2014 IL App (2d) 130880-U
No. 2-13-0880
Order filed May 8, 2014

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE HERRINGTON, INC., and SHODEEN MANAGEMENT COMPANY, Plaintiffs-Appellants, v. TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, Defendant-Appellee.	)	Appeal from the Circuit Court of Kane County. No. 08-L-363 Honorable James R. Murphy, Judge, Presiding.

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

ORDER

¶ 1 *Held*: In a jury trial over an alleged breach of an insurance contract, the trial court did not err in: (1) denying plaintiffs' motions for a directed verdict and for judgment notwithstanding the verdict or for a new trial; and (2) ruling on certain jury instructions and a special verdict form. Affirmed.

¶ 2 Following a flood at their hotel, plaintiffs, The Herrington, Inc., and Shodeen Management Company, sued defendant, Travelers Property Casualty Company of America, their insurer, for breach of contract. Travelers had denied coverage for plaintiffs' loss based on the policy's surface water exclusion. At the close of evidence during trial, plaintiffs moved for a

directed verdict, and the trial court denied the motion. Following trial, the jury returned a verdict in Travelers' favor. Subsequently, the trial court denied plaintiffs' motion for judgment notwithstanding the verdict (*n.o.v.*) or for a new trial. Plaintiffs appeal, challenging the court's rulings: (1) on their motions for a directed verdict and for judgment *n.o.v.* or a new trial; and (2) as to certain jury instructions and a special verdict form. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The Herrington, Inc., owns The Herrington Inn & Spa, a hotel, restaurant, and spa complex at 15 South River Lane in Geneva. Shodeen Management Company operates The Herrington. The hotel is adjacent to and west of the Fox River. To the west of the hotel is River Lane.

¶ 5 On September 22, 2006, The Herrington was damaged when water flooded the building during a heavy rainstorm. The water entered the hotel on its west side through windows and louvers. 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). The basin contains a storm drain, and the water that flooded the building came from the basin area.

¶ 6 Plaintiffs sought coverage under their policy with Travelers. Travelers denied plaintiffs' claim. The policy contains a surface water exclusion that provides that Travelers will not pay for loss or damage caused directly or indirectly by flood and surface water. The loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss (anti-concurrent cause provision).

¶ 7 Travelers determined that water pooled in the basin area and that the storm drain in the basin was partially or totally covered with soil. Travelers maintained that rainwater hit the

surface of the ground, flowed over the ground and over the sidewalk and into a landscaped basin area, where it accumulated, ponded, and then entered the building. Travelers argued that this constituted surface water and there was no coverage under its policy.

¶ 8 Following the flood and Travelers' denial of coverage, plaintiffs sued Travelers for breach of contract. Plaintiffs asserted that their loss was caused by water flowing through the sewer system (a "defined watercourse"). Plaintiffs argued that no (or an insignificant) amount of water traveled over River Lane, the sidewalk, and into the basin during the storm. Its expert would testify that tree root blockage in the city's sewer system caused water to surcharge from a city sewer and then to surcharge out of the basin drain next to the hotel and to enter the hotel. Thus, the water that entered the hotel was water discharged from a defined sub-surface watercourse, that is, the sewer (as a result of the tree root blockage in the city's sewer system).

¶ 9 On August 2, 2011, the trial court granted Travelers summary judgment based on the exclusion. This court reversed the ruling, holding that factual issues concerning the amount, if any, of surface water that entered plaintiffs' building precluded summary judgment for Travelers. *The Herrington, Inc. v. The City of Geneva*, 2012 IL App (2d) 120131-U.[1]

¶ 10 A. Trial

¶ 11 The trial occurred May 7, to 9, 2013. On September 22, 2006, starting in the late afternoon, very heavy rains occurred at The Herrington. Tornado sirens activated at about 5 p.m. Amy Jorgensen, a chef at the hotel's restaurant, testified that there was water well above the curb of the sidewalk to the west of the hotel. She assumed that the water was hitting the ground surface, coming toward her near the basin, going over the curb and sidewalk, and into the basin

[1] The decision also addressed issues and parties not relevant to this appeal.

area. She was impeached with her deposition testimony, wherein she had stated that water *was* actually traveling over the curb and then entering the basin.

¶ 12 David Pazelt, president of Shodeen, testified that, on the morning after the storm, he noticed a large amount of erosion on the east edge of the slope in the basin. He observed that topsoil had been washed away, that plants were gone, and that a significant layer of ground was gone. He concluded that the erosion was caused by water flowing over River Lane from the police parking lot, over the sidewalk, and into the basin. Paul Ruby, the hotel's general manager, testified about a timeline he prepared soon after the storm. Therein, he wrote that the rainwater in the parking lot was moving with such force that it "jumped" the curb and filled the basin area to the west of the hotel. He testified that this statement in his timeline was consistent with what Jorgensen had reported to him.

