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1804-14 GREEN STREET ASSOCIATES, L.P.	:	COURT OF COMMON PLEAS PHILADELPHIA COUNTY
Plaintiff.	:	JUNE TERM, 2006
v.	:	No. 1763
ERIE INSURANCE EXCHANGE	:	COMMERCE PROGRAM
Defendant.	:	

TRIAL MEMORANDUM, PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW OF 1804-14 GREEN STREET ASSOCIATES, L.P.

I. INTRODUCTION

This action was the subject of a two (2) day bench trial on September 22 and 23, 2008. At the conclusion of trial, Defendant/Counterclaim Plaintiff, Erie Insurance Exchange (hereinafter "Erie"), the party with the burden of proof, submitted a Trial Memorandum and Proposed Findings of Facts and Conclusions of Law. Plaintiff, Counterclaim Defendant, 1804-14 Green Street Associates, L.P. (hereinafter "Green Street"), provides the same in this submission.

Before trial, Erie moved for summary judgment, contending that the damage at 240 New York Avenue on September 28, 2004, (hereinafter "Loss") was excluded from coverage pursuant to what it described as exclusions for wind-driven rain, rust and corrosion, and deterioration. In denying Erie's Motion, the Court observed that applicability of these exclusions required

consideration, by the finder-of-fact, of the credibility of and weight to be given the expert opinions offered by Erie through its expert witness, Rodney J. Blouch, P.E. Indeed, at the commencement of trial, it was apparent to most, if not to Erie, that Erie's case would rise or fall on the applicability of the deterioration exclusion and, in this regard, on the weight to be afforded Mr. Blouch's testimony. (See N.T., 9/22/08, at p. 7; l. 2-3; "THE COURT: The issue is the deterioration exclusion.").

However, after Mr. Blouch testified, Erie, during closing argument and in its post-trial submissions, claimed that the Loss was excluded from coverage by another exclusion in the Policy, one that excluded damage caused by "surface water." Quite tellingly, Erie argues that application of this exclusion does not require that the Court accept or find persuasive the testimony of Mr. Blouch. (N.T., 9/23/08, at 42). Other than in its New Matter, where reference is made to fifteen exclusions, Erie had never before advanced the exclusion for "surface water" as a basis for the Court to find that the Loss was excluded from coverage.

Erie's attempt at the quintessential "Hail Mary pass" notwithstanding, Green Street reviews herein, *seriatim*, the four (4) exclusions advanced by Erie in its post-trial submission. None excludes the Loss from coverage.

II. SUMMARY OF ARGUMENT

Green Street respectfully contends that Erie has failed to meet its burden to prove that the Loss is excluded by operation of any of the four (4) exclusions upon which it now relies.

First, the exclusion for "rain" does not apply, because it was not raining at the time of the Loss and had not rained for seven (7) hours prior to the Loss. Moreover, even if the offending water could be characterized as "rain," the roof of the Property sustained damage when the cover that had been on the roof, over the interior roof drain, blew away in the high winds on the day of the Loss.

Second, the exclusion for "surface water" does not apply, because Pennsylvania law defines "surface water" as water on the surface of the ground, and the offending water was never on the surface of the ground. Further, even if the water could have been considered surface water while it remained on the roof, it was actively diverted by use of the interior roof drain, and lost its character as surface water at that time. Therefore, by the time the water flowed from the interior drain and into the Property, it was no longer surface water when the Loss occurred, even if it had been surface water previously.

Third, the exclusion for "rust or corrosion" does not apply because Erie has failed to prove that rust or corrosion was either present or the sole cause of the separation of the PVC pipe from the roof drain. In the alternative, the exclusion does not exclude coverage for the Loss, because the Loss that ensued from any rust or corrosion was not otherwise excluded.

Fourth, the exclusion for "deterioration" does not bar coverage for the Loss for three reasons. Deterioration is considered a natural and expected phenomenon, and the only "deterioration" suggested by Erie was neither natural nor expected. It was the result of an external force, water, causing rust or corrosion. Second, the exclusion for "deterioration" cannot be considered to include damage caused by rust or corrosion, as Erie wrote a specific exclusion for "rust or corrosion" and inserted it after that for "deterioration." Such a specific exclusion trumps a more general one, and is informative as to the limitations of the general exclusion. Lastly, because the exclusion for "rust or corrosion" specifically states that coverage will exist for any losses that ensue from rust or corrosion, the deterioration exclusion cannot be interpreted to bar coverage for the Loss. Otherwise, the coverage afforded by the ensuing loss provision in the exclusion for "rust or corrosion" would be illusory.

