2015 IL App (1st) 133594-U

FIFTH DIVISION
JUNE 26, 2015

No. 1-13-3594

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

JEAN LEE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant and Cross-Appellee,	)	Cook County
	)	
v.	)	No. 11 L 9494
	)	
ERIE INSURANCE EXCHANGE d/b/a ERIE INSURANCE,	)	Honorable
	)	Margaret A. Brennan,
Defendant-Appellee and Cross-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Palmer and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Following a bench trial, the circuit court ordered the defendant property insurer to pay the plaintiff insured the actual cash value of a loss resulting from a collapse of a multi-story structure attached to the insured's apartment building. The appellate court held the circuit court: (1) did not err in denying summary judgment for the insurer; (2) did not err in entering judgment for the insured; (3); did not err in excluding sums the insured spent erecting a simple nonequivalent replacement for the collapsed structure and (4) erred in awarding the actual cash value of the loss, as opposed to the replacement costs.

¶ 2 Following a bench trial, the circuit court of Cook County entered judgment in favor of plaintiff Jean Lee (Lee) and against defendant Erie Insurance Exchange d/b/a Erie Insurance (Erie) on Lee's first amended complaint, which alleged that Erie was in breach of contract by denying dwelling property coverage under an insurance policy issued by Erie to Lee. On appeal, Lee argues the trial court applied improper measures in its award of damages. On cross-appeal, Erie argues the trial court erred in entering judgment in favor of Lee and in denying summary judgment in favor of Erie. For the following reasons, we affirm the judgment of the circuit court regarding coverage, vacate the award of damages and remand to the circuit court for a recalculation of damages consistent with this order.

¶ 3 BACKGROUND

¶ 4 The record on appeal discloses that on September 12, 2011, Lee filed her original complaint against Erie. The complaint alleged that Erie provided insurance for the premises located at 3736 North Ashland Avenue in Chicago, effective from February 1, 2010, to February 1, 2011. The property was owned by Lee. A copy of the policy declarations was attached to the complaint. Lee alleged that on September 12, 2010, a large number of individuals were on the second-floor deck of the premises when the deck collapsed. As a result of the collapse, Lee alleged there was "a direct physical loss to the premises." As noted in the complaint, one of the policy endorsements stated that Erie "insure[d] for direct physical loss to covered property involving a collapse of a building or any part of a building if the collapse was caused by *** weight of *** people." Lee presented a claim for that loss to Erie.

¶ 5 In a letter dated October 20, 2010, a copy of which was attached to the complaint, Erie denied coverage for the collapse of the deck. The letter stated that after reviewing a report from Rimkus Consulting, Erie found the collapse of the deck was due to improper construction, and

that losses of this type were thereby excluded from coverage under the policy. Lee alleged the denial of coverage breached the contract between her and Erie, and sought the reasonable costs of repairing the deck.

¶ 6 On October 24, 2011, Erie filed its answer to Lee's complaint and a counterclaim. In its counterclaim, Erie sought a judgment declaring Erie had no duty to pay the claim alleged in the complaint under the policy it issued to Lee. On November 28, 2011, Lee filed her answer to Erie's counterclaim.

¶ 7 On March 22, 2012, Erie filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1005 (West 2010)), arguing no genuine issue of material of fact existed regarding the scope of the property damage or the terms of its insurance policy. Erie attached a copy of the policy to its memorandum in support of summary judgment. For a better understanding of the issue on appeal, a summary of the pertinent provisions of the policy is necessary.

¶ 8 The "dwelling property" section of the policy contains a number of coverages. "Coverage A - Dwelling" applied to the dwelling at the location described in the policy declarations, "including structures attached to the dwelling." "Coverage B - Other Structures" applied to structures at the described location set apart from the dwelling by clear space, but connected to the dwelling by only a fence, utility line "or similar connection." "Coverage C" applied to personal property usual to the occupancy of a dwelling, excluding certain enumerated items. "Coverage D" provided for the payment of fair rental value in the event of a loss to property described by the prior coverages by a "Peril Insured Against" under the policy. "Coverage E" provided for similar payments of any necessary living expenses as the result of the type of loss described by Coverage D.

