

No. 1-18-1853

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

TIMOTHY FOLEY,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellant,)	Cook County.
)	
v.)	No. 17 M2 000546
)	
AMERICAN ZURICH INSURANCE COMPANY,)	Honorable
)	Thaddeus S. Machnik,
Defendant-Appellee.)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held:* We reverse the judgment of the circuit court of Cook County granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment on count I of plaintiff's complaint. Plaintiff is entitled to additional coverage for "Debris Removal" and damage to "Scaffolding, Construction Forms, and Temporary Structures" because plaintiff's damages were caused by a "Covered Cause of Loss." We also reverse the trial court's summary judgment order finding as a matter of law that defendant did not violate section 155 of the Illinois Insurance Code. We remand this case for the trial court to determine whether defendant's conduct violated section 155 of the Illinois Insurance Code and to determine the amount owed to plaintiff for additional coverage under "Debris Removal" and damage to "Scaffolding, Construction Forms, and Temporary Structures."

¶ 2 Plaintiff, Timothy Foley, filed a two count complaint against defendant, American Zurich Insurance Company alleging in count I that defendant breached the terms of its insurance policy

contract (Policy) with plaintiff by failing to fulfill its insuring obligations under the Policy and alleging in count II a violation of section 155 of the Illinois Insurance Code (Code) (215 ILCS 5/155 (West 2016)) stating that defendant's denial of plaintiff's claims for additional coverages was vexatious and unreasonable. The parties filed cross-motions for summary judgment. The trial court entered an order of summary judgment in favor of defendant on both counts of plaintiff's complaint. Plaintiff appeals the court's decision. Plaintiff first argues the provisions of the Policy require a finding that his damages were caused by a "Covered Cause of Loss" and, as such, defendant is obligated to pay for additional coverages for "Scaffolding, Construction Forms And Temporary Structures" and "Debris Removal" beyond the \$25,000 already paid by defendant to plaintiff. Plaintiff next argues, in the alternative, that the meaning of "Covered Cause of Loss" is ambiguous and must be resolved in his favor thereby requiring coverage for "Scaffolding, Construction Forms And Temporary Structures" and "Debris Removal." Finally, plaintiff argues that the court's ruling that defendant did not act in violation of section 155 of the Code (215 ILCS 5/155 (West 2016)) was in error. For the following reasons we reverse the judgment of the trial court and remand for further proceedings.

¶ 3

BACKGROUND

¶ 4 Defendant issued plaintiff an insurance policy effective from April 22, 2016 to April 22, 2017 for plaintiff's property located at 165 DeWindt Road, Winnetka, Illinois (Property) where he was in the initial stages of building a single family home.

¶ 5 On July 23, 2016, heavy rains caused the storm sewer system in the Village of Winnetka to reach capacity, back-up, and overflow causing damage to the Property which was under construction at the time. The foundation for the home had been dug and construction forms had been laid in trenches. However, the backup of storm water and overflow onto the Property completely destroyed the work that had been done. Losses included the erosion of foundation

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walls, the destruction of trenches holding the laid foundation construction forms, and damage to the construction forms themselves. As a result, the foundation needed to be drained and re-excavated and the foundation frames and footings needed to be removed and re-built.

Approximately 998 cubic yards of gravel had to be poured into the foundation in order to stabilize the foundation walls that eroded due to the storm water. Defendant estimated the cost to repair and restore the Property to be \$84,451.40. The nature and extent of the losses to the Property are not disputed.

¶ 6 Plaintiff timely reported the loss to defendant and made a claim under the Policy. After receiving the claim, defendant hired Crawford & Company (Crawford) to inspect the Property and investigate the damage. Crawford did so on July 26, 2016 and prepared a report. The report concluded that that cause of damage to the Property appeared to be surface water and noted that heavy rains and water runoff caused the excavated foundation area to fill with water and mud. In a section entitled "Debris Removal/Building" the report stated that the foundation would have to be drained, partially re-excavated, and the foundation frames for the footers removed and rebuilt. After receiving the Crawford report, defendant sent a letter to plaintiff dated August 4, 2016 denying all coverage under the Policy. In its denial letter, defendant stated that the Policy excludes damage due to flood, surface water, and water damage unless the building is first damaged by a covered cause of loss through which the water enters. While defendant references a building in its denial letter, all parties understood that there was no building on the Property at the time losses were sustained.