¶ 13 Six days after the storm, Randy Miller, a City of Geneva water and sewer department supervisor, met Pat Browne of Shodeen at the hotel to inspect the area. Miller testified that the city's storm sewer manholes were opened and inspected; they were free of debris. Viewing the basin area, Miller observed there was a private drain at the bottom of the basin. A filter fabric was under the drain cover. Miller told Browne that this was the source of his problem. Miller further testified that the filter fabric obstructed about 90% of the drain opening and that Browne told him that, during the storm, he had employees working in the basin and poking holes in the fabric. He explained that the fabric is temporarily used during construction and should be removed once construction is complete. It impedes the rate of water flow. Given its age, the fabric might have completely blocked the flow of water into the drain. The city concluded (presented via Daniel Dinges', the director of public works' testimony) that rainwater poured over River Lane and the sidewalk and went into the basin. It further concluded (presented via

Miller's testimony) that there was no evidence that any rainwater that went into the inlets then surcharged up and out of any inlets or the basin drain.

¶ 14 Travelers retained James Hauck, a licensed structural engineer, to help with its investigation. Seven days after the flood, Hauck investigated the hotel area and concluded that the water in the basin drain came from the parking lot and that the basin drain was blocked by landscaping that had collapsed on and plugged the drain. He further opined that the water that entered the hotel was accumulated surface water. Hauck testified that he saw no evidence of a surcharge; he would have expected to see washed out or disrupted vegetation in that area if a surcharge had occurred. He instead observed that the vegetation around the basin drain was intact and that the disruption on the landscaping was on the upslope side, which indicates that water came over the curb and down to the drain.

¶ 15 Michael Willard, an adjuster with Travelers, testified that he accompanied Hauck at the on-site investigation and he confirmed that Ruby, who was also present, told him that debris or soil had partially or completely covered the basin manhole. (Ruby stated that the drain was only partially covered by soils.) Addressing Travelers' claim denial letter (based on the surface water exclusion), Willard testified that Travelers also stated that water pooled in the basin, that the basin drain was partially or totally covered with soil, and that the water accumulated in the basin and then rose to a level at which it entered the hotel.

¶ 16 Richard Zellar of Jomar Telegrouting, testified about videos his company took of the sewer pipe interiors about 13 months after the storm. The videos depicted tree roots in the sewer pipes. He stated that the pipes were about 50% blocked when his company took the videos, but that water was still flowing through the pipes. Zellar had no knowledge about the condition of the pipes during the storm or whether roots were present at that time.

¶ 17 Plaintiffs' theory, presented through Randall Bus's testimony, was that the hotel's water damage was caused by a surcharge (due to tree root blockage) in a city sewer, subsequently resulting in the backup and flow of storm water up and out of the basin drain and then into the hotel. Bus, CEO of Cemcom, Ltd., testified that he was retained by plaintiffs over three years after the storm. He came to his opinions by running a computer model. Bus opined that *no* water flowed from the police parking lot, into River Lane, over the sidewalk/curb, and into the basin. His model assumed that the blockage in the pipe in September 2006 was 75%. Bus disagreed with Zeller's observation that the blockage in October 2007 was only 50%; Bus opined that it was 75% at that time. Bus conceded that he never spoke to Jorgensen. He also does not believe that there was erosion in the basin consistent with water going over the sidewalk; he believes that did not occur. Bus did not run his computer model using a 50% blockage assumption. Also, the model did not account for wind gusts and assumed no velocity in the water. Bus also assumed that the basin drain was free of debris, and he did not take into account erosion on the side of the basin. Bus's model assumed that water first surcharged from the basin drain at about 5:15 p.m. Samantha Nelson, a hotel supervisor and the manager on duty during the storm, testified that the tornado sirens activated at 5 p.m. that day and that the water entered the hotel prior to their activation.

¶ 18 B. Subsequent Proceedings

¶ 19 At the close of evidence, plaintiffs moved for a directed verdict on "liability," arguing that Travelers had admitted that it denied the claim and that plaintiff suffered damages. (Travelers also moved for a direct verdict as to its defense based on the surface water exclusion.) Plaintiffs claimed they had established a breach of contract and that application of any exclusion would remain for the jury to assess. The trial court denied the motion, finding that there were

factual questions that remained for the jury to decide, including the source of the water that infiltrated the hotel. (It also denied Travelers' motion.)