¶ 9 Section F of the policy contained a number of "Other Coverages," including subsection 10, which is entitled "Collapse" (Other Coverage 10). This coverage defined a collapse as "an abrupt falling down or caving in of a building or any part of a building with the result that the building or part of the building cannot be occupied for its current intended purpose." The policy insured "for direct physical loss to covered property involving collapse of a building or any part of a building if the collapse was caused by one or more" of a list of causes, including the "[w]eight of contents, equipment animals or people." The policy further provided, however, that "[l]oss to an awning, fence, patio, deck, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included" for a weight-related collapse "unless the loss [was] the direct result of the collapse of a building or any part of a building."

¶ 10 Section F of the policy also included subsection 12, which is entitled "Ordinance or Law" (Other Coverage 12). This coverage applied in part to increased costs incurred due to the enforcement of any ordinance or law which "require[d] or regulate[d] *** the construction, demolition, remodeling or repair of that part of a covered building or other structure damaged by a Peril Insured Against."

¶ 11 The "Perils Insured Against" section of the policy stated Erie would insure against the risk of direct physical loss to property described in Coverages A and B. Erie would not insure for loss: excluded under the policy's general exclusions; involving collapse (except as provided in "Other Coverage 10"); or caused by a list of enumerated perils. The policy also provided Erie would insure against the risk of direct physical loss to property described in Coverage C, unless the loss was excluded by the general exclusions or appeared on an enumerated list in the policy.

¶ 12 The "General Exclusions" section of the Policy is broadly divided into two subsections.

The first subsection provided the policy did not insure for loss "caused directly or indirectly" by certain described factors such as intentional action, war, and nuclear hazard. The policy stated "[s]uch loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss." One of these general exclusions stated Erie did not insure for loss caused directly or indirectly by ordinance or law, but this exclusion stated it did not apply to the amount of coverage that may be provided by Other Coverage 12.

¶ 13 The second subsection of the general exclusions provided in pertinent part that Erie did not insure for loss to property described in Coverages A and B caused by faulty, inadequate or defective design specifications, workmanship, repair, construction, renovation, remodeling, or compaction. The second subsection similarly excluded loss due to faulty, inadequate or defective materials used in repair, construction, renovation, or remodeling.

¶ 14 The conditions section of the policy includes a subsection on loss settlement. This subsection provided in part that covered losses regarding "[s]tructures that are not buildings" would be settled at "actual cash value at the time of loss but not more than the amount needed to repair or replace." This subsection also provided that property losses for "[b]uildings under Coverages A or B" would be settled at replacement cost without deduction for depreciation, subject to certain limitations.

¶ 15 In its memoranda[1] in support of summary judgment, Erie observed the plain and unambiguous language of its policy stated that loss to a deck was not covered unless the loss was a direct result of the collapse of a building or any part of a building. Erie observed that in objecting to a request to admit, Lee had stated no other building collapsed and "no structure not

[1] Erie amended its memorandum in support of summary judgment, but the argument presented is substantially identical in both memoranda.

attached to or associated with the deck collapsed." Thus, Erie contended, "the house connected to the deck in this case *** did not collapse to cause the deck to collapse to trigger coverage under the policy."

¶ 16 On June 14, 2012, Lee filed a cross-motion for summary judgment regarding liability, as well as a response to Erie's motion for summary judgment. Lee's cross-motion for summary judgment and response to Erie's motion were supported by: an affidavit executed by Lee; a discovery deposition of Albert J. Gouwens, a licensed professional engineer who prepared a report on the incident for Rimkus Consulting on behalf of Erie; the report on the incident produced by Rimkus Consulting; and the materials submitted by Erie in support of summary judgment. Lee described her apartment building as having two and one-half stories, with an attic apartment and a rear porch with decks at three levels. The first floor of the porch was accessible from the rear door of the first story apartment or from the outside. The second floor of the porch was accessible from an outside stairway and a sliding door from the second floor apartment or from the outside stairway. The third floor of the porch was accessible only from the attic apartment.[2] The collapse began at the second floor of the porch, which also resulted in the third-floor deck collapsing.

¶ 17 The Rimkus Consulting report describes the building at issue as having a single exterior porch constructed of pressure-treated lumber, with three decks, two of which had been removed prior to Rimkus visiting the building. Photographs included in the Rimkus Consulting report indicate that the porches were attached to the side of the house and to each other, by either stairs or support posts. The first-story porch is only slightly elevated from ground level. The portion

[2] Although not clear from the Rimkus Consulting report, Lee later testified at trial that the third-floor porch was accessible from a sliding glass door, similar to the second-floor porch.

of the second-story closest to the sliding door had become displaced and extended down toward the first-story porch. The third-story deck was missing in the photographs included in the report.

