on side *[sic]* of the street, and the street was *[sic]* everything under water." When he was able to enter Hi-Tech's building a few days later, the floor and equipment had been damaged by water, and there was a visible water line about six inches high on some of the walls.

¶20 LaBerg testified that he had been a civil engineer for Des Plaines for 22 years and was familiar with prior floods and the storm and sanitary sewer systems in Des Plaines. LaBerg went to Busse Highway on September 13, 2008, and estimated there was 1 to 1 ½ feet of water in the road. The city placed "road closed" signs on Busse Highway and received 200 to 300 complaints about flooding relating to the September 2008 storm. Viewing a photograph of Mid-States Recycling, he indicated that it showed storm water coming up through the sewers and eddying

around. LaBerg explained that the storm sewer system, which collected water along Busse Highway and carried it under the railroad embankment to the culvert on the other side, could only handle so much capacity. The culvert had a tide flex valve or a one-way valve which would automatically close when the river level became too high, and it would not let water pass in either direction. Before the valve closed, some water from the river could enter into the storm sewer and end up on Busse Highway. He testified that although the sewer and sanitary systems were separate, a large accumulation of surface water or flood event could cause water to get into the sanitary system if "it flooded over the sanitary manholes and actually leaked around the rims *** and fill up the sanitary manholes. And that, in turn, would fill up the sanitary lines and cause sewage backup." LaBerg testified that the sanitary sewer system could also become backed up from a blockage or debris, but "that's very rare" and he was not aware of that sanitary sewer backing up in the past.

¶21 When asked if the September 2008 storm could have "created a storm-induced sanitary backup at Delta Technical," LaBerg testified "Sure. I don't know if it did, but it definitely could." LaBerg testified that during another flood in 2011, the city received 1,400 calls and 95% related to sewage backup, but "they would not have had that without a storm. So they pretty much go hand in hand." In addition, LaBerg testified that the 18 inches of water in Delta's building could have not only come through the sanitary sewer, but also come "overland *** through ** doors and ** walk-out doors or garage doors. Or even seep under, you know, between the bricks and foundation itself." Based on the level of the water in the street and the level of Delta's building, LaBerg believed the water came in from a combination of the street (underneath doors or seeping through the foundation) and the sanitary sewer. "It probably came from the street, just from my knowledge of the area, and from both. I would love to say it came

from one or the other, but I think it was such a—just such a big storm that it's almost impossible to tell."

¶22 Delta subsequently moved to amend its complaint to add a count of unfair claims practice pursuant to section 155 of the Insurance Code. Following additional briefing by the parties, oral arguments were held on May 30, 2012. Notably, Delta asserted during the hearing that the damage was solely caused by back up from a sewer or drain, because once the water entered the sanitary sewer it no longer had the identity of being surface water accumulation.

¶23 On June 25, 2012, the circuit court granted Hartford's motion for summary judgment, denied Delta's motion for summary judgment and motion to amend the complaint, and entered judgment in favor of Hartford. In its written opinion, the circuit court found that Hartford had established that there was "no genuine issue of material fact that any sewer or drain back up that occurred was indeed the result of flooding." The court held that the photographs created a reasonable evidentiary inference regarding the extent of the flooding near Delta's building, and that this evidence, along with the testimony of Tsurkis and the opinions of Burke and LaBerg, established that there was no genuine issue of material fact that the rainstorms over the weekend of September 13, 2008, caused the accumulation of surface water on Busse Highway, and these flooding conditions caused water to back up in a sewer or drain in Delta's building and also caused water to enter its building through its doors or other openings. The court held that the loss was not covered under the policy or the sewer and drain back up endorsement. The court found Delta's interpretation of the endorsement unreasonable. The court concluded that Delta had failed to establish, for purposes of its motion and pursuant to the endorsement, that the water back up was solely caused by sewer or drain back up, unrelated to any flood, and Hartford's evidence was uncontroverted. With respect to Froegel's and Pizza's affidavits, the court held that

they contained statements which were conclusory, not based on personal knowledge, and constituted inadmissible hearsay, and thus could not be used to contradict Hartford's evidence.