¶ 20 During closing arguments, plaintiffs' counsel argued to the jury that there were two cases before it. The "first case" addressed whether plaintiffs proved that the damages sustained by the flood were caused by a covered cause of loss under the insurance policy. Counsel argued that "[t]hat's the case I have the burden of proving." He continued, "[t]he second case is the affirmative defense by Travelers. Travelers has the burden of proving that case. They have to prove the policy exclusion is applicable and it bars my clients' claim." Plaintiffs' counsel also stated: "It's important to note that my clients' claim is not barred simply because water caused the damages. My client is entitled to recover under the policy that's in evidence unless Travelers proves the, quote-unquote, surface water exclusion." Later in his closing, plaintiffs' counsel again reminded the jury of the burdens of proof: "Therefore, I submit under Illinois law, as the instructions will indicate to you, and you'll have copies of the instructions the Judge reads to you with you in the jury room, Travelers did not prove the surface water exclusion." Counsel again stated, "If and – the plaintiff's claim is barred if and only if Travelers can prove based upon the evidence that Travelers chose to bring in that the surface water exclusion applies." Yet again, plaintiffs' counsel stated:

> "You will receive two questions to answer. Based on the law and the evidence, I believe you should answer the first question yes, because my clients, the plaintiffs, have proved their case.
>
> Based on the law and evidence, I submit you should answer the second question no, because Travelers has not proved, has not met its burden of proof, that the surface water exclusion bars my clients' claim."

¶ 21 During Travelers' closing, its counsel explained to the jury:

"The Judge is going to give you instructions on the burden of proof. I recognize I have the burden to prove that exclusion applies. And when I say I have the burden of proof, the Judge is going to instruct you that that means that you have to be persuaded that it is more probably true than not that the exclusion applies."

¶ 22 Travelers' counsel also stated:

"I want to remind you again about the burden of proof, more probably true than not, that's what we have to do. That is our burden, more likely than not.

Now, you are going to get some instructions and a verdict form from the Judge, and he's going to read these to you and advise you on that.

There's a question 2. It says 'Did Travelers prove more likely than not that the loss or damage to The Herrington was caused directly or indirectly by surface water regardless of any other cause or event that contributed concurrently or in any sequence to the loss?' And then it says check one, yes or no. Obviously I think the overwhelming evidence is you check yes.

'If your answer is yes, your deliberations are complete. You should' discard – 'disregard the remaining questions. Your verdict is for Travelers. You should go to Verdict Form B and sign it.'

That's what we're asking for. ***"

¶ 23 Finally, during his rebuttal argument, plaintiffs' counsel stated:

"First of all, [defense counsel] did remind me and reminded you of the oath you took that if the evidence so proved, then you could give a verdict for Travelers. And

similarly you promised me that if the evidence supported my clients' position, you could reward damages to my client."

¶ 24 The following (pattern) jury instructions were given to the jury:

"The Herrington has the burden of proving that:

a. The Herrington's claim falls within the terms of the contract of insurance;

b. Travelers breached the contract; and

c. The Herrington was damaged by the breach of contract.

Travelers denies it breached the insurance contract. Travelers contends that any loss or damage is not covered because of the surface water exclusion. Travelers has the burden of proving that the surface water exclusion applies.

The Herrington denies that the surface water exclusion applies.

If you find from your consideration of all the evidence, that any one of the propositions The Herrington is required to prove has not been proved, or that Travelers' defense has been proved, then your verdict shall be for Travelers. If, on the other hand, you find from your consideration of all the evidence that each of the propositions required of The Herrington has been proved and that Travelers' defense has not been proved, then your verdict shall be for The Herrington."

¶ 25 The following special verdict form was also given:

"Please answer the questions in the order they are identified, starting with Question 1, and then following the instructions appearing after your answer.

1. Did *The Herrington* prove, more likely than not, that the loss or damage to The Herrington was caused by a Covered Cause of Loss?

Answer (check one): __ Yes _X_ No [The jury marked the "X" before "No."]

If your answer is "NO," then your deliberations are complete. You should disregard the remaining questions. Your verdict is for Travelers and against The Herrington and you should go to Verdict Form B at the end of this verdict and sign it. If your answer is "YES," proceed to the next question.

2. Did *Travelers* prove more likely than not that the loss or damage to The Herrington was caused, directly or indirectly, by surface water, regardless of any other cause or event that contributed concurrently or in any sequence to the loss?

Answer (check one): __ Yes ___ No [The jury made no marks before either answer.]

If your answer is "YES," then your deliberations are complete. You should disregard the remaining questions. Your verdict is for Travelers and against The Herrington and you should go to verdict Form B and sign it. If your answer is "NO," your verdict is for The Herrington and against Travelers. Proceed to the next question [addressing damages]." (Emphases added.)

¶ 26 The jurors signed "VERDICT FORM B," which states: "We, the jury, find for Travelers Property Casualty Company of America and against The Herrington Inc. and Shodeen Management Company."