¶ 18 Gouwens determined the collapse was caused by the weight of the building materials and the occupants on the deck at the time of the collapse. According to Gouwens, the nails attaching the porch to the apartment building at the second floor could not withstand the combined weight of the deck and the occupants. Thus, the nails separated and the second-floor deck collapsed, displacing and breaking a post which caused the third-floor deck to collapse.

¶ 19 Accordingly, Lee argued, "a cause of the porch collapse, though not the only cause, was the weight of the occupants on the porch ***, which caused the nails necessary to keep the porch standing to fail." Thus, Lee concluded, the loss is covered by the "other" coverage for a collapse. Lee observed that in the letter denying coverage, Erie relied upon the policy's general exclusion of faulty, inadequate or defective construction. Lee asserted the general exclusion does not apply to losses specifically governed by the "other" coverage for a collapse.

¶ 20 On July 16, 2012, Erie filed a reply in support of its motion for summary judgment and response to Lee's cross-motion for summary judgment. Erie observed its letter denying coverage relied on not only the report from Rimkus Consulting, but also policy language indicating a loss to a deck is excluded from coverage. Asserting that a deck is not a building or a part of a building, Erie argued that all decks are excluded from coverage under its policy, regardless of whether the decks are attached to a building. In particular, Erie observed the report from Rimkus Consulting indicated the building at issue was 116 years old, whereas Lee represented only that the deck had been standing for more than 10 years before the incident. Erie also argued that Lee's interpretation of the policy would nullify certain terms of the exclusion in Other Coverage

10[3], such as the part referring to a foundation, which is always attached to a building. Erie further argued that if an attached deck is "part of a building" under the policy, "the collapse of the attached deck is not the direct 'result of' the collapse of the building." In addition, Erie asserted that Lee's description of the structure as a porch did not create any ambiguity regarding the policy, as Lee made numerous judicial admissions that the structure at issue was a deck. Moreover, Erie maintained the report from Rimkus Consulting concluded only that the deck failed due to inadequate fasteners and "the applied load did *not* exceed the allowable design load." (Emphasis in original.) For these reasons, Erie concluded it was entitled to summary judgment.

¶ 21 On October 30, 2012, the circuit court entered an order denying the parties' motions for summary judgment, ruling the term "deck" was ambiguous. The circuit court also granted Lee leave to file an amended complaint.

¶ 22 Lee filed her amended complaint on November 15, 2012. The amended complaint refers to the structure at issue as a porch, and asserted that "nothing which collapsed, including the floors of the structure commonly described as a porch, was a deck" within the meaning of the policy. The amended complaint also alleged that Gouwens had opined the weight of the people on the porch was a cause of the collapse. The amended complaint further alleged Erie's denial of coverage relied on the policy's general exclusion for faulty, inadequate or defective construction. Lee asserted the general exclusion cited by Erie did not apply to losses governed by the policy's specific coverage for collapses (*i.e.*, Other Coverage 10).

¶ 23 On November 21, 2012, Erie filed its answer to the amended complaint and counterclaim for a declaratory judgment. In the counterclaim, Erie continued to allege Lee's claim involved

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[3] Other Coverage 10 is the policy provision entitled "Collapse." *Supra* ¶ 9.

the alleged collapse of a deck. On December 20, 2012, Lee filed her answer to Erie's counterclaim, including an admission of the allegation that her claim involved the alleged collapse of a deck.

¶ 24 On May 23, 2013, the parties entered into a number of stipulations, including three joint exhibits. The parties agreed to label the policy at issue as joint exhibit number one. The parties also agreed to label a collection of photographs of the structure at issue on the insured premises as joint exhibit two.[4] The parties further agreed that if called to testify as a witness, Gouwens would testify to the matters contained in his discovery deposition, which was submitted as joint exhibit number three. The parties additionally stipulated that the structure collapsed on September 12, 2010.

¶ 25 Moreover, the parties agreed that if the trial court determined there was coverage, the replacement cost of the structure was $46,350, the actual cash value of which would be $24,009.30. The parties agreed that after the structure collapsed, Lee paid $17,000 to build a new structure not identical to the original. The parties disagreed regarding the inclusion of the $17,000 as an element of Lee's damages. If the trial court determined the $17,000 should be included as an element of Lee's damages, the replacement cost would be $63,350, the actual cash value of which would be $32,815.30.

