2012 IL App (2d) 120131-U
No. 2-12-0131
Order filed November 9, 2012
Modified upon denial of rehearing November 14, 2012



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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| THE HERRINGTON, INC., and SHODEEN MANAGEMENT COMPANY, | ) | Appeal from the Circuit Court of Kane County. |
| Plaintiffs-Appellants, | ) | |
| v. | ) | No. 08-L-363 |
| THE CITY OF GENEVA, TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA a/k/a St. Paul Travelers, and WISS JANNEY ELSTNER ASSOCIATES, INC., | ) | Honorable Judith M. Brawka, |
| Defendants-Appellees. | ) | Judge, Presiding. |

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PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Hutchinson and Schostok concurred in the judgment.

**ORDER**

*Held*: The trial court: (1) erred in granting summary judgment to insurer, where there exists a factual issue concerning the amount, if any, of surface water that entered plaintiffs' building; and (2) did not err in granting summary judgment to the municipality, where the city made a policy determination and exercised discretion in deciding not to inspect newer storm sewer pipe.

¶ 1 Following a flood at a property they owned and operated, plaintiffs, The Herrington, Inc., and Shodeen Management Company, sued defendants, the City of Geneva, Travelers Property Casualty Company of America (a/k/a St. Paul Travelers) (plaintiffs' insurer), and Wiss Janney Elstner Associates, Inc., (consultants hired by Travelers to investigate plaintiffs' claim), raising claims for negligence and trespass against the City, breach of contract against Travelers, and negligent misrepresentation against Travelers and Wiss Janney.[1] Travelers moved for summary judgment as to the breach-of-contract count, and the City moved for summary judgment as to the negligence and trespass counts. The trial court granted both motions, finding that plaintiffs' claim against Travelers was barred based on its policy's surface water exclusion and further finding that plaintiffs' claim against the City was barred based on discretionary immunity. Plaintiffs appeal, challenging the trial court's rulings as to both summary judgment motions. We affirm in part, reverse in part, and remand.

¶ 2 I. BACKGROUND

¶ 3 Plaintiffs own and operate The Herrington Inn & Spa, a hotel, restaurant, and spa complex at 15 South River Lane in Geneva. The complex is located directly adjacent to and to the west of the Fox River in a three-story, wood-framed structure. The building is U-shaped, with the open side facing the Fox River on the east side. On the west side, the building's ground floor level is about one-half of a floor below grade. Landscaping on the west side pitches steeply downward from the sidewalk on the east side of River Lane to the building's west face (the basin). Near the south end of the basin is a storm drain (H1). The City operates separate sanitary and storm drain systems. Storm drains near the Herrington complex empty directly into the Fox River. Following a heavy

[1]Plaintiffs and Wiss Janney settled their dispute, and Wiss Janney is not a party to this appeal.

storm on Friday, September 22, 2006, plaintiffs' building experienced flooding and water damage when water from the basin entered the hotel through windows and mechanical louvers on the building's west side.

¶ 4 Weather data collected at Du Page Airport, four miles away, stated that about 2 1/4 inches of rain was recorded between 4:30 and 5 p.m. on September 22, 2006.

¶ 5 Plaintiffs submitted claims to Travelers and the City. Travelers denied plaintiffs' claim based on its policy's surface water exclusion and its anti-concurrent cause language, which provided, in relevant part: "We will not pay for loss or damage caused directly or indirectly by any of the following [subsequently specifying surface water]. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss." Travelers determined that water pooled in the basin area on the west side of the hotel and that the storm drain in the basin was partially or totally covered by soils. In a November 1, 2006, letter to Shodeen, Travelers stated that "[w]ater accumulated in the basin and eventually the water rose to a level in which water entered your building."

¶ 6 The City, in turn, denied plaintiffs' claim on the basis that the one year statute of limitations for actions against a public entity had passed. (Plaintiffs filed their claim on March 7, 2008; the date of loss was September 22, 2006.)

¶ 7 In July 2008, plaintiffs sued defendants. In a second amended complaint, plaintiffs alleged negligence and trespass against the City. In their negligence count, they asserted that the City had a duty to properly operate, maintain, design, and construct the storm sewers that serviced the hotel and, further, that part of its duty was to inspect the sewer system for blockage and to clean it out. According to plaintiffs, the City knew or should have known of tree root blockage in its sewer

system before the September 22, 2006, storm. Plaintiffs alleged that the City misled plaintiffs by failing to advise them that the cause of the water damage was sewer blockage. Plaintiffs noted that defendant Wiss Janney (which was hired by Travelers to investigate plaintiffs' claim) issued a report on October 23, 2006, wherein it opined that the water damage was caused by heavy rainfall and the subsequent ponding of surface water in the basin along the west side of the hotel. The report stated: "Visible damage to the building is consistent with surface water accumulation in the bowl-shaped landscaped area between the sidewalk and the west facade of the building." Noting that the City had reported that it was unaware of any problems with the storm sewers during the storm, Wiss Janney further opined that the drain in the landscaped area was likely blocked/clogged by "failed landscaping" (*i.e.*, soil) on the sloped grade above the storm drain during the storm. Plaintiffs asserted that it was not until November 2007 that they became aware that the City's negligence (and not an act of God) caused the water damage. In October 2007, plaintiffs hired Jomar Telegrouting, Inc., to videotape the City's sewer line near the hotel (specifically, a line between manhole 43 and manhole 80 that runs parallel and to the east of River Lane that was installed during the hotel's 2000 expansion; manhole 80 is at the south end, and manhole 43 is at the north end). In November 2007 (14 months after the hotel flood), plaintiffs reviewed a videotape of the storm sewers near the hotel complex that showed that the sewers were blocked in September 2006. They asserted that this was when they first learned that the damage was caused by the City; specifically, that the blockage resulted in a surcharged system upstream (and north) of the City's manhole 43 that subsequently surcharged the storm sewer (H1) in the basin that was the source of the water that entered the hotel. Plaintiffs claimed that they suffered over $750,000 in damages. (Plaintiffs' trespass count against the City contained essentially the same allegations.)