¶ 7 The Policy provides in relevant part that defendant will pay for damage to the property resulting from a covered cause of loss. Water damage is excluded as a covered cause of loss but then damage caused by water backing up from the sewer is excepted from the exclusion. It provides as follows:

"A. COVERAGE.

We will pay for direct physical loss or damage to Covered Property from a Covered Cause of Loss described in this Coverage Form.

* * *

3. Covered Cause of Loss.

Covered Cause of Loss means risk of direct physical loss or damage to Covered Property, *except those causes of loss listed in Section B.*

EXCLUSIONS." (Emphasis added.)

¶ 8 Section B, exclusions states in part as follows:

"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 concurrently or in any sequence to the loss or damage.

* * *

e. Water

(4) Water that backs up or overflows from a sewer, drain or sump, *except as provided in the Back-Up Or Overflow Of Sewers, Drains or Sumps Additional Coverage; ***.*" (Emphasis added.)

¶ 9 Section 4 of the Policy provides in relevant part as follows:

"4. *Additional Coverages*

* * *

d. Back-Up Or Overflow Of Sewers, Drains Or Sumps

We will pay for loss or damage to Covered Property caused by water that backs up or overflows from a sewer, drain or sump *from within the reported location.*

The most we will pay under this Additional Coverage is the amount shown in the Supplemental Declarations for Back-Up Or Overflow Of Sewers, Drains or Sumps. ***." (Emphasis added.)

¶ 10 The amount shown in the Supplemental Declarations for "Back-Up Or Overflow Of Sewers, Drains or Sumps" is \$25,000.

¶ 11 In section 4 of the Policy's "Additional Coverages," provision is made for the payment of certain other damages caused by a "Covered Cause of Loss" and include the following:

"b. Scaffolding, Construction Forms And Temporary Structures

(1) We will pay for direct physical loss or damage which is caused by or results from a *Covered Cause of Loss*, to scaffolding, construction forms and temporary structures ***. The most we will pay under this Additional Coverage is the amount shown in the Supplemental Declarations for Scaffolding, Construction Forms And Temporary Structures.

* * *

c. Debris Removal

We will pay your expenses to remove debris of Covered Property. This debris must result from a *Covered Cause of Loss* under this Coverage Form. *** If the sum of the loss or damage and debris removal expenses exceeds the limit of the insurance applicable to the property, we will pay an additional amount of debris removal expenses you incur in excess of the limit of insurance applicable to the property up to, but not exceeding the

amount shown in the Supplemental Declarations for Debris Removal."

(Emphases added).

¶ 12 The amount listed in the Supplemental Declarations for Debris Removal is \$50,000 and the amount listed for Scaffolding, Construction Forms And Temporary Structures is \$50,000¹.

¶ 13 Plaintiff disputed defendant's denial letter. As a result, on August 12, 2016, Crawford conducted a second inspection of the Property and prepared a second report. In Crawford's second report, the cause of the damage was changed from "surface water" to "a backup of the storm sewer drain." The second report estimated the cost to repair damages to the Property at \$84,451.40. The report rejected plaintiff's request for additional coverage for construction forms stating that such coverage would only be applicable if the damage resulted from a named covered cause of loss. The report further stated that the "sewer back up endorsement would not fit into a covered cause of loss and would be instead considered an endorsement." However, the sewer overflow coverage was not an endorsement to the Policy, rather it was an integrated provision within the Policy.

¶ 14 On September 15, 2016, plaintiff received a check from defendant payable to plaintiff in the amount of \$25,000. The check itself described the nature of the payment as constituting the "Overflow of Sewers Coverage Limit." On October 6, 2016, plaintiff sent correspondence to defendant demanding payment for coverage under the Policy beyond the \$25,000 already paid for debris removal and damage to construction forms. On October 28, 2016, defendant sent plaintiff a second denial letter denying coverage for both debris removal and damage to

¹ Both defendant's brief and the trial court's July 25, 2018 Order misquote the Builders Risk Coverage Supplemental Declarations limit of insurance for "Scaffolding, Construction Forms And Temporary Structures" as being \$25,000 where the Policy states the limit is \$50,000.

construction forms stating that the damage was not the result of a "Covered Cause of Loss." In this second denial letter, reference was again made by defendant to the Policy excluding water damage unless the building was first damaged by a covered cause of loss through which the water enters. The second denial letter, like the first, is inaccurate in that there was no building on the Property at the time losses were sustained.