¶ 27 After trial, plaintiffs moved for judgment *n.o.v.* or, in the alternative, a new trial, arguing that the trial court erred in denying their motion for a directed verdict on "liability" because the evidence on the issue overwhelmingly favored plaintiffs, the verdict was against the manifest weight of the evidence, and the jury instructions were erroneous. They argued that the jury, by entering a verdict finding that plaintiff did not prove that its loss was caused by a covered cause of loss, was confused as to the parties' burdens of proof. That is, it incorrectly found that

plaintiffs (not Travelers) failed to prove that the surface water exclusion applied. Plaintiffs further argued that the verdict was against the manifest weight of the evidence, noting that they made a *prima facie* case and that Travelers never challenged plaintiffs' evidence on liability (and only challenged part of their evidence on damages). Also, erroneous jury instructions lead to jury confusion on the parties' burdens of proof. Finally, plaintiffs challenged the court's refusal to give certain jury instructions.

¶ 28 On August 1, 2013, the trial court denied plaintiffs' motion for judgment *n.o.v.*, finding that the parties discussed "numerous times" the issues that would be presented at trial. Plaintiffs "had agreed that there was just going to be some cursory proofs of the plaintiff's [*sic*] case on the contract and that wouldn't take long, that the trial was going to be essentially on the Travelers' case in chief and any rebuttal that would be brought by the plaintiff's [*sic*] expert, so that it was more or less—in my mind, it was plaintiff's position that plaintiff had everything for a breach of contract and defendants did not disagree, *except for the element of breach of contract*. They had contract. They had damages. Existence of the policy was the contract." (Emphasis added.) It "was going to be the decision of the jury as to what provisions were covered; whether it was covered, whether it was not."

¶ 29 II. ANALYSIS

¶ 30 A. Motions for Directed Verdict and Judgment *N.O.V.* or a New Trial

¶ 31 The first issue on appeal is whether the circuit court erred in denying plaintiffs' motion for a directed verdict and, subsequently, their motion for a judgment *n.o.v.* or a new trial. For the following reasons, we conclude that it did not.

¶ 32 Although motions for directed verdicts and motions for judgments *n.o.v.* are made at different times, they raise the same questions and are governed by the same rules of law. *Maple*

v. Gustafson, 151 Ill. 2d 453 n.1 (1992). A directed verdict (735 ILCS 5/2-1202(a) (West 2012)) or a judgment *n.o.v.* (735 ILCS 5/2-1202(b) (West 2012)) is to be entered only when all of the evidence, viewed in the light most favorable to the nonmovant, so overwhelmingly favors the movant that no contrary verdict could stand based on the evidence. See *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999); *Maple*, 151 Ill. 2d at 453; see also *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 502 (1967). In deciding whether to grant such a judgment, the trial court may not reweigh the evidence and set aside the verdict simply because a jury could have drawn different conclusions or inferences from the evidence or because it feels other possible results may have been more reasonable. See *McClure*, 188 Ill. 2d at 132; *Pedrick*, 37 Ill. App. 3d at 504 (the right of the parties to have a substantial factual dispute resolved by the jury should be "carefully preserve[d]"); accord *Maple*, 151 Ill. 2d at 452-4 (court should not enter a directed verdict or judgment *n.o.v.* if there is any evidence demonstrating a substantial factual dispute or where credibility assessments or resolutions of conflicting evidence are decisive to the outcome).

¶ 33 A reviewing court may not usurp the role of the jury and substitute its own judgment on factual questions fairly submitted, tried, and determined from the evidence. See *McClure*, 188 Ill. 2d at 132 (reviewing court cannot substitute own judgment on questions of fact and witness credibility, which remain solely within the province of the jury); *Maple*, 151 Ill. 2d at 452-53. Rather, the standard is a high one, and we review *de novo* decisions on motions for directed verdict and judgment *n.o.v.* *McClure*, 188 Ill. 2d at 132.

¶ 34 "On a motion for a new trial a court will weigh the evidence and set aside the verdict and order a new trial if the verdict is contrary to the manifest weight of the evidence." *Lawlor v. North American Corp. of Illinois*, 2012 IL 112530, ¶ 38. "A verdict is against the manifest

weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary and not based upon any of the evidence." *Villa v. Crown Cork & Seal Co.*, 202 Ill. App. 3d 1082, 1089 (1990).

¶ 35 A trial court's ruling on a motion for a new trial will be reversed where the court abused its discretion. *Maple*, 151 Ill. 2d at 455. The reviewing court, in making this determination, "should consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial." *Id.* at 455-56.

¶ 36 Plaintiffs argue that the trial court erred in denying their motions for a directed verdict and judgment *n.o.v.* or a new trial because they established their *prima facie* case: they admitted, without Travelers' objection, the insurance policy, plaintiffs' claim, Travelers' denial letter, and their evidence as to damages. They contend that Travelers challenged only part of the damages evidence and did not challenge plaintiffs' "liability" evidence.