¶ 8 In their breach-of-contract count against Travelers (pleaded in the alternative to the negligence and trespass counts against the City), plaintiffs alleged that they were insured by Travelers and that Travelers' denial of their claim was wrongful because their damages were not caused by a flood, surface water, or any other event within the policy's exclusions (terms which, they further asserted, were not defined in the policy). Rather, they asserted that the damages were caused by water flowing through the sewer system (*i.e.*, a "defined watercourse"). Plaintiffs alleged that Travelers' denial of their claim constituted a breach of contract.

¶ 9 In its summary judgment motion (as to the breach-of-contract count against it), Travelers argued that the undisputed facts established that plaintiffs' loss was caused, *at least in part*, by surface water and that, even if there was tree root blockage and or water that surcharged out of the sewer system and into the basin, rainwater (that did not travel through the sewer system) nevertheless also hit the ground surface, flowed over the ground, and into the basin, where it ponded and entered the hotel complex.

¶ 10 The City argued in its summary judgment motion that plaintiffs' claim was barred by discretionary immunity.

¶ 11 The deposition testimony and affidavit statements were as follows. Amy Jorgensen, the *sous* chef at the hotel's restaurant, testified that, during the rain storm, she and another employee, Juan Zamore, went outside. They stood in River Lane (the street on the west side of The Herrington). The water was calf-high. Jorgensen stated that rainwater fell on the ground and was "rushing from all over." The water went over the curb that runs along the sidewalk on River Lane and flowed into and accumulated in the basin. Jorgensen retrieved a broom and tried to sweep potential debris off the manhole covers on River Lane. Zamore went into the basin area with a broom. The water was

waist high. Jorgensen could not describe what Zamore did in the basin area because it was dark, "really raining; so, you know, my vision wasn't the best. And he was below me at that point. So I really didn't see exactly." While they were outside, the water broke through a hotel window.

¶ 12 David Patzelt works for Shodeen Construction Company, which periodically does work for plaintiff Shodeen. Patzelt testified that, at about 5:30 p.m. on the day of the storm, he was in his car at the stop sign at River Lane and Route 38, facing south. He saw a female employee standing in the street, ankle-to-knee deep in water and holding a rake or broom. The entire street in that area was covered with water. Patzelt drove south to the hotel parking lot. While it rained, water came down River Lane and flowed down the police parking lot, which was to the west of the hotel. According to Patzelt, the rainwater that fell on the ground flowed *over the sidewalk* or curb to the west of the hotel and accumulated in the landscaped retention or basin area directly to the west of the hotel. There, the water pooled or ponded against the west side of the hotel. The water entered the hotel through windows, as well as through a louver, all of which were on the outside wall of the first floor level. Water did not enter the hotel from any other location.

¶ 13 Patzelt did *not* personally observe the water flowing over the curb. Rather, he concluded that this occurred based on his Saturday morning (the following day) observation of "a large amount of erosion on the east edge of the sidewalk beyond that curb line where the side slope of that grassed area had eroded." It "looked evident that a large amount of water had come over the sidewalk and washed or caused the erosion." He concluded that water had made its way down River Lane, over the sidewalk, and into the basin area directly west of the hotel. A subsequent rainfall on October 3, 2006, was significantly less severe; the hotel again flooded.

¶ 14 Paul Ruby, general manager of the hotel in September 2006, testified that he prepared a timeline soon after the September 22, 2006, events. There, he stated that, when the rain began at 4 p.m. on September 22, 2006, the ground was already saturated from a previous rainfall and that city streets began flooding as storm water drains "were not keeping up." He further stated that the "amount of rainwater from the parking lot to the West of the hotel was moving with such force and volume that it 'jumped' the curb and filled the retention area next to the West wall of the hotel." Ruby wrote that the water rose in the basin area faster than it was draining. The drain was partially covered with soil. However, Ruby did *not* personally observe the water jumping the curb; he was told by Jorgensen. On the day of the storm, Ruby arrived at the hotel at 5 p.m. Ruby testified that, based upon subsequent information, he revised his timeline to reflect that the "impact of the water jumping the curb was less of a factor than the water rising from the storm sewer." Between 1999, when Ruby started working at the hotel, and prior to September 22, 2006, no water had ever pooled in the basin to the extent it did during the storm at issue.

¶ 15 James Hauck, who authored Wiss Janney's October 23, 2006, report, testified that surface water was rainwater that ran across the surface of the ground. He stated that there was "a great deal of rainfall that came from every which way and came to pond against the face of" the hotel.