¶ 26 The trial commenced on May 23, 2013. Lee testified on her own behalf regarding her description of the apartment building and the multi-level porch. Lee also testified she used the terms "deck" and "porch" interchangeably. Lee additionally testified that when she purchased

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[4] Although the parties in this case disagree regarding whether the structure in this case should be called a "porch" or a "deck," and whether the structure should be considered part of the building, the parties' stipulations refer to it as a "structure."

the Policy, she expected the collapse of a porch would be covered. Lee acknowledged, however, that when she purchased the policy, she did not inquire about that topic.

¶ 27 Defense counsel questioned Lee regarding her pretrial stipulation that she spent money for a structure that was not equivalent to the structure that collapsed. Lee explained that television news publicity of the porch collapse caused her to be prosecuted in "building court" and she was advised by her attorney to act to end the proceedings as quickly as possible, because the fines were approximately $2,000 daily. Lee thus paid $17,000 for a simple partial replacement structure, which would secure the building against potential falls and comply with a court order to "take down the porch." This cost included architectural drawings for the partial replacement structure. Lee described the new structure as smaller, with two fewer levels than the one that collapsed. According to Lee, she could not afford a structure as large as the one that collapsed because Erie refused to cover her loss.

¶ 28 Erie presented testimony from Todd Shurtz, the property insurance adjuster who investigated the loss at Lee's property. Shurtz inspected the property and was unable to determine the cause of the collapse, which resulted in Erie hiring Rimkus Consulting to issue a report on the subject. Shurtz testified that the report concluded: (1) the collapse was the result of inadequate nails, a construction defect; and (2) the applied load on the deck did not exceed the allowable code-specified design load. Accordingly, Schurtz issued the letter denying coverage of Lee's property claim. Schurtz then testified regarding the grounds for denial listed in the letter he issued to Lee.

¶ 29 Schurtz also testified he did not look up the definition of a "building" in making his coverage determination. Schrutz explained that his definition of a building would be that "it has four walls and a roof." Schurtz further testified the structure that collapsed did not have a roof.

Therefore, Shrurtz did not consider the structure to be a building, but considered it part of the building and attached to the building.

¶ 30 Following the close of evidence the trial court directed the parties to provide written closing arguments, as well as proposed findings of fact and conclusions of law, by June 20, 2013. The trial court entered an order on July 3, 2013, granting judgment in favor of Lee in the amount of $25,508.95. On August 2, 2013, Lee filed a motion to reconsider the amount of the judgment, arguing she should have been awarded her replacement costs, rather than the actual cash value of the loss. Lee also argued the $17,000 cost incurred to build a new deck should be included in the award. On September 13, 2013, Erie filed a response in opposition to the motion for reconsideration, arguing that Lee had "not offered any new or convincing argument in support of her claims for additional coverage." On September 27, 2013, Lee filed her reply in support of her motion for reconsideration, arguing that a structure which is part of a building cannot be treated separately from the building itself, and thus should be settled for replacement costs under Coverage A of the Policy (which includes structures attached to a dwelling). On October 15, 2013, the trial court entered an order increasing the judgment to include $397 for court costs, but otherwise denying the motion for reconsideration.

¶ 31 On November 14, 2013, Lee filed a timely notice of appeal to this court. On November 21, 2013, Erie timely filed its notice of cross-appeal.

¶ 32 ANALYSIS

¶ 33 On appeal, Lee argues the trial court applied improper measures in its award of damages. On cross-appeal, Erie argues the trial court erred in denying summary judgment in favor of Erie and in entering judgment in favor of Lee. We will review the rulings of the circuit court in chronological order.

¶ 34 Summary Judgment

¶ 35 A grant of summary judgment is only appropriate when the pleadings, depositions, admissions, and affidavits demonstrate no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2010); *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). "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." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. "However, the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact" and the court must determine if a question of fact exists. *Id.* "In appeals from summary judgment rulings, review is *de novo*." *Williams*, 228 Ill. 2d at 417. Finally, we note that we review the trial court's judgment, not its reasoning, and we may affirm on any grounds in the record, regardless of whether the trial court relied on those grounds or whether the trial court's reasoning was correct. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97 (1995); see *Hess v. Flores*, 408 Ill. App. 3d 631, 636 (2011).