When Erie wrote and sold the Policy, it knew that it was issuing an all-risk policy. Under an all-risk policy, all fortuitous losses are covered, even those resulting from the insured's negligence, unless the insurer proves that a loss is specifically excluded in the policy. Miller v. Boston Ins. Co., 420 Pa. 566, 218 A.2d 275, 280 (1966); Betz v. Erie Ins. Exch., ___ A.2d at ___, 2008 WL 4291513, *6 (Pa. Super. Sept. 22, 2008); Spece v. Erie Ins. Gp., 850 A.2d 679, 683 (Pa. Super. 2004). Erie has not done so in this case.

In the context of an all-risk policy, the unknown risk of loss is borne by the insurance company under Pennsylvania law. Miller, 218 A.2d at 278 (if otherwise "the inclusive character of the coverage afforded [by an all-risk policy] would be a mere delusion." Having not proven that the Loss is specifically excluded, Erie has failed to meet its burden of proof. Therefore, Green Street respectfully requests that the Court enter judgment in favor of Green Street and against Erie on Erie's Counterclaim. Pursuant to the parties' Stipulation, entry of such judgment shall fully resolve all issues in this case. (P-1, ¶¶ 3, 6 & 7).

III. ARGUMENT

Erie's Ultrasure Package for Property Owners

On the day in question, September 28, 2004, Green Street and the property at New York Drive (hereinafter "Property") were insured under an all-risk, commercial insurance policy issued by Erie, bearing Policy Number Q41 0970052 A, which, in addition to other insurance coverage and protection, provided indemnity to Green Street for damage to the Property (hereinafter "Erie's Policy" or "Policy"). (P-2, ¶ 4; P-3). The insurance policy in question was a standard policy issued by Erie and entitled "Ultrasure Package Policy for Property Owners." (P-3; N.T., 9/23/08, at 31).

Pursuant to the Policy's Insuring Agreement, Erie agreed to pay for "loss" of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss." (P-3 at Ultrasure for Property Owners' Commercial Prop. Coverage Part, at § 1 – Coverages, at p. 1). In turn, the Policy defines "Covered Cause of Loss" as being "risk of "loss" . . . except as excluded in this policy." (Id. at § 2 – Perils Insured Against, at p. 3). "Loss," as used in the Policy, is defined as "direct and accidental loss of or damage to covered property." (Id. at § 11 – Definitions, at p. 16).

On September 28, 2004, at approximately 6:00pm., David Fletcher, the President of Fletcher-Harlee, a tenant at the Property, heard a loud bang coming from the interior area of the building. When he came upon the scene, he observed water from above the ceiling tiles pouring into the building in an area that Fletcher-Harlee used as its "print room" (hereinafter "Loss"). (P-2; ¶ 6; N.T., 9/22/08, at 43 & 45).

The Loss was caused when a PVC pipe, located above the ceiling tiles and connected to an interior drain on the roof, spontaneously dislodged. (P-2; ¶ 7). The purpose of the interior drain was to remove water from the roof, take it inside the building and then remove it. (N.T., 9/22/08, at 10; D-4b; P-4d & P-4e).

After discovery was concluded in this action, the parties stipulated that the claim submitted by Green Street in respect to the Loss of September 28, 2004, "is covered by the Policy as a covered claim unless it falls within one or more exclusions under the Policy. The issue to be adjudicated is whether the claim is excluded under the Policy, as informed by the facts and circumstances of the loss and events thereafter and Pennsylvania law, or any other law the Court deems to be persuasive[.]" (P-1 at ¶¶ 3 & 5, at p. 2).

Erie now relies, at least as of its post-trial submission, upon four exclusions in the Policy in an attempt to meet its burden of proving that the loss is excluded under the Policy. In the order

presented by Erie in its submissions, they are: (1) rain; (2) surface water; (3) rust or corrosion; and (4) deterioration. These exclusions are contained in the Policy language, in pertinent part, as follows:

> **SECTION III – EXCLUSIONS**
>
> **A. Coverages 1, 2 and 3**
>
> We do not cover under Building(s) (Coverage 1) . . . "loss" or damage caused directly or indirectly by any of the following. Such "loss" or damage is excluded regardless of any cause or event that contributes concurrently or in any sequence to the "loss":
>
> 1. *Deterioration* or depreciation.
>
> . . .
>
> 6. Water
>
> a. Flood, *surface water*, waves, tidal water or tidal wave, overflow of any body of water or their spray, all whether driven by wind or not;
>
> b. [deleted by Endorsement]
>
> c. Water under the ground surface pressing on, or flowing or seeping through:
>
> 1) Foundations, walls, floors or paved surfaces;
>
> 2) Sidewalks, or driveways;
>
> 3) Basements, whether paved or not; or
>
> 4) Doors, windows or other openings.
>
> But if Water, as described in **6.a** through **6.c** results in fire, explosion, sprinkler leakage, volcanic action, or building glass breakage, we will pay for the "loss" or damage caused by such perils.
>
> . . .