¶ 16 Daniel Dinges, the City's director of public works, testified that the City determined that: (1) there was an intense rainstorm; (2) the water did not get into the inlets (west of River Lane in the police parking lot entrances and in River Lane itself) fast enough; (3) the water flooded out from the police parking lot (on the west side of River Lane) into River Lane, headed over the sidewalk, and into the basin on the hotel's west side. The City's understanding was that there was a fabric over the inlet/storm sewer in the basin outside the hotel's windows and that the fabric did not allow water

to drain in that area; rather, the water built up and then went into the hotel through the windows. Dinges explained that the September storm was a 50-plus year rain event and that storm sewers are typically designed for a 10-year rain event. Thus, if a storm exceeds a 10-year storm, "then the storm sewers are going to be potentially surcharged." However, Dinges further stated that the City did *not* make a determination that the sewer system was surcharged: "No, everything that we were looking at at the end of September or early October, there is debris, leaves are starting to drop. What we were looking at was the fact that you had an intense rainstorm event. You had inlets, the water could not get in the inlets fast enough, therefore raising, you know, flooding out River Lane and heading over the sidewalk toward [the hotel]." Addressing the Siberian elm tree, whose roots penetrated a sewer line near the hotel, he testified that the tree had been there for many years and that, in September 2006, "there could have been tree roots in the line," although he did not know that they caused a blockage at that time.

¶ 17 As director of public works, Dinges' goal was that the department clean and inspect about 38,000 feet of storm sewers each year (out of over 1 million total feet, or 3.5%). His department concentrated on areas where they were aware of issues (such as when a resident informed the department of flooding). Dinges balances budgetary and manpower issues. Sanitary sewers have a priority over storm sewers, older areas have priority over newer lines because there is more degradation in older pipes and more roots. Storm sewer upgrading is completed in conjunction with budgetary and manpower considerations. The storm sewer by the hotel (between manhole 43 and manhole 80) was not inspected at any time before the storm because it was only five years old: "I would not expect there to be issues with [it]."

¶ 18 Julie O'Nan, a civil engineer, worked for the City from April 2006 to January 2007. She testified that the storm sewer system was not designed to handle a storm of the magnitude of the September 22, 2006, storm. O'Nan stated that the storm was handled "as typical industry practice, which would be not to inspect a newer storm line." She opined that the hotel's flooding was caused by the excessive rainfall that exceeded the storm line's capacity. Following the storm, all storm inlets in the area were inspected, but not the storm sewers themselves. It is not common practice for a municipality to videotape a five- or six-year-old storm sewer; a storm sewer of that age is unlikely to be infiltrated by tree roots because it does not typically have cracks. There was no way to determine in 2007 whether or not there was a blockage in 2006.

¶ 19 Dave Morris, an engineering technician in the City's public works department, testified that he reports directly to the City engineer. Morris was the inspector for the underground utilities for the hotel's 2000 expansion project. When Morris inspected the storm sewer line between manhole 43 and manhole 80 he would have seen the elm tree. He is unaware how long the elm tree was in that location.

¶ 20 Patrick Browne testified that, in 2006, he was project manager for Shodeen Construction. He was involved in the flood restoration at the hotel and reported to Patzelt. Browne arrived at the hotel on September 22, 2006, at about 5 or 6 p.m. He returned at 9 a.m. the following day to survey the flood damage. The drain in the basin area had a filter fabric "sticking out of it." The fabric was covered with mud, was dirty and discolored (signifying it was old), and had holes punctured through it, apparently by hotel employees the previous day. Browne believed that the fabric may have caused the flooding because it would have slowed drainage. Pazelt and Browne discussed other possible

causes, including water washing over the parking lot curb. Browne did not personally observe any water washing over the curb.

¶ 21 Randall Bus, a civil engineer and plaintiff's expert, opined that the water that flooded the hotel "was following a defined sub-surface watercourse;" that is, a sewer line. "On the day of the flood, stormwater runoff was first intercepted by inlets on River Lane and was then conveyed by sub-surface storm sewers to the [City's] public 18-inch storm sewer between MH 43 and MH 80 where that stormwater runoff encountered a massive tree root blockage which caused a surcharge at MH 43 *and a backup out of MH H1 [the sewer in the basin] into the windows and louvers of the [hotel]*." (Emphasis added.) Bus also stated that: "Continuing rainfall, which partly fell onto ground surfaces and partly onto water surfaces, contributed to additional surcharging at manhole 43 due to the tree root blockage and this surcharge occurred to the extent that these backup waters eventually broke the windows and came in through the louvers on the west side of [the hotel] causing extensive damage. The water that entered [the hotel] on September 22, 2006, was water discharged from a defined sub-surface watercourse, *i.e.*, the sewer as a result of the tree root blockage in the City's sewer system."

¶ 22 Bus testified that the blockage "had been there for some time. How long is I guess somewhat questionable. But certainly the DVDs that I saw showed a substantial mass of tree roots." The October 2007 videotape showed that the pipe was about 2/3 blocked such that the top 6 inches were still open.

¶ 23 Bus reviewed several depositions in this case, including Jorgensen's, Patzelt's, and Ruby's, and various surveys and plans of the storm sewer system and topography near the hotel. He also visited the site about 10 times. Addressing the Siberian elm tree, whose roots penetrated a sewer line

near the storm sewer in the basin, Bus testified that it is a common tree, very invasive as far as root penetration into utility systems, and has a very fast-growing root system. (The elm had a 24-inch diameter, and the storm sewer the roots penetrated was 11 feet from the tree's base, within the tree's drip line and within the root area.) Bus opined that the elm's roots were in the storm sewer system (*i.e.*, penetrated sewer joints between manholes 43 and 80) and caused a blockage.

¶ 24 The storm sewer between manhole 43 and manhole 80 was installed in 2000 when the hotel was expanded; the Siberian elm is noted in the hotel plans that were reviewed by the City. Bus noted that the City's records reflected that it had cleaned and root cut the sewer line in November 2007, August 2008, and May 2009. "The need to continuously clean and root cut this sewer line confirms my opinion that there was a serious tree root blockage problem before November 2007 and a serious tree root blockage problem on September 22, 2006." (The City removed the tree in 2009.)