¶ 36 This case involves the interpretation of an insurance policy contract, which also 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). Therefore, we construe the policy as a whole, giving effect to every provision and applying unambiguous policy language as written. *Id.* at 363. "Where an inconsistency arises between a clause that is general and one that is more specific, the latter prevails." *Alberto-Culver Co. v. Aon Corp.*, 351 Ill. App.

3d 123, 135 (2004). "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). "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). "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*. An undefined contract term is given its plain and ordinary meaning, which can be obtained from a dictionary. See *El Rincon Supportive Services Organization, Inc. v. First Nonprofit Mutual Insurance Co*., 346 Ill. App. 3d 96, 102 (2004).

¶ 37 Erie argues that Lee judicially admitted the only structure that collapsed in this case was unequivocally a "deck." Thus, Erie maintains, the policy excludes coverage because the collapse of the deck was not a direct result of the collapse of the building or any part of a building. Lee responds that her references to a "deck" cannot constitute a judicial admission because the meaning of the policy is a question of law and matters of law cannot be the subject of admissions of fact. See, *e.g*., *Montalbano Builders, Inc. v. Rauschenberger*, 341 Ill. App. 3d 1075, 1081 (2003) (discussing difference between legal conclusions and admissions of fact). Lee also observes her original complaint was not verified and she subsequently amended her complaint to refer to the structure at issue as a "porch." Lee further observes the term "deck" is ambiguous because it may refer to part of a porch which is in turn part of a home. See, *e.g*., *Hall v. Canady*, 149 Ill. App. 3d 544, 548-49 (1986).

¶ 38 The provision of the policy at issue in this case provided that "[l]oss to [a] deck *** is not included" for a weight-related collapse "unless the loss [was] the direct result of the collapse of a building or any part of a building." Accordingly, the question of whether the structure is a deck or a porch only matters if the structure is not a "building" or a "part of a building."[5]

¶ 39 Other Coverage 10 does not define a "building" or a "part of a building." Erie observes that the Chicago Building Code defines a building as a "structure, or part thereof, enclosing any occupancy." See Chicago Municipal Code § 13-04-010 (2012)). Erie, however, provides no evidence that the parties agreed upon that particular legal definition of a "building." Thus, the undefined contract term is to be given its plain and ordinary meaning, which can be obtained from a dictionary. *El Rincon Supportive Services Organization, Inc.*, 346 Ill. App. 3d at 102.

¶ 40 A common dictionary definition of a building is "a usu[ally] roofed and walled structure built for permanent use (as for a dwelling)." Merriam-Webster's Collegiate Dictionary 162 (11th ed. 2003). The policy does not cover collapses other than as stated in Other Coverage 10. The policy, however, does not indicate the term "building" in Other Coverage 10 was intended to narrow the coverage of a dwelling described in Coverage A. The policy's Coverage A for dwellings specifically includes structures attached to the dwelling. Accordingly, Coverage A would extend to the structure attached to the dwelling at issue in this case.

¶ 41 The remaining issue is whether the exclusion in Other Coverage 10 would apply to the claim asserted in this case. The Rimkus Consulting report and included photographs establish that the second-floor deck of the exterior porch was accessible from sliding doors of the second-floor apartment, such that tenants of that apartment would fall some distance to the ground

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[5] Indeed, the Policy's definition of a collapse and the provision defining the scope of coverage for a collapse both refer to a building or a part of a building.

absent the porch.[6] The report thus raised a genuine issue as to whether the attached structure was to be considered part of the building. Therefore, the loss of the second-floor and third-floor decks and associated support posts arguably was the result of the collapse of "part of a building." Consequently, the loss arguably was covered by Other Coverage 10.

¶ 42 The only case Erie cites in support of the opposite conclusion is *Teti v. Phoenix Insurance Co.*, No. 08-cv-0983, 2009 WL 260780 (E.D. Pa. Jan. 29, 2009), an unpublished decision of the federal district court for the Eastern District of Pennsylvania. This court has often declined to consider unpublished federal decisions. See, *e.g.*, *Horwitz v. Sonnenschein Nath & Rosenthal, LLP*, 399 Ill. App. 3d 965, 976 (2010); *Burnette v. Stroger*, 389 Ill. App. 3d 321, 329 (2009). On the other hand, nothing prevents this court from using the same reasoning and logic as set forth in an unpublished federal decision where we find it to be persuasive. *Solargenix Energy, LLC v. Acciona, S.A.*, 2014 IL App (1st) 123403, ¶ 39 n.10. In *Teti*, the court ruled a retaining wall would not be considered "part of a building" under the more general portion of a seemingly similar collapse coverage.[7] *Teti*, 2009 WL 260780 at p*5. Accordingly, the *Teti* court concluded the express exclusion of loss to retaining walls in occurrences involving collapse applied. *Id*. There is no indication the retaining wall in *Teti* was attached to the dwelling or was part of its design. Therefore, we do not find *Teti* persuasive in this case.