¶ 37 Travelers responds that the court did not err in denying plaintiffs' motions. It contends that, as part of their case-in-chief, plaintiffs had to prove that Travelers breached the contract. The trial court, Travelers further contends, recognized that the question whether there was a breach of contract was the issue that was being tried. Travelers notes that plaintiffs also acknowledged this in one of their instructions that was ultimately given to the jury, wherein they stated that *they* had the burden to prove that Travelers breached the contract (without any more specific instructions or exclusions). Travelers urges that we exercise all reasonable presumptions in favor of upholding the jury's verdict. See *Metropolitan Life Insurance Co. v. Nauss*, 226 Ill. App. 3d 1014, 1018 (1992) ("A verdict should be examined to ascertain the intention of the jury in returning it and, if the verdict is supportable, it will be molded into form and made to serve unless there is doubt as to its meaning.").

¶ 38 We conclude that the trial court did not err in denying plaintiffs' motions. Overall, plaintiffs' case was weak. Clearly, on the overarching issue of breach of contract, viewing the evidence in the light most favorable to Travelers, the trial court did not err in denying plaintiffs' motion for judgment *n.o.v.* or a new trial. Plaintiffs' entire case rested on Bus's testimony. His testimony was fraught with weaknesses, including that he assumed that the basin drain was free of debris (where the other witnesses testified that debris was present), he assumed there was no velocity in the water or wind gusts (where other witnesses stated that water jumped the curb and that the tornado sirens activated), and he did not account for any soil erosion in the basin area. The evidence in Travelers' favor, however, included testimony from *plaintiffs'* current and former employees, city personnel, and Travelers' employees or experts that rainwater flowed from the police parking lot, onto River Lane, over the curb, and into the basin area and that filter fabric blocked the basin drain. Thus, the water that pooled and subsequently flooded the hotel was surface water, not water surging from a defined watercourse.

¶ 39 We reject plaintiffs' argument that the trial court's alleged error in denying plaintiffs' motions ultimately led to jury confusion on the parties' burdens of proof, as we find that argument (concerning the special verdict form) unavailing below.

¶ 40 In summary, the trial court did not err in denying plaintiffs' motions.

¶ 41 B. Jury Instructions

¶ 42 Next, plaintiffs argue that the trial court erred in admitting and denying certain jury instructions and ruling as to the special verdict form. For the following reasons, we reject these arguments.

¶ 43 For a particular jury instruction to be warranted, it must be supported by some evidence in the record. *Heastie v. Roberts*, 226 Ill. 2d 515, 543 (2007). The determination as to which

issues are raised by the evidence presented and which jury instructions should be given rests in the sound discretion of the trial court, and its decisions in that regard will not be reversed on appeal absent an abuse of discretion. *Id.*; *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 273 (2002). The standard for determining whether an abuse of discretion has occurred in the giving of jury instructions is whether the jury instructions, taken as a whole, were sufficiently clear so as not to mislead the jury and whether the instructions fairly and correctly stated the law. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 505 (2002). Thus, reversal based upon the giving of a faulty jury instruction is warranted only if the faulty instruction clearly misled the jury and resulted in serious prejudice to the opposing party. *Schultz*, 201 Ill. 2d at 274.

¶ 44 To preserve for appeal the issue of an allegedly improper jury instruction or verdict form, a party must make a specific objection during the jury instruction conference or when the instruction is read to the jury, and must submit a remedial instruction or verdict form to the trial court. *Compton v. Ubilluz*, 353 Ill. App. 3d 863, 869 (2004); see also Ill. S. Ct. R. 366(b)(2)(i) (eff. Feb. 1, 1994) ("No party may raise on appeal the failure to give an instruction unless the party shall have tendered it.").

¶ 45 1. Insurance Policy Construction

¶ 46 Plaintiffs argue first that the trial court erred in refusing to tender their proposed jury instruction addressing insurance policy construction. One proposed instruction stated:

> "If the terms of the insurance policy are clear and unambiguous, they must be given their plain and ordinary meaning. Conversely, if the terms of the policy are susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer (Travelers) who drafted the policy. In addition, provisions that limit

> or exclude coverage will be interpreted liberally in favor of the insured (Plaintiffs) and against the insurer (Travelers)."

Plaintiffs also proposed, several days before trial, the following alternative instruction to the foregoing instruction:

> "The terms of the insurance policy should be construed strictly against the insurer (Travelers) who drafted the policy. In addition, provisions that limit or exclude coverage will be interpreted liberally in favor of the insured (Plaintiffs) and against the insurer (Travelers)."

¶ 47 The trial court rejected the instructions, noting that they touched upon legal and not factual issues that are properly within the jury's purview. When the court again addressed the issue in ruling upon plaintiffs' posttrial motions, it found that any ambiguity issue should have been resolved before trial, such as with a summary judgment motion, and, thus, it was forfeited thereafter when couched as support for a jury instruction. The court noted that, in any event, the definition of surface water presented to the jury was not ambiguous and ambiguity was not raised, for example, in any expert witness testimony. Furthermore, the trial court noted that this court noted that, although the term "surface water" was not defined in Travelers' policy, it *was* defined in case law. *The Herrington, Inc.*, 2012 IL App (2d) 120131-U, ¶ 38.