¶ 15 On February 8, 2017, plaintiff filed a two-count complaint. Count I for breach of contract alleged that defendant failed to fulfill its insuring obligations under the Policy and Count II alleged a violation of section 155 of the Code (215 ILCS 5/155 (West 2016)) because defendant's denial of plaintiff's claims was vexatious and unreasonable. Defendant filed its response on April 7, 2017 raising no affirmative defenses or counterclaims.

¶ 16 On July 21, 2017, defendant filed its motion for summary judgment arguing that there was no coverage for the loss claimed by plaintiff under Count I of the complaint and that defendant had a *bona fide* coverage dispute under Count II. On April 20, 2018, plaintiff filed a response and cross-motion for summary judgment. In his cross-motion for summary judgment, plaintiff argued that the damages were caused by a "Covered Cause of Loss" and that defendant was obligated to pay pursuant to the Policy provisions allowing additional coverage for damage to "Scaffolding, Construction Forms And Temporary Structures" and for "Debris Removal." Plaintiff argued, in the alternative, that the Policy was ambiguous and such ambiguity must be resolved in his favor as the insured resulting in coverage for damage to "Scaffolding, Construction Forms And Temporary Structures" and for "Debris Removal" up to the Policy limits. With respect to Count II, plaintiff argued that the totality of the circumstances required a finding that defendant's actions in disclaiming coverage for the damage were unreasonable and vexatious within the meaning of section 155 of the Code. The cross-motions for summary judgment were briefed.

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¶ 17 On July 25, 2018, the trial court entered a ruling granting defendant's motion for summary judgment and denying plaintiff's motion for summary judgment as to Count I of plaintiff's complaint. The trial court further stated that based on its finding that defendant was not required to pay for damage to "Scaffolding, Construction Forms And Temporary Structures" and for "Debris Removal", defendant's refusal to pay for that damage was not unreasonable and vexatious as alleged in count II of the complaint and the court entered judgment in favor of defendant on Count II.

¶ 18 On August 23, 2018, plaintiff timely filed his notice of appeal.

¶ 19 This appeal follows.

¶ 20 ANALYSIS

¶ 21 In the case before us, both parties agree that the Policy relates to plaintiff's Property and was in effect at the time losses defendant estimated at \$84,451.40 were sustained. There is also no dispute that defendant has paid to plaintiff \$25,000 for damages resulting from "Back-Up Or Overflow of Sewers, Drains or Sumps" pursuant to section 4 of the Policy "Additional Coverages." The Parties filed cross motions for summary judgment. "When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. *Allen v. Meyer*, 14 Ill. 2d 284, 292 (1958). However, the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment. *Haberer v. Village of Sauget*, 158 Ill. App. 3d 313, 317 (1987); *Andrews v. Cramer*, 256 Ill. App. 3d 766, 769 (1993); *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. The circuit court's entry of summary judgment is subject to *de novo* review as is the construction of an insurance policy which is a question of law. *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 153 (2004).

¶ 22 Two issues are raised by plaintiff on appeal. The first is whether the damages sustained to plaintiff's Property were caused by a "Covered Cause of Loss" under the Policy which would allow for additional coverage for "Scaffolding, Construction Forms And Temporary Structures" and "Debris Removal." Plaintiff also argues in the alternative that the meaning of "Covered Cause of Loss" is ambiguous and that ambiguity is to be resolved in favor of the insured resulting in coverage for "Scaffolding, Construction Forms And Temporary Structures" and "Debris Removal." As for his second issue, plaintiff argues that the trial court's summary judgment order finding that defendant did not act in violation of section 155 of the Code as alleged in count II of plaintiff's complaint was in error and should be reversed. We address each of plaintiff's arguments in turn.

¶ 23 Covered Cause of Loss

¶ 24 Plaintiff argues that the trial court erred in granting summary judgment in favor of defendant as to Count I of his complaint finding that damage resulting from "Back-Up Or Overflow of Sewers, Drains or Sumps" is excluded by the Policy as a "Covered Cause of Loss" and are capped at \$25,000 which has already been paid to plaintiff by defendant.