¶ 25 Bus testified that computer models he developed to assess the flood were "reasonably accurate and [ ] closely replicated the conditions that existed in 2006. And so from that we concluded that the tree mass, the root mass was there in 2006 to the extent or very close to the extent that we saw in 2007."

¶ 26 Bus further opined that a severe drought in 2005 resulted in invasive tree root blockage. Rain events between 2001 and 2004 that were more severe than that in 2006 did not result in flooding or surcharge. Thus, the blockage probably became invasive in 2005. The Siberian elm was present in plans prepared in 2000 for a hotel expansion. Typically, in close proximity to trees, measures are taken to either protect the tree or the sewer. Sewers, for example, are laid away from the tree's drip line or a pipe is augered. "Apparently nothing" was done in the case of the elm; this was "unusual."

¶ 27 The City executed some partial tree root cutting and clearing and storm sewer cleaning in November 2007 and August 2008. Subsequently, on September 12-13, 2008, and July 23-24, 2010, there were rainfall events similar or greater to the storm at issue that did not result in a significant surcharge at manhole 43 or a backup and flow out of the basin sewer/H1 into the hotel, and the hotel did not sustain any water damage. According to Bus, there was no flooding at the hotel after these storms because there was no tree root blockage; this supports his opinion that tree root blockage caused the flooding on September 22, 2006.

¶ 28 In formulating his opinion that the cause of the flooding was a reduction in storm sewer capacity due to tree root blockage, Bus took into account overflow from the police parking lot across from the hotel. His computer models also accounted for fabric over the basin sewer/H1, and he determined that the September 22, 2006, storm would not have filled up the area "anywhere close to the level that would be needed to overtop the window wells and louvers." Bus disagreed with Hauck's assessment. Bus testified that the ponding was not a cause, but an effect. The ponding was not caused by the fabric; the fabric had no effect due to its age and small size. Bus opined that the ponding of surface water on River Lane adjacent to the hotel did not overtop the sidewalk at any time on September 22, 2006, nor did surface waters from the area well/basin drain on the west side of the hotel above the window sills and louver openings. According to Bus, if there was no sewer in the basin, there would not have been any flooding on September 22, 2006.

¶ 29 Further, he disagreed with the eyewitness testimony that the water overtopped the sidewalk. Specifically, as to Jorgensen, he explained that he disagreed with her testimony on the bases that: (1) his testing and analysis reflected otherwise; and (2) she stated that her vision was not " 'the best.' " He never spoke to Jorgensen (but reviewed her deposition) or Nelson, but spoke to Ruby, who,

according to Bus, stated that he never saw the water overtopping the sidewalk. However, Bus acknowledged that Ruby arrived at the hotel after the hotel had flooded. Bus further testified that Ruby told him that no one else saw the water flowing over the sidewalk. Bus also spoke to Patzelt, who told him that the he did not see the water overtopping the sidewalk. Patzelt drove down River Lane that evening and observed a woman on the road "poking at the drains thinking—trying to clear the drains or doing some type of activity like that."

¶ 30 Bus opined that, if the City had properly maintained the sewer between MH 43 and MH 80, the sewer would have sent runoff from the September 22, 2006, storm to the downstream storm sewer system and to the Fox River without a significant surcharge and flooding of the hotel. The system's capacity was exceeded only because of the substantial tree root blockage.

¶ 31 Finally, Bus addressed an issue upon which Travelers focuses on appeal, specifically the rainwater that hit the ground. Bus testified that the "predominant" source of the water in the basin was the surcharge from manhole H1 and that another source was the rainwater that fell into the basin; these waters combined and entered the hotel. When asked to quantify the percentage of water that surcharged from the manhole and the percentage that came from rainwater, Bus stated that, based on his computer models, *less than 5%* of the water that accumulated in the basin next to the hotel came from *rainwater that hit the basin*. When further asked to clarify if any of the rainwater that fell into the basin hit *the surface of the ground in the basin*, Bus opined that it was "insignificant." Thus, according to Bus: (1) the rainwater that fell partly on the ground surface (an "insignificant" amount), and (2) partly on the water surface (less than 5% of the overall water that accumulated in the basin) in the basin area, combined with (3) the surcharged/backed up water. These combined waters entered the hotel.

¶ 32 On August 2, 2011, the trial court granted Travelers' motion for summary judgment, finding that plaintiffs' claim against it was barred because plaintiffs' damages were caused directly, indirectly, or in part by surface water. Thus, the claim was barred by the policy exclusion. The court found that surface water contributed to plaintiff's loss:

> "Regardless of whether surface water jumped the curb and that surface water came flowing down from the police parking lot, there is absolutely no question that rain came down, hit the sidewalk, and from the pictures and the testimony of the people that all identified the pictures, and you look at the pictures, it hit the sidewalk and it flowed from the sidewalk into that basin area. It's downhill. It flowed.
>
> And there is absolutely no doubt from all of these testimonial references that it was raining cats and dogs, that that rainwater hit the surface of the sidewalk as well as the street and the parking lots and everything else, and *even if it didn't jump the curb, there was surface water that was falling into that depression area*, there was surface water that was falling on the sidewalk.
>
> That sidewalk surface came down and hit the sloped property. *The rain itself hit the sloped property. There was erosion that was there. That was surface water*, which under that anti-concurrent cause language was one of the sources that led to what ultimately was the loss in this matter." (Emphases added.)

¶ 33 On January 4, 2012, the court granted the City's summary judgment motion, finding that plaintiffs' claim was barred by discretionary immunity. Plaintiffs appeal.