¶ 48 Plaintiffs contend that they were severely prejudiced by the trial court's failure to give the foregoing instructions. However, they do not cite any relevant case law supporting their conclusory assertion. Plaintiffs note only that they have repeatedly cited to *American States Insurance Co. v. Koloms*, 177 Ill. 2d 473 (1997), "throughout this case" in support of their position, but do not discuss in their initial brief the holding in that case and how it applies here. We note that *Koloms* involved an appeal from rulings on cross-motions for summary judgment

and did *not* address jury instructions. We find plaintiffs' argument forfeited because it is undeveloped and because plaintiffs cite no relevant authority to support their claim. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (a point raised but unsupported by argument or citation to relevant authority is waived). We also note that the appellate court is not a repository into which an appellant may foist the burden of argument and research. *Velocity Investments, LLC v. Alston*, 397 Ill. App. 3d 296, 297 (2010). In their reply brief, plaintiffs note that *Koloms* stated various rules of insurance policy construction and relied on them in holding that an absolute pollution exclusion in a commercial general liability policy was ambiguous. *Id.* at 479-80, 488. Plaintiffs further argue in their reply brief that, because the policy language here is not as clear as the policy language at issue in *Koloms*, this court should hold that the language now at issue is ambiguous. We decline to address this argument as it is not properly before us, including for the reasons that it is raised for the first time in plaintiffs' reply brief (Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued [in the opening brief] are waived and shall not be raised in the reply brief ***."); see also *Franciscan Communities, Inc. v. Hamer*, 2012 IL App (2d) 110431, ¶ 19) and because plaintiffs did not seek a ruling from the trial court on the ambiguity issue such as in a summary judgment motion.

¶ 49 In summary, plaintiffs' argument is forfeited.

¶ 50 2. Surface Water Instruction

¶ 51 Next, plaintiffs contend that the trial court erred in refusing their instruction on a sub-question noted in this court's previous ruling. In our prior ruling, this court held as follows:

> "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." (Emphasis in original.) *The Herrington, Inc.*, 2012 IL App (2d) 120131-U, ¶ 48.

Plaintiffs argue that the trial court erred by refusing to give an instruction consistent with the sub-question this court identified in our ruling. For the following reasons, we reject their argument.

¶ 52 Plaintiffs first proposed, in part: "The surface water exclusion only precludes coverage if a significant amount of water entered The Herrington." They later proposed: "The surface water exclusion is not applicable if an insignificant amount of surface water entered The Herrington. The dictionary defines insignificant as follows: *** unimportant, paltry, trifling, petty, ***."

¶ 53 The instruction given to the jury was as follows:

> "Illinois law defines surface water as water derived from natural precipitation such as rain that flows over or accumulates on the ground without following a defined watercourse. Illinois law also holds that surface water loses its character and is no longer surface water when it enters a defined channel.
>
> Surface water is not limited to water that is completely unaffected by man-made constructions."[2]

¶ 54 As Travelers notes, in denying plaintiffs' posttrial motions, the trial court found that there was no trial testimony by Bus similar to his deposition testimony (and that was addressed in this

[2] See *The Herrington, Inc. v. The City of Geneva*, 2012 IL App (2d) 120131-U.

court's prior order) that there may have been up to 5% surface water in the water that entered the hotel and that, in his opinion, this amount was insignificant. At trial, Bus provided no testimony concerning the amount of surface water that entered the hotel. Further, plaintiffs did not put into evidence Bus's testimony about the 5%, nor did counsel address this during closing argument. See *Heastie*, 226 Ill. 2d at 543 (for a particular jury instruction to be warranted, it must be supported by some evidence in the record). In their reply brief, plaintiffs do not address this point. We conclude that the trial court did not abuse its discretion in rejecting plaintiffs' proposed instruction concerning the sub-question identified in our earlier ruling, where there was no evidence to warrant the giving of such an instruction.

¶ 55 3. Special Verdict Form – Question No. 1

¶ 56 Plaintiffs' final argument is that the trial court erred in giving the jury the special verdict form because there was no basis in the evidence for the question (No. 1) asking whether plaintiffs met their burden of proof on the liability issue, *i.e.*, whether Travelers breached the contract. Plaintiffs argue that the first question should *not* have been submitted to the jury because there was no basis in the evidence to support a "No" answer to that question. They contend that this error warrants reversal. We disagree.

¶ 57 Section 2-1108 of the Code of Civil Procedure addresses special interrogatories. It provides:

> "Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a

> question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly." 735 ILCS 5/2-1108 (West 2012).