¶ 25 Our review of the trial court's ruling here turns on contract interpretation. Insurance policies are governed by the same rules of construction as other types of contracts. *Bozek v. Erie Insurance Group*, 2015 IL App (2d) 150155, ¶ 19. When interpreting the language of an insurance policy, a court's primary objective is to ascertain and give effect to the intentions of the parties as expressed in the policy. *Central Illinois Light Co.*, 213 Ill. 2d at 153. Such policies are to be read as a whole, giving effect to every provision, if possible, because it is assumed that every provision was intended to serve a purpose. *Id.* If the words in the policy are clear and unambiguous, they must be given their plain, ordinary, and popular meaning, but a contract will not be rendered ambiguous simply because the parties disagree on its meaning. *Id.* Moreover,

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we will not strain to find ambiguity where none exists or consider an unreasonable interpretation or an interpretation that leads to absurd results. *Bozek*, 2015 IL App (2d) 150155, ¶ 19.

¶ 26 At issue in the instant case is an exclusion to a "Covered Cause of Loss" under the Policy. In Illinois, it is the insurer's burden to affirmatively demonstrate the applicability of an exclusion. *Phusion Projects, Inc. v. Selective Insurance Company of South Carolina*, 2015 IL App (1st) 150172, ¶ 47. Exclusion provisions in an insurance policy that limit or exclude coverage must be construed liberally in favor of the insured. *Id.* Where an exclusion is clear and unambiguous it must be applied as written. *Pekin Insurance Co. v. Willett*, 301 Ill. App. 3d 1034, 1037-38 (1998).

¶ 27 As a preliminary matter, we note that we have reviewed the out-of-state cases cited by both parties, but we do not find them particularly helpful to our analysis where the policies at issue in those cases do not include an exception to an exclusion which is incorporated within the insurance policy itself rather than by endorsement and where the language of the exception is expressly distinguished from the stated exclusion within the Policy.

¶ 28 Turning to the language of the Policy at issue, we find there is no ambiguity and thus apply to the words of the contract their plain, ordinary, and popular meaning. *Central Illinois Light Co.*, 213 Ill. 2d at 153. In doing so, we first look to the Policy's definition of a "Covered Cause of Loss." Under the Policy a "Covered Cause of Loss means risk of direct physical loss or damage to Covered Property, except those causes of loss listed in Section B. EXCLUSIONS." Under the section B exclusions, the Policy provides that it will not pay for damage caused by "[w]ater that backs up or overflows from a sewer, drain or sump, *except* as provided in the Back-Up Or Overflow Of Sewers, Drains Or Sumps Additional Coverage; ***." (Emphasis added.)

¶ 29 Accordingly, pursuant to the definition of a "Covered Cause of Loss" "[w]ater that backs up or overflows from a sewer, drain or sump" is not a "Covered Cause of Loss" *unless* it was

caused by water backup or overflow as set forth in the "Back-Up Or Overflow Of Sewers, Drains or Sumps Additional Coverage" which is found in section A(4)(d) of the Policy. Stated differently, water backup or overflow as set forth in the "Back-Up Or Overflow Of Sewers, Drains or Sumps Additional Coverage" is an exception to the water damage exclusion of the policy.

¶ 30 Section A(4)(d) of the Policy, the "Back-Up Or Overflow Of Sewers, Drains or Sumps Additional Coverage" section, states that defendant "will pay for loss or damage to Covered Property caused by water that backs up or overflows from a sewer, drain or sump *from within the reported location.*" (Emphasis added.) Thus, "water that backs up or overflows from a sewer, drain or sump from within the reported location" which causes physical loss or damage to Covered Property is a "Covered Cause of Loss." See *Phusion Projects, Inc.*, 2015 IL App (1st) 150172, ¶ 47 (holding that exclusion provisions in an insurance policy that exclude coverage are construed liberally in favor of the insured); and *Pekin Insurance Co.*, 301 Ill. App. 3d at 1037-38 (holding clear and unambiguous exclusions must be applied as written). An exception to an exclusion is permissible in insurance policies to grant coverage so long as it is not limited by any other related exclusion as is the case with the exception for damages identified in section A(4)(d) of the Policy, the "Back-Up Or Overflow Of Sewers, Drains or Sumps Additional Coverage." See *Western Casualty & Surety Co. v. Brochu*, 105 Ill. 2d 486, 496-97 (1985).