¶ 34 II. ANALYSIS

¶ 35 Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010). In ruling on a motion for summary judgment, the trial court is to determine whether a genuine issue of material fact exists, not try a question of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A party opposing a motion for summary judgment must present a factual basis that would arguably entitle it to a judgment. *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). When determining whether a genuine issue of material fact exists, courts construe the pleadings liberally in favor of the nonmoving party. *Williams*, 228 Ill. 2d at 417. "Summary judgment is to be encouraged in the interest of prompt disposition of lawsuits, but as a drastic measure it should be allowed only when a moving party's right to it is clear and free from doubt." *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). "If the plaintiff fails to establish any element of the cause of action asserted, summary judgment for the defendant is proper." *Governmental Interinsurance Exchange v. Judge*, 221 Ill. 2d 195, 215 (2006). We review summary judgment rulings *de novo* (*Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)), and we will disturb the decision of the trial court only where we find that a genuine issue of material fact exists. *Addison v. Whittenberg*, 124 Ill. 2d 287, 294 (1988).

¶ 36 A. Travelers' Summary Judgment Motion

¶ 37 Plaintiffs argue first that the trial court erred in granting Travelers' summary judgment motion as to the breach-of-contract count of their complaint, where it found that surface water caused the September 2006 flooding at the hotel and, thus, the damage was excluded from coverage.

Plaintiffs assert that the question whether the flood damage was caused by surface water is a factual question for the jury. For the following reasons, we reverse.

¶ 38 Travelers' policy does not define the term "surface water." Illinois case law defines it as "water derived from natural precipitation that flows over or accumulates on the ground *without* forming a definite body of water or *following a defined watercourse*." (Emphases added.) *Smith v. Union Automobile Indemnity Co.*, 323 Ill. App. 3d 741, 749 (2001). The *Smith* court rejected the plaintiffs' proposed definition that surface water should include water "whose flow has not been altered in any way by paved surfaces, buildings, or other structures." *Id.* at 745, 748-50 (the plaintiffs' expert testified that the water that entered their home through their basement windows following a torrential rainstorm had been diverted by manmade objects, including streets, other paved surfaces, houses, and associated construction and landscaping; court affirmed summary judgment for insurer based upon policy's water damage exclusion where it was *undisputed* that the water that entered their basement was partly rainwater or runoff that accumulated as a result of the storm). See also Lee R. Russ & Thomas F. Segalla, 11 Couch on Insurance 3d §153:50 (Nov. 2011) ("though it is derived from rain, surface water is distinguished from rain by its character as water on the ground;" thus, "damage from water flowing on the earth onto the insured's property, or into the insured's building, will generally constitute damage from surface water. Damage from water naturally falling from the sky onto the insured's property, or into the insured's building, will generally constitute damage from rain" (footnotes omitted)).

¶ 39 "When surface water enters defined channels and then damages the insured property, the damage is not caused by surface water because the water has lost its character as 'surface' water." Lee R. Russ & Thomas F. Segalla, 11 Couch on Insurance 3d §153:57 (Nov. 2011). For example,

generally, "when water enters into a hole, flows into a sewer pipe, and from there enters and damages a building, the water does not constitute surface water." *Id.* See *Selective Way Insurance Co. v. Litigation Technology, Inc.*, 606 S.E.2d 68, 71 (Ga. Ct. App. 2005) (upholding denial of insurer's summary judgment motion; rainwater that gathered into a pit, flowed into a structure through an underground pipe, and damaged a structure was not surface water at the time that damage was sustained and, thus, surface water exclusion did not apply because damage was not directly or indirectly caused by surface water); but see *Hirschfield v. Continental Casualty Co.*, 405 S.E.2d 737, 738 (Ga. Ct. App. 1991) (upholding summary judgment for insurer, where, after rainstorm, rainwater flowed or rose from a grate opening to an underground storm drain, across surface, and entered the plaintiffs' basement; holding that whether water was diverted from drain to the surface by an underground blockage, or accumulated near grate because drain was obstructed, rainwater nevertheless flowed from grate across surface area and into basement and, thus, was surface water).

¶ 40 Plaintiffs argue that summary judgment in Travelers' favor was not warranted here because the water that entered the hotel came from a defined waterway or channel, *i.e.*, the sewer line. Plaintiffs urge that rainwater that causes flooding after entering a defined channel is no longer surface water. Relying primarily on Bus's testimony, they argue that there is a material factual question whether any portion of the surface water (that was not from a defined waterway or channel) was part of the water that entered the hotel.

¶ 41 Travelers argues that, even if there was tree root blockage accompanied by surcharged water from an overloaded sewer system, it was entitled to summary judgment under the policy's anti-concurrent cause language because *surface water contributed in part to the loss*. For this claim, Travelers points to case law and to portions of Bus's statements.

¶ 42 Turning first to the cases cited by Travelers, we conclude that they are distinguishable or actually support plaintiffs' position. In *Sunshine Motors, Inc. v. New Hampshire Insurance Co.*, 530 N.W.2d 120 (Mich. Ct. App. 1995), which Travelers argues is nearly identical to this case, the reviewing court, in a one-page decision, affirmed summary disposition for the insurer, where the plaintiff's car dealership flooded when, after a storm, the local drainage system became partially blocked with a piece of wood. The court determined that the plaintiff's losses were caused, directly and indirectly, by heavy rainfall that created surface water that failed to drain away because of debris blocking the drainage system. *Id.* There was no argument in that case, as there is here, that the water had entered a defined watercourse such as a sewer line and ceased to be surface water at any point or that there was a subsequent surcharge of the water from the sewer. Accordingly, the case does not aid our analysis.