The court also held that Delta had not shown that Hartford engaged in unreasonable and vexatious claims practice and no genuine issue of material fact existed regarding Delta's section 155 claim. This appeal followed.

¶24

ANALYSIS

¶25 "[S]ummary judgment is proper only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49 (citing 735 ILCS 5/2–1005(c) (West 2000)). We review the circuit court's decision *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶26 As summary judgment is a drastic measure, the moving party's right must be "clear and free from doubt." *Mashal*, 2012 IL 112341, ¶ 49. "[T]he moving party has the burden of production on a summary judgment motion, and the moving party's affidavits may be contradicted by deposition testimony or other evidence." *Id.* "Mere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328 (1999). When a party fails to contradict, by counter-affidavit or deposition, statements in the depositions or affidavits presented by the moving party, the statements are taken as true for purposes of a summary judgment motion. *Purtill v. Hess*, 111 Ill. 2d 229, 241 (1986). As in this case, where both parties filed cross-motions for summary judgment, "they concede the absence of a genuine issue of material fact and invite the court to decide the questions presented as a matter of law." *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill.

App. 3d 749, 755 (2005) (citing *Continental Casualty Co. v. Law Offices of Melvin James Kaplan*, 345 Ill. App. 3d 34, 37-38 (2003)).

¶27 This case also involves the interpretation of an insurance policy contract, which presents an issue of law that is reviewed *de novo*. *Crum & Forster Managers Corp. v. Resolution Trust Corp.*, 156 Ill. 2d 384, 391 (1993). "[T]he rules applicable to contract interpretation govern the interpretation of an insurance policy." *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424, 433 (2010). Our primary objective is to give effect to the intent of the parties. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 362 (2006). We construe the policy as a whole, giving effect to every provision and applying unambiguous policy language as written. *Id.* at 363. "Under general rules of construction, where policy provisions are unambiguous, the court must give the words of the provisions their plain and ordinary meaning." *Indiana Insurance Co. v. Liaskos*, 297 Ill. App. 3d 569, 573 (1998). "A policy term is not ambiguous simply because a term is not defined within the policy." *Id.* "Ambiguity exists in an insurance contract if the language is subject to more than one reasonable interpretation, but we will not strain to find an ambiguity where none exists." *Abram v. United Services Automobile Ass'n*, 395 Ill. App. 3d 700, 703 (2009). "Although policy terms that limit an insurer's liability will be liberally construed in favor of coverage, this rule of construction only comes into play when the policy is ambiguous." *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17 (2005).

¶28 Initially, we note that, in asserting that the cause of the backup was a blockage in the sewer line, Delta argues that the trial court erroneously saddled it with the burden of proving that a blockage existed and disproving that flooding was a concurrent cause. Delta argues that it was not obligated to prove that a blockage existed and that it was Hartford's burden to prove that

flooding was the cause. However, our supreme court "has long established that the burden is on the insured to prove that its claim falls within the coverage of an insurance policy. [Citation.]

Once the insured has demonstrated coverage, the burden then shifts to the insurer to prove that a limitation or exclusion applies." *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453-54 (2009).

As Delta claimed coverage under the sewer and drain back up endorsement, it was rightfully its burden to establish coverage thereunder. Similarly, the plaintiff in a declaratory judgment action bears the burden of proof, regardless of whether the plaintiff is the insured or the insurer.

Farmers Auto Insurance Ass'n v. Gitelson, 344 Ill. App. 3d 888, 896 (2003). See also *Reedy Industries, Inc. v. Hartford Insurance Co. of Illinois*, 306 Ill. App. 3d 989, 994 (1999) (finding that, in order to withstand an insurer's motion for summary judgment, the insured must "come forward with some evidence that its claim falls within the terms of the policy.")

¶29 Turning to the policy language at issue, as previously set forth, the sewer and drain back up endorsement provides that there is coverage for "direct physical loss or physical damage" where it is "*solely* caused by water that backs up from a sewer or drain." (Emphasis added.) The endorsement also states in bold, capital letters that "**THIS IS NOT FLOOD INSURANCE.**" In addition, the endorsement further directs that Hartford "will not pay for water or other materials that back up from any sewer or drain when it is caused by any flood. This applies regardless of the proximity of the flood to Covered Property. Flood includes the accumulation of surface water, *** [and] overflow of streams or other bodies of water."