¶ 31 The Policy further provides coverage for debris removal and damage to footings resulting from a "Covered Cause of Loss" and those coverages are set forth in the section entitled "Additional Coverages." The relevant provisions are sections A(4)(b) and (c) which state as follows:

"b. Scaffolding, Construction Forms And Temporary Structures

(1) We will pay for direct physical loss or damage which is caused by or results from a *Covered Cause of Loss*, to scaffolding, construction forms and temporary structures ***. The most we will pay under this Additional Coverage is the amount shown in the Supplemental Declarations for Scaffolding, Construction Forms And Temporary Structures.

* * *

c. Debris Removal

We will pay your expenses to remove debris of Covered Property. This debris must result from a *Covered Cause of Loss* under this Coverage Form. *** If the sum of the loss or damage and debris removal expenses exceeds the limit of the insurance applicable to the property, we will pay an additional amount of debris removal expenses you incur in excess of the limit of insurance applicable to the property up to, but not exceeding the amount shown in the Supplemental Declarations for Debris Removal."

(Emphases added.)

¶ 32 The amount listed in the Supplemental Declarations for "Debris Removal" is \$50,000 and the amount listed for "Scaffolding, Construction Forms And Temporary Structures" is \$50,000.

¶ 33 When read with the Supplemental Declarations, provisions A(4)(b) and (c) of the Policy clearly obligate defendant to pay up to \$50,000 for debris removal and up to \$50,000 for scaffolding, construction forms and temporary structures when the loss or expense results from a "Covered Cause of Loss." As stated in defendant's brief, the "policy language setting forth these coverages is not in dispute, and both provisions clearly require that any losses must arise from a Covered Cause of Loss for there to be coverage for them under the policy."

¶ 34 Defendant disputes that the water that backs up or overflows from a sewer, drain or sump from within the reported location which causes physical loss or damage to Covered Property is a "Covered Cause of Loss." However, defendant concedes that plaintiff is entitled to payment pursuant to section A(4)(d) of the Policy which provides coverage up to \$25,000 for loss or damage to Covered Property caused by water that backs up or overflows from a sewer, drain or sump from within the reported location. This is further evidenced by defendant's tendering a check to plaintiff in the amount of \$25,000 with the notation "Overflow of Sewers Coverage Limit."

¶ 35 As we established above, damage to Covered Property caused by water that backs up or overflows from a sewer, drain or sump from within the reported location is an exception to the exclusion provisions of the Policy which excludes water damage as a covered loss. Therefore water damage caused by water that backs up or overflows from a sewer, drain or sump from within the reported location is a "Covered Cause of Loss" under section A(4)(d) of the Policy. Defendant having acknowledged that plaintiff is entitled to coverage under section A(4)(d) of the Policy, which we have determined is a "Covered Cause of Loss," we further conclude that defendant is also obligated under the Policy for coverage pursuant to sections A(4)(b) and (c) of the Policy for "Debris Removal" up to \$50,000 and "Scaffolding, Construction Forms And Temporary Structures" up to \$50,000. In the instant case, while coverage for "Debris Removal" and "Scaffolding, Construction Forms And Temporary Structures" is triggered by section A(4)(d), these additional sources of coverage grant specific coverage with specific limits of insurance separate and independent from that provided in section A(4)(d). Plaintiff purchased these additional coverages so they would be included in the Policy.

¶ 36 Defendant argues that such a reading of the Policy would render numerous provisions within the Policy meaningless contrary to well-settled rules governing insurance policy contract

interpretation citing *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 381 (2007), and *Young v. Allstate Insurance Co.*, 351 Ill. App. 3d 151, 158 (2004). In support of this position, defendant states that an interpretation construing section A(4)(d) as a "Covered Cause of Loss" has the effect of rendering meaningless the \$25,000 limit listed in the Coverage Declarations applicable to "Back-Up Or Overflow Of Sewers, Drains Or Sumps." We disagree.

¶ 37 The \$25,000 limit of insurance places a cap on coverage for back-up or overflow of sewers, drains, or sumps under section A(4)(d) as against the Policy's general coverage limit of \$2,925,000. As such, the \$25,000 limit is not meaningless, but applicable where damages under A(4)(d) exceed \$25,000 and do not trigger other "Additional Coverages" under Section A(4) of the Policy.