B. Coverages 1, 2 and 3

We do not cover under Building(s) (Coverage 1) . . . "loss" caused:

1. By

a. Wear and tear, *rust or corrosion*, mold or rotting;
. . .

unless a covered "loss" ensues, and then only for ensuing "loss".

. . .

5. To the interior of the building or the contents by *rain*, snow, sand or dust, whether driven by wind or not, *unless the exterior of the building first sustains damage to its roof or walls by a covered "loss". . . .*

(P-3, supra, at § 3 – Exclusions, at pgs. 3-5) (italics added).

The Rules of Policy Interpretation and the "All Risk" Policy at Issue

Interpretation of an insurance contract is a question of law for a court. Gamble Farm, Inc. v. Selective Ins. Co., 656 A.2d 142, 143 (Pa. Super. 1995) (citations omitted); DiFabio v. Centaur Ins. Co., 531 A.2d 1141, 1142 (Pa. Super. 1987) (citations omitted). The goal in interpreting an insurance policy is to ascertain the intent of the parties. 401 Fourth St., Inc. v. Investors Ins. Gp., 583 Pa.445, 879 A.2d 166, 171 (2005) (citation omitted). Words and phrases of common usage should be given their ordinary and customary meanings. Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 735 A.2d 100, 108 (1999).

Clauses in an insurance policy providing coverage are interpreted broadly, "so as to afford the greatest possible protection to the insured." Eichelberger v. Warner, 434 A.2d 747, 750 (Pa. Super. 1981). Conversely, "[p]olicy exclusions are strictly construed against the insurer." Continental

Casualty Co. v. County of Chester, 244 F. Supp.2d 403, 408 (E.D. Pa. 2003) (citations omitted) (interpreting Pennsylvania law); Miller v. Boston Ins. Co., 420 Pa. 566, 218 A.2d 275, 280 (1966); Eichelberger, 434 A.2d at 750 (citations omitted). These rules are necessary because insurance policies generally, as is the case with Erie's Policy, are contracts of adhesion. Eichelberger, 434 A.2d at 750 (citation omitted).

Where, as here, an insurer relies upon a policy exclusion to deny coverage, the insurer has the burden of proving that the exclusion applies. Miller, 218 A.2d at 277 (citations omitted). "The insurer can sustain its burden only by establishing [an] exclusion's applicability by uncontroverted facts in the record." Continental Casualty Co., 244 F. Supp.2d at 407 (citing Mistick, Inc. v. Northwestern Nat. Casualty Co., 806 A.2d 39, 42 (Pa. Super. 2002); Butterfield v. Giuntoli, 670 A.2d 646, 651-52 (Pa. Super. 1995), alloc. denied, 546 Pa. 635, 683 A.2d 875 (1996)).

A court should not interpret policy language in a vacuum; rather, the insurance contract should be interpreted with a view toward the entire policy, "so as to avoid rendering portions of it contradictory and inoperative by giving effect to some clauses and nullifying others." 2 Lee R. Russ and Thomas F. Segalia, Couch on Insurance 3d, § 22.30, at 22-65 & § 22:43, at 22-92 & 22-93 (1995) (citations omitted); 401 Fourth St., Inc., 879 A.2d at 171.

When policy language is clear and unambiguous, the language should be given effect. Madison Constr. Co., 735 A.2d at 108 (citation omitted). However, "[a] contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." 401 Fourth St., Inc., 879 A.2d at 171 (citations omitted). Stated another way, terms of an insurance policy are ambiguous if they "are subject to `more than one interpretation when applied to a particular set of facts." Gamble Farm, 656 A.2d at 143 (quoting DiFabio, 531 A.2d at 1143).

When extrinsic evidence of the mutual intent of the insurer and insured is available, a court may examine such evidence to resolve the ambiguity. DiFabio, 531 A.2d at 1142; Motor Coils Mfg. Co. v. American Ins. Co., 454 A.2d 1044, 1048 (Pa. Super. 1982). However, one party's unilateral intent is irrelevant unless there is evidence that it was communicated to the other party. Celley v. Mutual Benefit Health & Accident Ass'n, 324 A.2d 430, 435 (Pa. Super. 1975) (citations omitted).