¶ 43 In *Front Row Theatre, Inc. v. American Manufacturer's Mutual Insurance Cos.*, 18 F.3d 1343, 1345, 1349 (6th Cir. 1994), the reviewing court affirmed summary judgment for the insurer where a 50% blockage caused sewers to back up and overflow after a storm, run over a driveway and curb, and enter the insured's building. Unlike in this case, it was undisputed in *Front Row Theatre* that the damage may have been caused by a *combination* of water that entered the drainage system and water that flowed over the manholes, did not enter the system, and flowed downhill into the insured's building. *Id.* at 1345, 1348. The court also held (and plaintiffs here urge that we adopt this proposition) that water that entered the sewer system and exited through a manhole before entering the building was not surface water; however, water that *never* entered the sewer system before entering the building retained its character as surface water. *Id.* at 1348.

¶ 44 Next, Travelers relies on *Casey v. General Accident Insurance Co.*, 578 N.Y.S.2d 337, (N.Y. App. Div. 1991). In *Casey*, the reviewing court reversed the trial court and granted summary judgment to the insurer. *Id.* In that case, a heavy rainfall caused rain from plaintiff's roof to collect outside the basement door and enter the basement due to the failure of the rain gutter and drainage system. The parties agreed that the water that ultimately entered the plaintiff's home originated as natural precipitation and accumulated at the lowest point in the backyard. The court held that the fact that other factors, such as a clogged drain and the roof's slope, contributed to the loss was of no consequence: the actual cause of the loss was the presence of surface water. *Id.* at 338. Again, there was no argument in that case, as there is here, that the water entered a defined watercourse and that there was a subsequent surcharge of the water from the sewer before it entered the premises. See also *Pakmark Corp. v. Liberty Mutual Insurance Co.*, 943 S.W.2d 256, 259-61 (Mo. Ct. App. 1997) (reviewing court affirmed summary judgment for the insurer, where there was no dispute that both flood water—which is surface water—and a sewer backup caused the plaintiff's loss).

¶ 45 We find persuasive the case law upon which plaintiffs rely for the proposition (which appears to state the general rule) that surface water that becomes part of a defined channel or waterway is no longer surface water. For example, in *Surabian Realty Co., Inc. v. NGM Insurance Co.*, 971 N.E.2d 269, 274 (Mass. 2012), a commercial building was damaged when a drain in an adjacent parking lot backed up during heavy rain and flooded the building. The Supreme Judicial Court of Massachusetts, citing case law from four jurisdictions, noted that:

> "neither the surface water exclusion nor the anticoncurrent cause provision would bar coverage when heavy rain enters a sewer system, is diverted out of the system, and is then the sole cause of damage to property. The water would have lost its character as surface

> water on entering the sewer system and, at the moment of damage, the water would have been defined solely as drain or sewer water. A temporary characterization as surface water before the onset of damage does not deem the damage to be indirectly caused by surface water." *Id.*

The court nevertheless affirmed summary judgment for the insurer because it was undisputed that the damages to the building resulted from the *combination* of water that had backed up after entering the parking lot drain and water that (as a result of a blockage of the drain) never entered the drain and remained surface water. *Id.* at 272-75. See also *M & M Corp. of South Carolina v. Auto-Owners Insurance Co.*, 701 S.E.2d 33, 35-37 (S.C. 2010) (answering certified questions, court held that water that exited an incomplete drainage system following a significant storm and pooled in a hotel parking lot, reaching a depth to enter the hotel building and damage the property, was not surface water; water did not become surface water after it exited the pipe because it only reached the plaintiff's property due to its deliberate containment and casting by pipe, not due to a natural flow; water was not flood water because it did not breach containment, but instead was deliberately channeled by pipe and cast upon the plaintiff's property); *Assurance Co. of America, Inc., v. Jay-Mar, Inc.*, 38 F. Supp. 2d 349, 354 (D. N.J. 1999) (insurer's summary judgment motion denied where factual issue existed as to whether loss resulted solely from sewer and drain backups or whether flooding and surface waters were the primary or sole cause of the insured's damage due to limited rainwater disposal the sewers provided, where water entered the insured's building following a storm and where nearby storm sewers backed up or overflowed; anti-concurrent cause provision)*;* *Georgetowne Square v. United States Fidelity & Guaranty Co.*, 523 N.W.2d 380, 387 (Neb. Ct. App. 1994) (water carried by an underground drainage pipe ceased to exist as surface water or runoff once

it was channeled through the pipe; surface water and runoff are limited to waters that flow naturally); *Heller v. Fire Insurance Exchange*, 800 P.2d 1006, 1009 (Colo. 1990) (jury verdict reinstated where water from spring runoffs of melted snow damaged the plaintiffs property after water's regular path was diverted by three 15-to-20-foot long manmade trenches; trenches were defined channels that diverted the regular flow of water, thus, *runoff lost its character as surface water when it was diverted* and was not within the plaintiffs' policy's surface water exclusion).

¶ 46 Next, Travelers points to portions of Bus's deposition and affidavit, asserting that he opined that surface water contributed *in part* to plaintiffs' loss and, thus, the policy exclusion operates to bar coverage. Apparently referencing the trial court's findings, Travelers contends that Bus testified at his deposition that, even though the predominant source of the water in the basin came up from the manhole, rainwater that hit the ground surface in the basin *combined* with the surcharged water and then entered the hotel. It also points to Bus's affidavit statement that rainfall "contributed" to the water that surcharged from the manhole. We reject this argument.