¶30 Further, as previously stated, the terms of the exclusion provision provide that there is no coverage for loss or damage caused "directly or indirectly" by flood, including "the accumulation of surface water, *** overflow or streams or other bodies of water, or their spray, all whether driven by wind or not"; "[w]ater that backs up from a sewer or drain"; and "[w]ater under the

ground surface pressing on, or flowing or seeping through *** [f]oundations, walls, floors[,] *** [d]oors, windows or other openings." The policy provides that any loss or damage is not covered even if another cause or event contributed to the loss.

¶31 Courts have defined the term "flood" in relation to insurance policy language by referring to the "plain and ordinary meaning" of this term as set forth in the dictionary: "The common meaning of a flood is 'a rising and overflowing of a body of water that covers land not usu[ally] under water.'" *Wallis v. Country Mutual Insurance Co.*, 309 Ill. App. 3d 566, 572 (2000) (quoting Black's Law Dictionary 1585 (7th ed. 1999)). Additionally, courts have defined "surface water" as "water that (1) derives from natural precipitation such as rain or melting snow; (2) flows over or accumulates on the surface of the ground; and (3) does not form a definite body of water or follow a defined watercourse." *Smith v. Union Automobile Indemnity Co.*, 323 Ill. App. 3d 741, 748 (2001).

¶32 Delta argues that defining the water backed up in its building as a "flood" for purposes of the insurance policy effectively renders the terms of the policy fraudulent and illusory. Delta argues that the definition of "flood" used by our courts in other insurance claim cases should not apply here because the policy contained a separate endorsement for sewer and drain back up. However, when the words of a policy are unambiguous, we " 'must afford them their plain, ordinary, and popular meaning.' " (Emphasis in original.) *Smith*, 323 Ill. App. 3d at 747 (quoting *Outboard Marine*, 154 Ill. 2d at 108). The "plain, ordinary, and popular meaning" of a word is " 'that meaning which the particular language conveys to the popular mind, to most people, to the average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business[person], or to a lay[person].' " *Outboard Marine*, 154 Ill. 2d at 115 (quoting 2 Couch on Insurance ¶ 15:18 (rev.ed. 1984)). Moreover, when

construing the terms of the policy, we must view it as a whole. *Valley Forge Insurance Co.*, 223 Ill. 2d at 363. We must read the policy in the context of the facts in the present case, the insured's reasonable expectations, and the coverage intended by the policy, without resorting to "a distorted meaning in order to reach a desired result." *Wallis*, 309 Ill. App. 3d at 571. We decline to disturb the plain, ordinary definition of these terms as set forth in prior cases.

¶33 Delta also contends that although the endorsement excluded coverage for removing "water and materials," it nonetheless covers the cost of the damage caused by the water or materials. We disagree. Like the circuit court, we find no ambiguity in the language of the endorsement in the insurance policy. The endorsement specifically and unequivocally provides that Hartford "will pay for direct physical loss or physical damage to Covered Property at the 'scheduled premises' *solely* caused by water that backs up from a sewer or drain," and that it would not pay "for water or other materials that back up from any sewer or drain when it is caused by *any* flood." (Emphasis added.) Delta's suggested reading of this provision would be unreasonable. The "water and materials" clause simply refers to water and materials that come onto the premises and cause damage, and this damage is only covered if it is *solely* caused by sewer or drain backup. As noted, the endorsement specifies that it "**IS NOT FLOOD INSURANCE.**" We find no ambiguity in this provision; the policy did not cover loss due to flood.