If extrinsic evidence is unavailable, or if it does not resolve an ambiguity in an insurance policy, the ambiguity is construed most strongly against the drafter of the language, the insurer. Motor Coils, 454 A.2d at 1049 (citation omitted); 401 Fourth Street, Inc., 879 A.2d at 174.

Understanding the type of policy at issue is also important in ascertaining the intent of the parties and, accordingly, how the policy should be interpreted. Erie's Policy is an "all-risk" policy. See T.H.E. Ins. Co. v. Charles Boyer Children's Tr., 455 F. Supp.2d 284, 290-91 & n.3 (M.D. Pa. 2006), aff'd, 269 Fed. Appx. 220 (3d Cir. 2008) (describing policy's insuring agreement containing nearly-identical language as Erie's Policy as "effectively the definition of an all-risk policy").

"[U]nder an all-risk property policy, the insuring agreement gives a broad grant of coverage and then specifically enumerates in the policy the types of losses that are excluded from coverage." 1 Jeffrey W. Stempel, Stempel on Insurance Contracts, § 15.01[B], at 15-5 (3d ed.) (Supp. 2007). In this respect, the parties intend that "all losses are covered except for those specifically excluded." Spece v. Erie Ins. Gp., 850 A.2d 679, 683 (Pa. Super. 2004) (characterizing all-risk policy). Put another way, "[a]ll risk coverage covers all losses which are fortuitous no matter what caused the loss, including the insured's own negligence, unless the insurer expressly advises otherwise." 1 Stempel, supra, at§ 15.01[B], at 15-5 n.3 (citation omitted); see also Miller, 218 A.2d at 278 (holding that all-risk policy must be "given a broad and comprehensive meaning as to covering any loss other than a willful or fraudulent act of the insured."); Betz v. Erie Ins. Exch., ___ A.2d at ___, 2008 WL

4291513 *6 (Pa. Super. Sept. 22, 2008) (same).

"Consistent with these general rules, under an all-risk policy, the unknown risk of loss is borne by the insurer." 1 Peter J. Kalis, Thomas M. Reiter and James R. Segerdahl, Policyholder's Guide to the Law of Insurance Coverage, § 13.09[A], at 13-66 (Supp. 2008); see also Miller, 218 A.2d at 278 (if otherwise "the inclusive character of the coverage afforded [by an all-risk policy] would be a mere delusion.").

With these rules of contract interpretation understood, we turn to the four exclusions now relied upon by Erie as bases for its contention that the Loss is excluded from coverage. As noted above, Erie has stipulated that the Loss is covered unless it meets its burden in proving that it is excluded from coverage by operation of one or more exclusions in the Policy. (P-1 at ¶¶ 3 & 5, at p. 2). Because Erie has not met its burden, judgment should be entered in favor of Green Street and against the insurer.

A. ERIE HAS NOT PROVEN THAT THE LOSS IS EXCLUDED BY THE POLICY EXCLUSION FOR "RAIN."

The first exclusion discussed by Erie in its submission is that for damage caused by "rain." This exclusion is not applicable for two reasons. First, the damage was not caused by rain, for it was not raining at the time of the loss. Second, even if, assuming *arguendo*, the term "rain" must be interpreted to include water draining from a roof into a roof drain, as Erie contends, the exclusion is inapplicable because the roof sustained exterior damage when the drain cover on the roof blew away.

1. The "Rain" Exclusion Does Not Apply, Because No Rain Was Falling At The Time Of The Loss.

The language of the exclusion for "rain" states:

B. Coverages 1, 2 and 3

> We do not cover under Building(s) (Coverage 1) . . . "loss" caused:
>
> . . .
>
> 5. To the interior of the building or the contents by *rain*, snow, sand or dust, whether driven by wind or not, *unless the exterior of the building first sustains damage to its roof or walls by a covered "loss"*. . . .

(P-3, supra, at § 3 – Exclusions, at pgs. 4-5) (italics added).

As is relevant, only damage to the interior of a building caused by "rain" is excluded by this exclusion. The parties have stipulated that no "rain" fell at any time in the seven hours preceding the Loss. (P-2; ¶ 11). The exclusion for "rain" does not apply. It was not raining when the Loss occurred.