¶ 58 The purpose of a special interrogatory is not to instruct the jury, but to serve as a check on the jury's deliberation and to enable the jury to determine one or more specific issues of ultimate fact. *Simmons v. Garces*, 198 Ill. 2d 541, 555 (2002). A trial court has discretion to refuse to submit a special interrogatory to the jury that is not in proper form. *Curatola v. Village of Niles*, 324 Ill. App. 3d 954, 960 (2001); *Thomas v. Johnson Controls, Inc.*, 344 Ill. App. 3d 1026, 1033 (2003). To be in proper form, a special interrogatory should consist of a single, direct question, should not be repetitive, misleading, confusing, or ambiguous and should use the same language contained in the jury instruction. *Id.* In addition, it should relate to an ultimate question of fact upon which the rights of the parties depend, and an answer responsive to it must be inconsistent with a general verdict. *Id.* A special interrogatory's response is inconsistent with a general verdict only where it is "clearly and absolutely irreconcilable with the general verdict." (Internal quotation marks omitted.) *Simmons*, 198 Ill. 2d at 555-56. A trial court has no discretion to reject a special interrogatory that is submitted in proper form, but may reject those it finds to be improper. *McGovern v. Kaneshiro*, 337 Ill. App. 3d 24, 30 (2003). We exercise all reasonable presumptions in favor of the jury verdict, and the verdict is not legally inconsistent unless it is absolutely irreconcilable. *Balough v. Northeast Illinois Regional Commuter R.R. Corp.*, 409 Ill. App. 3d 750, 774 (2011). We review *de novo* a trial court's ruling regarding a request for a special interrogatory. *Garcia v. Seneca Nursing Home*, 2011 IL App (1st) 103085, ¶ 35.

¶ 59 During the instruction conference, plaintiffs objected to question No. 1 and explained that, to prove their *prima facie* case, they had to "prove that it was not caused by surface water." The trial court noted its concerns:

> "It would seem to me that there's still someplace in instructions that says that it is not the defendant's burden of proof to say that they did not breach the contract; however, they are not saying that they have—they're admitting they have the burden of proof on the affirmative defense.
>
> But when do we, for instance, have a motion for a directed verdict at the end of plaintiff's case if we're going to switch around all of the burdens here?"

¶ 60 The court further noted it was concerned that the *exclusion* affirmative defense was not a *typical* affirmative defense such as, for example, fraud or duress. The court noted that plaintiffs would still have to prove a breach of contract.

¶ 61 Travelers' counsel asserted that plaintiffs still had to:

> "show that you've got something that's covered, that's a covered cause of loss. And if you prove that there is water that came from the manhole and entered The Herrington, that's a covered cause of loss. ***
>
> What we then have to come back and prove is that the exclusion applies. So even if there's surcharge water, what we're arguing is that if there's surface water that comes in and combines with somehow the surcharge water, according to the policy we would still win.
>
> But before we get to the application of the exclusion, you still have to show that there is a covered cause of loss."

¶ 62 Plaintiffs' counsel complained that his concern was that he would have the burden to prove a negative on the affirmative defense. Travelers' counsel again stated that it remained that, in a breach of contract case, plaintiffs still had to provide that there was a covered cause of loss. He referred to Bus's testimony about the surcharged water. The trial court, later in the proceedings, stated that the jury had "to determine whether all of the discharge[d] water was the only water that went in The Herrington or whether there was some surface water, as well[.]"

¶ 63 In denying plaintiffs' posttrial motion for judgment *n.o.v.* or for a new trial, the trial court commented:

> "But I think the element of breach was the element that we were trying, both by way of defendant's affirmative defense and the rebuttal.
>
> ***
>
> Based on the evidence that was presented at trial through plaintiff's case in chief, which plaintiff kind of agreed to defer until the defendant's case in chief and rebuttal, and viewing the—also, I think that the—the instruction that was given, as far as the form of the instruction, we talked about that. We amended that instruction and cut out about two or three preliminary questions to that.
>
> And so there was [*sic*] great opportunities for plaintiff to suggest different forms of that, and that's what was arrived at through some—a lot of back-and-forth discussion as to Question No. 1 in which the jury said basically that—I feel what the jury was saying was that there may have been contract and there may have been damages, but there was no breach proved by the plaintiff.
>
> And so that's—I don't think that's so inconsistent that no other verdict—no reasonable jury would ever enter that verdict after the trial with great opportunities for

everybody to talk about the burdens of proof and whether the other side had met their burdens or not.

***

But we let the jury determine—based on all the evidence and everything else that everybody wanted to prove, determine whether there was a breach of contract; and they determined that there was not a breach of contract."

¶ 64 Travelers responds that the entire case concerned whether it breached its contract with plaintiffs. It urges that this court exercise all reasonable presumptions in favor of upholding the jury's verdict. It argues that the jury entered its verdict in Travelers' favor because plaintiffs failed to prove that Travelers breached the contract. Travelers further asserts that the jury may have also entered the verdict in its favor because it found that Travelers met its burden to show that the exclusion applied.