¶ 47 Bus testified that the "predominant" source of the water in the basin was the surcharge from the basin manhole H1 and that another source was the rainwater that fell into the basin. The waters combined and entered the hotel. In quantifying the percentage that came from rainwater, Bus stated that, based on his computer models, it was *less than 5%* of the water that accumulated in the basin next to the hotel came from rainwater that *hit the basin* (*i.e.*, ground and water surfaces). When further asked if any of the rainwater that fell into the basin hit the *surface* of the ground in the basin, Bus opined that some did, but the amount was "*insignificant*" (emphasis added). Thus, according to Bus: (1) the rainwater that fell partly on the ground surface (an "insignificant" amount), and (2)

partly on the water surface[2] (less than 5% of the overall water that accumulated in the basin) in the basin area, combined with (3) the surcharged/backed up water. These combined waters entered the hotel. In essence, he testified that no surface water of any significance flooded the hotel. In the remainder of his testimony, Bus repeatedly testified that the flooding was caused by the surcharge/backup of water in the basin that was caused by the tree root blockage. He also disputed Hauck's assessment and the testimony from Jorgensen and others that surface water jumped the curb and entered the basin before flooding the hotel.

¶ 48 Accordingly, construing the pleadings liberally in plaintiffs' favor, we conclude that there was a material factual question as to whether *all* of the water that entered the hotel was water that had backed up/surcharged from manhole H1; this includes the sub-question whether the presence of an unquantified or immeasurable, "insignificant" amount (even a few raindrops) of surface water operates so as to preclude coverage. For this reason and in light of the persuasive case law holding that surface water ceases to be surface water once it enters a defined channel, we reverse the grant of summary judgment to Travelers.

¶ 49 B. The City's Summary Judgment Motion

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[2] Generally, "surface water loses its character and is no longer surface water when it forms or *joins a body of water* or a defined channel, is absorbed into the land, or lost by evaporation." (Emphasis added.) Lee R. Russ & Thomas F. Segalla, 11 Couch on Insurance 3d §153:57 (Nov. 2011); see also Smith, 323 Ill. App. 3d at 749 (surface water is "water derived from natural precipitation that flows over or accumulates on the ground without forming a definite body of water or following a defined watercourse").

¶ 50 Next, plaintiffs argue that the trial court erred in granting the City's summary judgment motion, claiming that factual questions concerning policy or discretionary elements of municipal immunity precluded such a ruling. Plaintiffs argue that the City's decision to install sewer lines near the hotel may have been discretionary, but the decision to not inspect the sewer system was ministerial. They contend that Dinges' testimony concerning the City's actions contradicts Bus's opinion that the City knew about the potentially dangerous tree root blockage and (negligently) did nothing. Thus, in plaintiffs' view, a triable issue exists as to the City's immunity. For the following reasons, we reject plaintiffs' argument.

¶ 51 The Local Governmental and Governmental Employees Tort Immunity Act (Act), 745 ILCS 10/1-101 (West 2008), adopted the general principle that " 'local governmental units are liable in tort but limited this [liability] with an extensive list of immunities based on specific government functions.' " *Zimmerman v. Village of Skokie*, 183 Ill. 2d 30, 43 (1998), *quoting Burdinie v. Village of Glendale Heights*, 139 Ill. 2d 501, 506 (1990). The Act is in derogation of the common law and, therefore, must be strictly construed against the public entities involved. *Aikens v. Morris*, 145 Ill. 2d 273, 278 (1991). "Unless an immunity provision applies, municipalities are liable in tort to the same extent as private parties." *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 368-69 (2003). In order to bar plaintiffs' recovery, governmental entities bear the burden of properly raising and proving that they are immune under the Act. *Id.*

¶ 52 The Act grants only immunities and defenses; it does not create duties. Rather, the Act merely codifies existing common law duties, to which the delineated immunities apply. *Arteman v. Clinton Community Unit School District No. 15*, 198 Ill. 2d 475, 479-80 (2002); *Village of Bloomingdale v. CDG Enterprises, Inc.*, 196 Ill. 2d 484, 490 (2001). Therefore, whether a local

public entity owed a duty of care and whether that entity enjoyed immunity are separate issues. Once a court determines that a duty exists, it then addresses whether the Act applies. *Arteman*, 198 Ill. 2d at 480; *Village of Bloomingdale*, 196 Ill. 2d at 490.

¶ 53 Section 2-201 of the Act provides:

> "§ 2-201. Except as otherwise provided by Statute, a public employee serving in a position involving the determination of policy or the exercise of discretion is not liable for an injury resulting from his act or omission in determining policy when acting in the exercise of such discretion even though abused." 745 ILCS 10/2-201 (West 2008).

¶ 63 In section 2-201, the legislature immunized "liability for both negligence and willful and wanton misconduct." *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 196 (1997). Section 2-109 of the statute provides that "[a] local public entity is not liable for an injury resulting from an act or omission of its employee where the employee is not liable." 745 ILCS 10/2-109 (West 2008).

¶ 64 Our supreme court has held that the Tort Immunity Act sets up a two-part test to determine which employees may be granted discretionary immunity under section 2-201. First, an employee may qualify for discretionary immunity "if he holds either a position involving the determination of policy or a position involving the exercise of discretion." *Harinek v. 161 North Clark Street Ltd. Partnership*, 181 Ill. 2d 335, 341 (1998). Second, however, an employee who satisfies the first prong of the test must also have engaged in both the determination of policy and the exercise of discretion when performing the act or omission from which the plaintiff's injury resulted. *Id.* It appears to be undisputed that Dinges, as director of public works for the City, holds a position that involves both the determination of policy and the exercise of discretion. Thus, we focus on the second prong of the test.