"Rain" is not defined in the Policy. In Berman v. Aetna Casualty & Sur. Co., 216 F.2d 626 (3d Cir. 1954), the Third Circuit, in interpreting Pennsylvania law, quoted with approval a dictionary definition of "rain" as being "[t]he condensed vapor of the atmosphere *falling* to the earth in drops large enough to attain sensible velocity." Id. at 628 (emphasis added). Perhaps the leading case addressing the definition to be afforded "rain" in the context of insurance coverage is State Farm Fire and Casualty Co. v. Paulson, 756 P.2d 764 (Wyo. 1988). There, the Supreme Court of Wyoming cited to and expounded upon the definition offered by the Third Circuit in Berman:

> ***Rain is ordinarily and commonly thought of as water falling from the sky. After it stops falling, one does not say that it is "raining" although there may still be*** wet sidewalks and streets, puddles of water resulting from the rain, or ***water running through gutters and elsewhere as a result of the rain.*** It is not common or usual to say in such instances that it is still raining.

Id. at 767 (emphasis added).

"Rain," the term used by Erie in its Policy exclusion, is best defined as water falling from the sky. Id.; Berman, 216 F.2d at 628; see also Thorell v. Union Ins. Co., 492 N.W.2d 879, 883 (Neb. 1998) (citing Paulson, 756 P.2d at 767) (defining rain as such and observing that it is consistent with the ordinary meaning ascribed to the term). Therefore, the most reasonable interpretation of the "rain" exclusion is that it applies only to those circumstances where it is actually raining.

Of course, to the extent Erie's suggested definition of "rain," as including water that has accumulated on a roof after it had stopped raining, is reasonable, this Court must strictly construe the exclusion against Erie, the drafter of its language. In this regard, Erie did not state in its Policy that damage caused by "rainwater" was excluded from coverage. It stated only that damage caused by "rain" was excluded and chose not to define the term. If Erie had intended to exclude "rainwater," or exclude any damage resulting from what was, at one time, "rain," it could have easily inserted such language in its Policy.[1] It did not. Because the interpretation suggested by Green Street is, at the very least, a reasonable one, and because no "rain" was falling at the time of the Loss, Erie has not met its burden of proof that the Loss is within the Policy exclusion for interior damage caused by "rain."

2. The "Rain" Exclusion Does Not Apply, Because The Roof Of The Property Was Damaged By A Covered Cause Of Loss.

Moreover, even if, assuming *arguendo*, this Court was to define "rain" as necessarily including "rainwater," the exclusion would be inapplicable. The Court heard uncontroverted

[1] Compare Horizon III R.E. v. Hartford Fire Ins. Co., 186 F.Supp.2d 1000 (D. Mn. 2002) (where, unlike Erie's Policy, exclusion was for any damage "caused by *or resulting from* rain," court held as inapposite and irrelevant that rainwater had accumulated on roof before entering building through damage portion of roof) (emphasis added).

testimony that the roof cap for the subject interior drain was found to be missing immediately after the Loss, and that there were strong winds on the day of the Loss. (N.T., 9/22/08, at 31 & 42). The Court also heard uncontroverted testimony from Abraham Woidislawsky, the General Partner of Green Street, that he had seen the cap in place on the roof within a month or two before the Loss. (N.T., 9/22/08, at 30 & 37-38). Erie also introduced the testimony of Alvars Krumins, a roofer who inspected the roof immediately before the Loss. Mr. Krumins does not recall noticing any missing roof cap during his inspection of the roof. (N.T., 9/22/08, at 56-58 & 63). Indeed, despite his inspection of the roof only a day or two before the Loss, Mr. Krumins had difficulty recognizing a photograph of the subject roof drain, taken by Erie after the Loss, as it was missing the exterior roof cap. (N.T., 9/22/08, at 56-58 & 63).

Erie's Policy does not exclude damage caused by wind. (P-3). By its very language, the "rain" exclusion does not apply when the roof of the Property is damaged by a covered cause of loss. (P-3, supra, at § 3 – Exclusions, at pgs. 4-5).

Nor does the Policy exclusion state that the "rain" must enter the Property as the direct result of damage to the roof, as do similar exclusions in policies written by other insurers. Compare Florida Windstorm Underwriting v. Gajwani, 934 So.2d 501, 506 (Fla. Dist. Ct. App. 2005); United States Fire Ins. Co. v. Matchoolian, 583 S.W.2d 692, 693-94 (Tex. Civ. App. 1979); New Hampshire Ins. Co. v. Carter, 359 So.2d 52, 53 (Fla. Dist. Ct. App. 1978); Travelers Indem. Co. v. Rawson, 222 So.2d 131, 134 (Miss. 1969); Reichman v. Camden Fire Ins. Ass'n, 427 S.W.2d 729, 730 (Mo. App. 1968) (each addressing policy language, not within Erie's Policy, specifically requiring that rain enter property as the result of damage to roof for coverage to be found); with Victory Peach Gp., Inc. v. Greater N.Y. Mut. Ins., 707 A.2d 1383 (N.J. App. Div. 1998) (absent such a requirement,

exclusion is inapplicable).[2]

Therefore, because the roof was damaged by a covered cause of loss, *i.e.*, wind, the "rain" exclusion, by its very language, does not apply and is not a basis upon which to conclude that the Loss is excluded from coverage.