¶ 65 We conclude that the trial court did not err in giving the jury question No. 1 on the special verdict form. The essential elements of a breach of contract are: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) resultant injury to the plaintiff. *Gallagher Corp.*, 309 Ill. App. 3d at 199. The special verdict form is based on Illinois Pattern Jury Instructions, Civil, No. 700.01V (Supp. Oct. 2012), which contains jury questions for breach of contract cases in which the formation of the contract is not in dispute.[3] The trial court must instruct the jury using an Illinois Pattern Jury

[3] Two sample questions contained in the pattern instructions are: (1) "Did plaintiff's name prove defendant's name breached the contract by [his][her][its][their] failure to perform [his][her][its][their] obligations under the contract?"; and (2) "Did defendant's name prove [he][she][they][it] had an affirmative defense for not performing the contract?" (Brackets in

Instruction unless it determines that the instruction does not accurately state the law. *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13; see also Ill. S. Ct. R. 239(a) (eff. April 8, 2013).

¶ 66 We reject plaintiffs' argument that a verdict finding that plaintiffs did not prove that the loss or damage to the hotel was caused by a covered cause of loss (which was defined for the jury as "risks of direct physical loss") was essentially a verdict finding that *plaintiffs* (not Travelers) failed to *prove* that the surface water exclusion did not apply to bar coverage. We cannot conclude that the jury's finding as to question No. 1 reflects that it was confused as to the parties' respective burdens of proof. As we noted in our statements of facts, the jury was repeatedly instructed on the appropriate burdens of proof, including during closing arguments and in the instructions they took into deliberations.

¶ 67 One of plaintiff's instructions (No. 13) that was *given* to the jury states, in relevant part, as follows:

> "*The Herrington has the burden of proving that*:
>
> a. *The Herrington's claim falls within the terms of the contract of insurance*;
>
> b. *Travelers breached the contract*; and
>
> c. The Herrington was damaged by the breach of contract.
>
> Travelers denies it breached the insurance contract. Travelers contends that any loss or damage is not covered because of the surface water exclusion. Travelers has the burden of proving that the surface water exclusion applies.
>
> The Herrington denies that the surface water exclusion applies.

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original.) Illinois Pattern Jury Instructions, Civil, No. 700.01V (Supp. Oct. 2012).

> If you find from your consideration of all the evidence, that any of the propositions The Herrington is required to prove has not been proved, or that Travelers' defense has been proved, then your verdict shall be for Travelers." (Emphases added.)

¶ 68 The foregoing instruction is based on Illinois Pattern Jury Instructions, Civil, No. 700.01 (Supp. Oct. 2012) (hereinafter IPI Civil (Supp. Oct. 2012) No. 700.01), which is an introductory instruction in a contract dispute and "may be given in all cases where there is no factual dispute as to the formation of a contract and no dispute as to its material terms." Notes on Use, IPI Civil (Supp. Oct. 2012) No. 700.01.

¶ 69 As Travelers notes, plaintiffs' entire case concerned whether or not Travelers breached the contract. Travelers submits, and we agree, that the logical explanation as to why the jury answered "No" to question No. 1 is that it found there was no breach, consistent with its completion of the general VERDICT FORM B, finding in Travelers' favor and consistent with the foregoing instruction. See *Iverson v. Iverson*, 56 Ill. App. 3d 297, 303 (1977) ("A special finding controls over a general verdict only when the two are inconsistent.") Given the instruction that plaintiffs submitted (and that was given to the jury) concerning the parties' burdens of proof, it is entirely possible that the jury's response to question No. 1 reflects its findings on the overarching issue in the case. It is also plausible that the jury found that Travelers met its burden of proof on the policy exclusion, but stopped after it answered the first question because the special verdict form (consistent with the pattern instructions) instructed the jury to *not* continue answering additional questions and go instead to the general verdict form. Stated differently, the jury could have found that plaintiffs did not prove their case (and answered "No" to the first question) and it could have further found that Travelers met its burden to prove its affirmative defense; however, it did not reach the second question because the

instructions directed the jury to go to the general verdict form (finding in Travelers' favor).[4] Therefore, and in light of the numerous admonishments to the jury concerning the burdens of proof, we cannot conclude that the jury was confused as to the parties' burdens of proof, most especially that Travelers had the burden to prove that the surface water exclusion applied.

¶ 70 III. CONCLUSION

¶ 71 For the reasons stated, the judgment of the circuit court of Kane County is affirmed.

¶ 72 Affirmed.

[4] The instructions state: "If you find from your consideration of all the evidence, that any one of the propositions The Herrington is required to prove has not been proved, *or* that Travelers' defense has been proved, then your verdict shall be for Travelers." (Emphasis added.)