¶ 43 In short, based on the record before the circuit court regarding the cross-motions for summary judgment, there was at a minimum a genuine issue of material fact regarding whether the structure at issue was part of the building. Accordingly, we conclude Erie was not entitled to

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[6] Lee's trial testimony established this was also true of the third-floor deck.

[7] We characterize the policy as "seemingly" similar because the *Teti* court quotes from the collapse coverage, but not from the overall coverages or perils insured against in that policy.

summary judgment even if the structure at issue was considered to be a deck.

¶ 44 The Bench Trial

¶ 45 Erie also argues the trial court erred in entering judgment in favor of Lee after the bench trial in this matter. Generally, the standard of review applied regarding a judgment from a bench trial is whether the order or judgment is against the manifest weight of the evidence. *Reliable Fire Equipment Co. v. Arredondo*, 2011 IL 111871, ¶ 12. "A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002). "We will reverse the trial court's decision only where the appealing party presents evidence that is strong and convincing enough to overcome, completely, the evidence and presumptions existing in the opposing party's favor." *Wolinsky v. Kadison*, 2013 IL App (1st) 111186, ¶ 116. "As a reviewing court, we may not overturn a judgment merely because we disagree with it, or as the trier of fact, we might have come to a different conclusion." *Id.* In reviewing the trial court's conclusions of law, however, we apply a *de novo* standard of review. *Eychaner*, 202 Ill. 2d at 252.

¶ 46 As previously noted, however, the Policy coverage extends to loss from the collapse of any part of a building, including loss to a deck where the deck is part of a building. Erie contends the structure that collapsed was a deck, not a building, and thus was not covered under its policy. Shrurtz, Erie's property insurance adjuster who investigated the loss at the property in question, testified he considered the structure at issue to be part of the building. Accordingly, Erie's argument on this point fails.

¶ 47 Erie also argues the loss was not covered because of the policy's general exclusion of loss due to faulty, inadequate or defective construction. Erie relies upon case law from other

jurisdictions to assert Illinois should strictly construe causation under a first-party property insurance policy, such that the loss is covered only if the covered risk was the efficient proximate cause of the loss. See *Murray v. State Farm Fire and Casualty Co*., 509 S.E.2d 1, 12 (W.Va. 1998); *Hartford Steam Boiler Inspection & Insurance Co. v. Pabst Brewing Co.*, 201 F. 617, 626-27 (7th Cir. 1912).

¶ 48 Lee initially responds that Erie forfeited this argument by failing to raise it in the circuit court. It is axiomatic that " 'an issue not presented to or considered by the circuit court cannot be raised for the first time on review.' " *Haudrich v. Howmedica, Inc*., 169 Ill. 2d 525, 536 (1996) (quoting *Daniels v. Anderson*, 162 Ill. 2d 47, 58 (1994)). "Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal." *Mabry v. Boler*, 2012 IL App (1st) 111464, ¶ 15. Allowing a party to change its theory of the case on appeal would weaken the adversarial process and likely prejudice the opposing party. *Haudrich*, 169 Ill. 2d at 536.

¶ 49 In this case, during the proceedings on the cross-motions for summary judgment, Lee asserted that the Rimkus Consulting report concluded the weight was the cause of the collapse. Erie disputed this assertion, contending that "[a]lthough Gouwens testified that the load on the deck caused it to fail, the totality of the testimony and the conclusions in his report lead to the conclusion that the inadequate fasteners caused the deck collapse." Erie, however, did not cite any authority in support of the argument that Illinois courts should construe causation under a first-party property insurance policy strictly, such that the loss is covered only if the covered risk was the efficient proximate cause of the loss. Instead, Erie argued there was no genuine issue of material fact regarding *the* cause of the collapse. Consequently, we conclude Erie forfeited this argument on appeal.