¶34 Having reviewed the relevant policy language in the present case and the evidence provided, we conclude that Delta has not established that its claim fell within the terms of the insurance policy. *Addison Insurance Co.*, 232 Ill. 2d at 453-54. Despite Delta's strenuous assertions that any loss or damage was solely caused by sanitary sewer blockage, it presented no admissible evidence that any sort of blockage of the sanitary sewer system occurred, let alone

that a blockage was the "sole" cause of the damage inside its facility, as required by the terms of the endorsement. Delta offered the merely speculative opinions of Froegel and Pizza, which as the circuit court found and we agree, were not based on personal knowledge and are inadmissible. See Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) and Illinois Rules of Evidence 602 and 802 (Ill. R. Evid. 602, 802 (eff. Jan. 1, 2011)).¹ In fact, the evidence presented actually disproved that any blockage occurred. Pizza's affidavit reported that when he and Froegel left the building on the evening of September 12, 2008, "everything was normal." Burke's report indicated that the sanitary sewer functioned normally before and after the storm event, indicating that no blockage or collapse occurred during the flooding. LaBerg testified that while it was possible for a sanitary system to be backed up by blockage or debris, this was "very rare." Thus, the evidence indicated that the sanitary sewer system was functioning normally before and after the occurrence.

¶35 Moreover, all of the evidence pointed the other way, *i.e.*, that the abundance of rainfall during the weekend of September 13, 2008, caused flooding in the area and the accumulation of surface water along Busse Highway, which inundated Delta's building. For example, Tsurkis testified that Hi-Tech, Delta's neighbor only three to four yards away, was surrounded by water, Busse Highway was under water, Tsurkis could not drive down the street or walk up to his building, and there was a visible six-inch water line inside Hi-Tech's building. Additionally,

¹ Froegel averred that the 18 inches of water "had backed up the sanitary sewer line" and that Mid-States Recycling did not have any water back up from their sanitary sewer lines. In his deposition, Froegel testified that he was not present to see whether the water came from the sanitary sewer drains and he conceded that he did not "[p]ersonally" know where the water came from, his knowledge of the storm and sanitary sewer lines were based on a letter from LaBerg. Similarly, Pizza averred that 18 inches of water inside Delta's building "had backed up from the sanitary sewer drains inside the facility" and that Mid-States Recycling "did not have water back up from their sanitary sewer lines between September 12, 2008, and September 16, 2008, and they share the same sanitary sewer line as our facility." However, Pizza testified that he was "not an engineer. I don't know for a fact" from where the water came. He conceded that his statement that the water backed up from the sewer drains was an assumption; he had no personal knowledge of his affidavit assertions regarding the storm and sanitary storm sewers, and he did not personally have any conversations with anyone from Mid-States Recycling.

LaBerg observed approximately 1 to 1 ½ feet of water on Busse Highway, and he explained that the storm system could overflow into the sanitary sewer by leaking through the sanitary sewer manholes in the street. He testified that the storm in September 2008 "definitely" could have caused the backup at Delta, and opined that the water inside Delta's facility could have entered both through the sanitary sewer system and the numerous doorways. Similarly, Burke concluded that the water which entered the building was floodwater resulting from the heavy rainfall that weekend. The floodwaters on Busse Highway "were on top of at least two of the sanitary sewer manholes with a depth of approximately 1.7 feet" and thus infiltrated the sanitary sewer manholes and cracks in sanitary sewer pipes, which led to the sanitary sewer backing up with storm water. According to Burke, given that the water flooding Busse Highway reached 10 inches higher than the first floor elevation of Delta's building, storm water also "entered the Building through the various doors."

¶36 In sum, the uncontradicted evidence showed that, due to the significant rainfall, Delta's building flooded in two manners: (1) water entered Delta's building through its several doors and entryways and/or through the bricks of the foundation as the water level outside on Busse Highway rose above the first floor elevation of the building, and (2) flood water entered through the sanitary sewers as the storm sewer system became overburdened by rainfall and the water flooding Busse Highway infiltrated sanitary sewer manholes in the street.