¶ 38 Moreover, the language of the Policy under "Back-up Or Overflow Of Sewers, Drains Or Sumps" states that "[t]he most we will pay under this Additional Coverage" is the \$25,000 set forth in the Supplemental Declarations. While limiting payment under "this Additional Coverage" the language of the Policy does not preclude payments provided for under other additional coverage sections provided for within the Policy. Specifically, the Policy expressly states it will pay for "Debris Removal," and "Scaffolding, Construction Forms And Temporary Structures" in each instance limiting that coverage by stating "the most we will pay under this Additional Coverage" is \$50,000. The only thing required by the Policy to trigger these additional coverages is a "Covered Cause of Loss." We also note that the language in section A(4)(c) "Debris Removal" expressly contemplates payment in excess of the limits of insurance applicable to the property stating "[i]f the sum of the loss or damage and debris removal expenses exceeds the limit of the insurance applicable to the property, we will pay an additional amount of debris removal expenses you incur in excess of the limit of insurance applicable to the property up to, but not exceeding the amount shown in the Supplemental Declarations for Debris

Removal." Furthermore, the additional coverage provisions for damages to "Scaffolding, Construction Forms And Temporary Structures" and for "Debris Removal" also do not limit coverage where the damage is the result of "Back-Up Or Overflow Of Sewers, Drains Or Sumps" under section A(4)(d) of the Policy. This is particularly significant where, as plaintiff points out, the Policy under "Debris Removal" expressly lists specific costs the additional coverage does not apply to and does not include costs for "Back-Up Or Overflow Of Sewers, Drains Or Sumps" under section A(4)(d).

¶ 39 As further justification, we look to the definition of the word "additional." Where an insurance policy does not define a particular term as is the case here, courts may look to their dictionary definition to afford the word its plain, ordinary, and popular meaning. *Valley Forge Insurance Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 367 (2006). Merriam-Webster Dictionary defines "additional" as "more than usual or expected." Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/additional> (last visited April 23, 2019). Additional Coverages for "Debris Removal" and "Scaffolding, Construction Forms And Temporary Structure" provide for "additional" or more than the expected \$25,000 coverage for "Back-up Or Overflow Of Sewers, Drains Or Sumps" and are expressly permitted under the Policy which requires only that the damage be the result of a "Covered Cause of Loss" in order for coverage to be triggered.

¶ 40 Therefore, we reverse the trial court's decision granting defendant's motion for summary judgment as to Count I of plaintiff's complaint. We also reverse the trial court's denial of plaintiff's motion summary judgment with respect to Count I and grant plaintiff's motion in part finding that plaintiff is entitled to coverage pursuant to sections A(4)(b) and (c) of the Policy for "Debris Removal" up to \$50,000 and "Scaffolding, Construction Forms And Temporary Structures" up to \$50,000. The amount of payments to which plaintiff is entitled for coverage

pursuant to sections A(4)(b) and (c) being a factual determination not addressed in this record, we remand that issue to the trial court for further proceedings consistent with this ruling.

¶ 41 Claim Pursuant to Section 155 of the Illinois Insurance Code

¶ 42 Plaintiff further argues on appeal that the trial court erred in granting summary judgment in favor of defendant finding that defendant did not act in violation of section 155 of the Code.

¶ 43 In its July 25, 2018 ruling, the trial court entered judgment in favor of defendant on Count II based on its erroneous determination that plaintiff was not entitled to coverage pursuant to sections A(4)(b) and (c) of the Policy for "Debris Removal" and "Scaffolding, Construction Forms And Temporary Structures."

¶ 44 The parties dispute the applicable standard of review. Defendant argues that the standard of review for a denial of plaintiff's claim under section 155 of the Code is abuse of discretion even when granted pursuant to summary judgment. In support of this position, defendant cites *Doyle v. Country Mutual Insurance Co.*, 2014 IL App (2d) 121238, ¶ 30, and *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 744 (2010) which emphasize the factual and discretionary nature of a trial court's determination when relief pursuant to section 155 of the Code is sought. We disagree. The trial court's decision to deny section 155 relief was not based on an assessment of the facts informing the court's discretion but, instead, the erroneous conclusion that defendant had no obligation for additional coverage under the Policy. Here, the proper standard of review applied to the trial court's denial of a request for relief under section 155 of the Code pursuant to a motion for summary judgment is *de novo*. *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 29.