¶ 50 Moreover, we observe in passing that Erie's argument would have failed had it not been forfeited. Although the first subsection of the general exclusions stated "[s]uch loss is excluded regardless of any other cause *** contributing concurrently or in any sequence to the loss," the second subsection—including the exclusion for faulty, inadequate or workmanship and construction—included no similar language regarding concurrent causation. Accordingly, reading the policy as a whole, the second subsection of the general exclusions could reasonably be interpreted as not completely excluding losses in cases where an insured cause is also involved. The resulting ambiguity would be liberally construed in favor of coverage. *Hobbs*, 214 Ill. 2d at 17.

¶ 51 Thus, Erie has failed to demonstrate the trial court erred in entering judgment in favor of Lee after the bench trial in this matter.

¶ 52 The Measure of Damages

¶ 53 Lastly, Lee contends the trial court applied improper measures in its award of damages. Lee argues she was entitled to the replacement cost of the structure attached to the dwelling, rather than the actual cash value awarded by the trial court. Lee also argues she was entitled to the $17,000 she spent on the nonequivalent porch erected to comply with the law and avoid substantial fines.

¶ 54 Where an award of damages is rendered after a bench trial, the standard of review is whether the trial court's judgment is against the manifest weight of the evidence. *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008). A judgment is against the manifest weight of the evidence only if the opposite conclusion is clear or where the trial court's findings appear to be unreasonable, arbitrary, or not based on evidence. *Id.* "[A] reviewing court should not overturn a trial court's findings merely because it does not

agree with the lower court or because it might have reached a different conclusion had it been the trier of fact." *In re Application of the County Treasurer*, 131 Ill. 2d 541, 549 (1989). In order to overturn a damage award, a reviewing court must find that the trial judge either ignored the evidence or that its measure of damages was erroneous as a matter of law. *MBC, Inc. v. Space Center Minnesota, Inc.*, 177 Ill. App. 3d 226, 234 (1988).

¶ 55 As previously noted, the evidence adduced at trial established the structure was not a building, but was part of a building. The policy's subsection on loss settlement provided that covered losses regarding "[s]tructures that are not buildings" would be settled at "actual cash value at the time of loss but not more than the amount needed to repair or replace." Property losses for "[b]uildings under Coverages A or B," however, would be settled at replacement cost without deduction for depreciation. The language of the policy thus contemplates loss settlement of the replacement cost in cases where part of a building is damaged. As the evidence in this case established the structure was part of a building (and was required to be characterized as such to enter judgment in favor of Lee), we conclude the trial court erred as a matter of law in awarding Lee the actual cash value instead of the replacement cost as the measure of damages. Accordingly, we will vacate the trial court's calculation of damages and remand the cause to the trial court solely for the recalculation of damages.

¶ 56 Regarding the $17,000 spent on the nonequivalent porch, Lee relies on Other Coverage 12, which applied in part to increased costs incurred due to the enforcement of any ordinance or law which "require[d] or regulate[d] *** the construction, demolition, remodeling or repair of that part of a covered building or other structure damaged by a Peril Insured Against." Lee argues Other Coverage 12 is "separate and apart from the 'Loss Settlement' provisions regarding actual cash value and replacement costs." The loss settlement subsection of the policy, however,

stated: "the terms 'cost to repair or replace' and 'replacement cost' do not include increased costs incurred to comply with the enforcement of any law, except to the extent that coverage for these increased costs is provided in [Other Coverage 12]." Thus, the plain language of the policy establishes that Other Coverage 12 is a separate component of coverage, but remains subject to the loss settlement provisions of the policy regarding actual cash value or replacement costs. Accordingly, Lee's argument on this point fails.

¶ 57 CONCLUSION

¶ 58 In sum, we conclude the circuit court did not err in denying Erie's motion for summary judgment or in entering judgment for Lee after the bench trial in this matter. We also conclude, however, the circuit court erred in applying the actual cash value as a measure of damages instead of awarding the replacement costs. Lastly, we conclude Lee failed to demonstrate the trial court erred by excluding the $17,000 spent on the nonequivalent porch in the damages award. Accordingly, we affirm the judgment of the circuit court regarding liability, vacate the award of damages, and remand the case to the circuit court for a recalculation of damages consistent with this court's order.

¶ 59 Affirmed in part, vacated in part and remanded.