B. ERIE HAS NOT PROVEN THAT THE LOSS IS EXCLUDED BY THE POLICY EXCLUSION FOR "SURFACE WATER."

Erie now claims that the Loss is excluded by the Policy's exclusion for "surface water." Erie is incorrect.

Preliminarily, it is important to observe that exclusions for surface water, flood and the like, particularly in the context of an all risk policy, are intended to reach an area-wide event or disaster, not an occurrence limited to a particular building or property. 1 Stempel, supra, § 15.02, at 15-24 (citation omitted); see generally T.H.E. Ins. Co., 455 F.Supp.2d at 294 (observing that purpose such exclusions "in all risk policies is to relieve the insurer from occasional major disasters which are almost impossible to predict and thus to insure against. There are earthquakes or floods which cause a major catastrophe and wreak damage to everyone in a large area rather than on individual policyholders.") (citations omitted). Furthermore, and as with all exclusions, the exclusion for surface water must be construed narrowly, and any ambiguities should be interpreted against the insurer and in favor of coverage. See Continental Casualty Co., 244 F. Supp.2d at 408 ("Policy

[2] The decisions of Canterbone v. Lititz Mut. Ins. Co., 18 Pa. D. & C.2d 218 (C.C.P. Lancaster County 1959), and Goldsteins Rosenbergs-Raphel Sacks v. Erie Ins. Exch., 2005 WL 1323444 (C.C.P. Phila. County 2005), cited by Erie, do not stand for the proposition suggested by Erie. They hold only that absent damage to the roof, the exclusion for "rain" is applicable if the water causing damage is rain. In the case before the Court, unlike the facts present in the decisions cited, the roof was damaged, and the water entering the Property, for all the reasons discussed previously, was not "rain."

exclusions are strictly construed against the insurer.") (citations omitted) (interpreting Pennsylvania law); Miller, 218 A.2d at 280; Eichelberger, 434 A.2d at 750 (citations omitted).

In addition, the declination letter sent by Erie after the Loss did not state that the Loss was caused by surface water, or that the exclusion for "surface water" was a basis upon which to conclude that the Loss was excluded from coverage. (D-11; P-8). This is particularly significant given the testimony of Erie's claim supervisor, Jacqueline Tirpak, that she verbally discussed the denial with Mr. Woidislawsky and, during that conversation, advised that Erie would be sending him a letter explaining why the Loss was excluded from coverage. (N.T., 9/23/08, at 35-36 & 36-38). Clearly those at Erie most connected with the Loss did not believe that the Loss was caused by surface water at any time before litigation was filed years later.

Consistent with these principles, a review of legal precedent demonstrates that Erie has not met its burden to prove that the Loss is excluded by operation of the "surface water" exclusion.

1. The "Surface Water" Exclusion Does Not Apply, Because The Water That Damaged The Property Was Never Surface Water.

Erie's Policy excludes from coverage loss caused by "surface water." (P-3, supra, at § 3 – Exclusions, at pgs. 3-4). The Policy does not define "surface water." Nevertheless, "surface water" enjoys a particular connotation and definition under Pennsylvania law.

As explained by the Superior Court of Pennsylvania more than fifty years ago, "surface waters are commonly understood to be waters ***on the surface of the ground***, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence." Richman v. Home Ins. Co. of N.Y., 94 A.2d 164, 166 (Pa. Super. 1953) (citations omitted) (emphasis added). Commonwealth Court has defined "surface

water" in similar fashion. See Tom Clark Chevrolet, Inc. v Pennsylvania Dep't of Protection, 816 A.2d 1246, 1251 n.15 (Pa. Commw.), alloc. denied, 574 Pa. 763, 831 A.2d 601 (2003) ("[T]he term 'surface water' means water from rain, melting snow, springs, or seepage, or detached from subsiding floods, ***that lies or flows on the surface of the earth*** but does not form a part of a watercourse or lake.") (quoting, e.g., Restatement (Second) of Torts § 846 (1977)) (emphasis added).