¶ 45 Either party to the litigation may move for summary judgment "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, 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 (West 2018). A genuine issue of material fact exists where the facts are in dispute. *Libolt v. Weiner Circle, Inc.*, 2016 IL App (1st) 150118, ¶ 24. Where material facts are disputed or where reasonable people could draw different inferences from the facts, summary judgment is inappropriate. *In re Marriage of LaRocque*, 2018 IL App (2d) 160973, ¶ 43.

¶ 46 Section 155 of the Code allows for attorney fees payable by an insurance company in an action brought against them "wherein there is in issue the liability of a company on a policy *** of insurance or the amount of loss payable thereunder, or for an unreasonable delay in settling the claim and it appears to the court that such action or delay is vexatious and unreasonable ***." 215 ILCS 5/155 (West 2016). The question of whether an insurance company's behavior is vexatious and unreasonable is a question of fact. *Buckner v. Causey*, 311 Ill. App. 3d 139, 150 (1999). An insurance company does not violate the statute merely by unsuccessfully litigating a dispute involving the scope of coverage or the magnitude of the loss. *McGee v. State Farm Fire and Casualty Co.*, 315 Ill. App. 3d 673, 681 (2000). In determining whether action or delay was vexatious and unreasonable, the totality of the circumstances must be considered including (1) the insurer's attitude, (2) whether the insured was forced to sue and recover, and (3) whether the insured was deprived of the use of his property. *Id.*

¶ 47 Plaintiff alleges in his complaint that defendant's actions were unreasonable and vexatious because (1) defendant engaged in improper claims practice under the Code when it delayed or failed to investigate plaintiff's claims before denying a portion of said claim and based this denial on the improper investigation and, (2) as a result, plaintiff was forced to file a complaint to recover money owed by defendant under the policy. In its answer to the complaint, defendant denied these allegations.

¶ 48 Plaintiff further alleges in his response to defendant's motion for summary judgment and cross-motion for summary judgment that (1) defendant prematurely issued its first denial letter

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denying all coverage for plaintiff's damages; (2) in its first denial letter defendant failed to identify any specific exclusion in the Policy upon which it allegedly relied to disclaim coverage for the loss and thereby failed to properly inform plaintiff of the basis for its denial of coverage; (3) defendant only re-investigated the loss after plaintiff objected to defendant's first denial, thereafter determining that its original assessment of the "origin of the loss" was incorrect and due to sewer backup and overflow; (4) defendant intentionally mischaracterized the sewer back-up additional coverage as an endorsement to justify its wrongful denial of plaintiff's loss; (5) while defendant paid \$25,000 for additional coverage for sewer overflow it continued to disclaim additional coverage claiming that the loss was not a "Covered Cause of Loss;" (6) in defendant's second denial letter, it failed to cite the specific exclusions in the Policy which it relied on to deny plaintiff coverage for debris removal and construction form damage thereby failing to inform plaintiff of the basis for its denial of coverage; (7) despite paying plaintiff \$25,000, in the second denial letter, defendant continued to deny coverage for additional coverage under debris removal and construction form damage on the basis that there was no "Covered Cause of Loss;" (8) defendant justified its wrongful denial of coverage under the Policy by relying on the "Sewer Back-Up Exclusion" while ignoring the exception to this exclusion; (9) defendant used its wrongful determination that there was no "Covered Cause of Loss" under the Policy to justify its denial of coverage under additional coverages for debris removal and construction forms; and (10) as a result, plaintiff was forced to file a complaint to compel defendant to perform its obligations under the Policy.

¶ 49 We have found that the trial court's basis for granting defendant's motion for summary judgment on Count I of plaintiff's complaint to be in error because defendant is entitled to additional coverage for "Debris Removal" and damage to "Scaffolding, Construction Forms And Temporary Structures." Therefore, we must also reverse the court's grant of summary judgment

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as to Count II made on the basis that defendant had no obligation to pay plaintiff for these additional coverages. We further find that there are disputed issues of material fact so as to preclude this issue from decision by way of summary judgment and, as such, remand the matter for further proceedings consistent with this order. *LaRocque*, 2018 IL App (2d) 160973, ¶ 43.

¶ 50

CONCLUSION

¶ 51 For the foregoing reasons, the judgment of the circuit court of Cook County is reversed and this case is remanded for further proceedings consistent with this order.

¶ 52 Reversed and remanded for further proceedings.