¶ 54 In its summary judgment motion, the City asserted that, with respect to any damage plaintiffs sustained that may have been caused by any alleged negligence, maintenance, and/or operation of its storm sewer system in connection with its inspection program, the City's public works department decided as to the manner in which the storm sewers would be inspected and maintained (considering the amount of sewers to inspect along with the manpower employed). The City based its decision on the age of the sewers and if they had been subjected to prior complaints. Thus, the City argues, these procedures were discretionary, unique to a particular public office, and it is entitled to immunity.

¶ 55 Plaintiffs argue that summary judgment was not warranted here because there are fact questions on the policy decision and discretionary elements of the City's discretionary immunity defense. Plaintiffs concede that the decision to install sewer lines near the hotel (in 2000) were discretionary acts. However, they argue that, once the lines were installed and approved by the City, the "duty to maintain and operate the lines" had to be executed in a non-negligent manner. Further, whether the City acted negligently is a factual question precluding summary judgment. Plaintiffs urge that this case involves negligent acts by the City in its performance of ministerial acts.

¶ 56 We reject plaintiffs' claim. Assuming that the City had a duty to maintain and operate the sewer lines, we conclude that the acts of which plaintiffs' complain constituted discretionary acts and policy determinations, not ministerial acts. Public policy decisions are "those that require the governmental entity or employee to balance competing interests and to make a judgment call as to what solutions will best serve each of those interests." *Harrison v. Hardin County Community Unit School District No. 1*, 197 Ill. 2d 466, 472 (2001). "[D]iscretionary acts are those which are unique to a particular public office, while ministerial acts are those which a person performs on a given state

of facts in a prescribed manner, in obedience to the mandate of legal authority, and without reference to the official's discretion as to the propriety of the act." *Snyder v. Curran Township*, 167 Ill. 2d 466, 474 (1995). " 'A municipal corporation acts judicially or exercises discretion when it selects and adopts a plan in the making of public improvements, but as soon as it begins to carry out that plan it acts ministerially and is bound to see that the work is done in a reasonably safe and skillful manner.' " *Greene v. City of Chicago*, 73 Ill. 2d 100, 108 (1978) (quoting *Johnston v. City of East Moline*, 405 Ill. 460, 466 (1950)). Thus, a municipality is not immune from liability for the performance of ministerial tasks. *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 257 (2002). The maintenance of property consists of keeping it in a state of repair or efficiency and constitutes a ministerial task, while the improvement of property is a discretionary act. *Id.* at 256. Generally, a repair is a ministerial act for which a municipality may be liable if negligently performed. *Id.* at 257.

¶ 57 Clearly, the City's (including Dinges') actions concerning the sewer line near the hotel constituted policy determinations. Dinges testified that he determined when and how to inspect and maintain the City's sewers and explained that the City does not have the manpower or resources to inspect all sewers. He, thus, made a policy decision as to how to allocate resources, and he prioritized the inspection and maintenance of the sewer system. Sanitary sewer lines had priority over storm sewers. He also decided that the City would clear about 38,000 feet of storm sewers each year (*i.e.*, 3.5% of the total miles of sewers). Dinges testified that the City concentrated its cleaning and inspection in areas where it knew there were issues or when someone notified the City of flooding. Dinges also determined that the City would not prioritize inspection of sewer lines near trees (as opposed to those not near trees); given the prevalence of trees near lines, the City did not

have the resources to conduct such inspections. He also noted that the City prioritized older sewers over newer ones because the older pipes had more degradation and root issues.

¶ 58 We further conclude that the City exercised its discretion in relation to the maintenance or operation of the sewer line near the hotel. The City's decision not to inspect that line was a discretionary decision. Based upon the priorities he set and in light of fiscal and manpower constraints, Dinges determined that, barring notice of an issue, newer sewer lines like that near the hotel would have low priority for cleaning and inspection. Plaintiffs claim that Bus testified "that the City knew about the potentially dangerous tree root blockage problem and negligently did nothing." This is a stretch and does not raise a factual issue concerning the City's possible notice and failure to carry out a ministerial task. Bus opined that the City approved the construction of the sewer line in close proximity to the Siberian elm tree, which is known for causing tree root blockages in sewers. At best, Bus's opinion stands for the proposition that an elm tree near a sewer is only a *potential* problem. This is especially so in light of the fact that plaintiffs point to no regulations, standards, guidelines, or procedures that restrict or prohibit such placements of sewer lines. *Cf. Trtanj v. City of Granite City*, 379 Ill. App. 3d 795, 804-06 (2008) (municipality not entitled to summary judgment on discretionary immunity issue, where failure to timely hook up city sewer bypass pump during power outage was ministerial; once alarm sounded to alert city's street department of outage, city's workers had no discretion and were required to follow prescribed procedures for hooking up the pump); see also *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 194 (1997) (" 'as soon as [a municipal corporation] begins to carry out [its sewer] plan, it acts ministerially[ ] and is bound to see that the work is done in a reasonably safe and skillful manner' " (*quoting City of Chicago v. Seben*, 165 Ill. 371, 378 (1897))).

¶ 59 The trial court did not err in granting the City's summary judgment motion.

¶ 60 III. CONCLUSION

¶ 61 For the foregoing reasons, the judgment of the circuit court of Kane County is affirmed in part and reversed in part and the cause is remanded.

¶ 62 Affirmed in part and reversed in part; cause remanded.