In T.H.E. Ins. Co. v. Charles Boyer Children's Tr., 455 F. Supp.2d 284, 296 (M.D. Pa. 2006), aff'd, 269 Fed. Appx. 220 (3d Cir. 2008), the Middle District of Pennsylvania was called upon to interpret "surface water" as used in an exclusion nearly-identical to that contained in Erie's Policy. There, the federal district court quoted with approval the definition under Pennsylvania law offered by Superior Court more than fifty years earlier in Richman.[3] See Id.

Most recently, the Eastern District of Pennsylvania, in Rock-Epstein v. Allstate Ins. Co., Civ. A. No. 07-2917, 2008 WL 4425059 (E.D. Pa. Sept. 29, 2008), restated this long-settled definition of surface water under Pennsylvania law. Id. at *3 (surface waters are those "waters on the surface of the ground . . . .") (citing T.H.E. Ins. Co., 269 Fed. Appx. at 222; Richman, 94 A.2d at 166); see also T.H.E. Ins. Co., 269 Fed. Appx. at 223 (citing Berman, 216 F.2d at 628) (holding that where water

[3] The court also cited various cases defining "surface water" in similar fashion. See T.H.E. Ins. Co., 455 F. Supp.2d at 296 (citing O'Neill v. State Farm Ins. Co., Civ. A. No. 94-3428, 1995 WL 214409, at *2 (E.D. Pa. Apr. 7, 1995) ("Surface water is water which has 'diffused ***over the surface of the ground***,' and is derived from falling rain or melting snow.") (emphasis added); Thorell v. Union Ins. Co., 492 N.W.2d 879, 883 (Neb. 1992) (same); Heller v. Fire Ins. Exch., 800 P.2d 1006, 1008-09 (Col.1990) (same); State Farm Fire & Casualty Co. v. Paulson, 756 P.2d 764, 768-72 (Wyo.1988) (collecting cases and concluding that "surface water" is not an ambiguous term, but plainly means "***water on the surface***, other than in streams, lakes and ponds.") (emphasis added); Valley Forge Ins. Co. v. Hicks Thomas & Lilienstern, L.L.P., 174 S.W.3d 254, 258 (Tex. Ct. App. 2004) ("'surface water' is generally defined as that which is derived from falling rain ... and is diffused ***over the surface of the ground***.... Such waters are not divested of their character as surface waters by reason of their flowing from the land on which they first make their appearance onto lower land in obedience of the law of gravity.") (emphasis added).

fell as rain *and went onto ground*, it was properly characterized as surface water).

These decisions demonstrate that Erie knew how "surface water" was defined when it wrote and sold the Policy. To be "surface water," and, therefore, fall within the Policy exclusion, the water causing damage must be "on the surface of the ground." However, the water that damaged Green Street's Property and caused the Loss was not on the surface of the ground. The water came from a height near the roofline and cascaded down, from a height of approximately fifteen (15) feet, into the interior of the first floor of the Property. (N.T., 9/22/08 at 44). The offending water came from above, not from the surface of the ground.[4]

Erie has not cited any decision from Pennsylvania, and Green Street is not aware of one, interpreting a policy exclusion for "surface water" as being applicable to the waterfall-like events that occurred at the Property on September 28, 2004. Contrary to the broad interpretation of the exclusion advanced by Erie, the exclusion, written by Erie, must be interpreted narrowly. See Continental Casualty Co., 244 F. Supp.2d at 408 ("Policy exclusions are strictly construed against the insurer.") (citations omitted) (interpreting Pennsylvania law); Miller, 218 A.2d at 280; Eichelberger, 434 A.2d at 750 (citations omitted).

Under Erie's all-risk Policy, the Loss is covered unless it fits within the accepted definition of "surface water" under Pennsylvania law. Given the long-standing definition afforded "surface water" under Pennsylvania law, Green Street respectfully contends that the exclusion is inapplicable

[4] In this regard, the lead-in, "concurrent causation" clause preceding the exclusion for "surface water," to which Erie cites with such ferocity, is of no matter, because none of the water entering and damaging the print room at the Property may be fairly, or necessarily, characterized as water "on the surface of the ground." See 11 Couch on Insurance 3d, § 153.57, at 153-80 (observing that surface water may lose its character and become some other form of water); Selective Way Ins. Co. v. Litigation Tech., Inc., 606 S.E.2d 68, 71 (Ct. App. 2004), cert. denied, (Ga. 2005) ("Because the damage in this case was not directly or indirectly caused by water that could be considered `surface water' at the time the damage was sustained, the exclusion does not apply.").

to a situation where, as here, water, which is not at or on the surface of the ground, is the cause of a Loss.