¶37 Similarly, based on this evidence, Hartford established that no coverage existed and that the loss was caused by flood. In moving for summary judgment, an insurer prevails by showing that the insured lacks sufficient evidence to prove an element of its case, *e.g.*, that coverage exists, or by "affirmatively disproving the plaintiff's case by introducing evidence that, if uncontroverted, would entitle the movant to judgment as a matter of law[.]" *Williams v.*

Covenant Medical Center, 316 Ill. App. 3d 682, 688 (2000). Delta provided no evidence to rebut Hartford's evidence. Consequently, we must take the evidence presented by Hartford as true for purposes of its summary judgment motion. *Purtill*, 111 Ill. 2d at 241. Accordingly, we find that the circuit court correctly found that Hartford was entitled to summary judgment because there was no genuine issue of material fact in dispute, and as a matter of law, no coverage was available under the insurance policy. *Mashal*, 2012 IL 112341, ¶ 49; 735 ILCS 5/2–1005(c) (West 2000).

¶38 Delta also argues that the circuit court erred in denying its motion to amend the complaint to add a claim of damages pursuant to section 155 of the Illinois Insurance Code. Section 155 provides for damages when an insurer unreasonably delays in settling a claim or disputes liability or the amount of the loss payable when "such action or delay is vexatious and unreasonable." 215 ILCS 5/155 (West 2008). However, where there is a genuine dispute regarding coverage, awarding damages under this section is not appropriate. *Uhlich Children's Advantage Network v. National Union Fire Co. of Pittsburgh, PA*, 398 Ill. App. 3d 710, 723 (2010). While this section "provides a remedy for an insured who encounters unnecessary difficulties when an insurer withholds policy benefits," a defendant insurer "cannot be liable for section 155 relief where no benefits are owed." *Martin v. Illinois Farmers Insurance*, 318 Ill. App. 3d 751, 764 (2000). Hartford's denial of Delta's claim did not constitute vexatious and unreasonable claims practice. Given the above analysis and our conclusion that the loss did not fall within the coverage provided in the insurance policy, the circuit court did not abuse its discretion in denying Delta's motion to amend the complaint. *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 41 (The trial court's decision on a motion to amend a complaint is reviewed for an abuse of discretion).

¶39 In ruling, we note that Hartford moved to strike Delta's reply brief on grounds that it raised new legal arguments for the first time in its reply brief, attached a document that was not part of the lower court record or the record on appeal, and presented a non-responsive analysis of a case that was not previously argued or cited in its opening brief. With respect to Hartford's argument that Delta argues for the first time in its reply brief that the policy was a contract of adhesion, we note that Delta merely briefly made this reference in the context of citing the proposition that ambiguities in insurance contracts should be construed against the drafter, which is an argument that it presented in its opening brief and in the circuit court. Delta concedes that the challenged document was not part of the official record. We therefore disregard it. See *Keener v. City of Herrin*, 235 Ill. 2d 338, 346 (2009) (if a party's brief refers to matters outside the record, the court "may strike the brief, or simply disregard the inappropriate material.") Regarding Delta's citation and discussion in its reply brief of *State Farm Lloyds v. Marchetti*, 962 S.W.2d 58 (Tex. App. 1997), we note that although Delta raised this case in the circuit court,² it never cited this case or presented argument about it in its opening brief, and raised it for the first time on appeal in its reply brief. Accordingly, Delta has waived this particular argument. "[A]n appellant's arguments must be made in the appellant's opening brief and cannot be raised for the first time in the appellate court by a reply brief." *In re Marriage of Winter*, 2013 IL App (1st) 112836, ¶ 29 (citing Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief.")). Nevertheless, we note that, even if we were to consider the reply brief, we find the arguments therein to be inapposite to our resolution of the issues on appeal.

² The record reflects that Delta relied on *State Farm Lloyds v. Marchetti*, 962 S.W.2d 58 (Tex. App. 1997), at the hearing on the summary judgment motions in arguing that the water that entered its building through the sewage line did not constitute surface water. The circuit court held that *Marchetti* involved different policy language and there was evidence in the present case that water also entered the building through its doors, unlike in *Marchetti*.

¶40

CONCLUSION

¶41 For the reasons stated above, we affirm the circuit court's order granting Hartford's cross-motion for summary judgment, denying Delta's motion for summary judgment and motion to amend the complaint, and entering judgment in favor of Hartford.

¶42 Affirmed.