Decisions of other courts are in accord with this interpretation. In McCorkle v. Penn Mut. Fire Ins. Co., 213 So.2d 272 (Fla. Dist. Ct. 1968), water built up on a flat roof when a drain became clogged, causing the roof to ultimately collapse and the water to damage the interior structure. The insurer denied the insureds' claim under their all-risk policy on the basis of an exclusion for "surface water" nearly identical to that contained in Erie's Policy. See Id. at 273. The question before the court was whether the water that damaged the insured's property could be characterized as "surface water," and, accordingly, whether the loss fell with the exclusionary language. Id.

Quoting the same definition of surface water as that found in Pennsylvania law, the Florida court rejected the insurer's contention that water, while on a roof, is properly characterized as "surface water." Id. In so doing, the Florida court relied upon another decision, American Ins. Co. v. Guest Printing Co., 152 S.E.2d 794 (Ga. Ct. App. 1966), where the court held:

> [T]he majority of cases apply the term [surface water] strictly to water on the surface of the ground. See Black's Law Dictionary, 4th Ed. P. 1762. (Water-Surface Waters); Aetna Ins. Co. v. Walker, 105 S.E.2d 917 (Ga. Ct. App. 1967) and cit. The most that can be said in the insurer's favor is that the term[] 'surface water' in the policy [is] ambiguous. Such ambiguities in the policy, which was written by the insurer, are construed in favor of the insured. This construction also conforms to a definition consistent with the majority construction. In view of the context in which the terms are used in the policy, it does not exclude damage from water on the roof, whether backed up or not.

McCorkle, 213 So.2d at 273 (quoting Guest Printing Co., 152 S.E.2d 794 (other citations omitted) (emphasis added).

The same conclusion was reached by different courts in Cochran v. Travelers Ins. Co., 606 So.2d 22 (La. Ct. App. 1992), and Delta Theaters, Inc. v. Alliance Gen. Ins. Co. All American

Admin., Inc., Civ. A. No. 96-2719, 1997 WL 313413 (E.D. La. June 9, 1997).

In Cochran, the insured sustained damage when water leaked from a roof into a building. As here, the insurance policy at issue was an all risk policy, but the insurer argued that water on the roof was surface water and, accordingly, that the loss was excluded from coverage. Cochran, 606 So.2d at 23. Consistent with the courts in McCorkle, Guest Printing and Walker, the court in Cochran emphasized the accepted definition of surface water as being those waters diffused over the surface of the ground or "coming unto the ground and naturally spreading over the ground." Id. at 24 (citing, e.g. 93 C.J.S. Water § 112; Black's Law Dictionary, 6th ed., 1990 ("Surface Waters")). In light of this definition, and the rule of construction that policy exclusions are to be narrowly construed, the court refused the insurer's request to broaden the exclusion for "surface water" to encompass water on a roof. Id. Affirming the trial court's entry of summary judgment, the Cochran court emphasized that the policy at issue, as is the case *sub judice*, was one covering all risks unless clearly and specifically excluded. See Id.

More recently, in Delta Theaters, Inc. v. Alliance Gen. Ins. Co. All American Admin., Inc., Civ. A. No. 96-2719, 1997 WL 313413 (E.D. La. June 9, 1997), a federal court in Louisiana adopted and described as persuasive the analysis and strict interpretation afforded the surface water exclusion by the Cochran court. Id. at *3. The court in Delta Theaters refused to interpret the exclusion for surface water as being anything other than water on the surface of the ground. Id.

The Cochran and Delta Theaters decisions are particularly significant because they expressly reject the analysis and holding contained in Sherwood R.E. and Inv. Co., Inc. v. Old Colony Ins. Co., 234 So.2d 445 (La. Ct. App. 1970), an earlier decision which Erie cites, albeit without informing the Court of the later decisions of Cochran and Delta Theaters. In Cochran, the insurer relied upon the Sherwood decision in support of its argument that the "surface water" exclusion must be interpreted

as including water on a roof. Cochran, 606 So.2d at 24. The court rejected the approach in Sherwood and distinguished it in several respects:

> In ***Sherwood*** the court opined that water which collected in a pool on a roof, and eventually seeped through the roof causing interior damage, was "surface water." ***Sherwood*** is distinguishable in several respects. It involved a "windstorm" policy. The court therein held that plaintiff failed to show that his loss was the direct result of windstorm. ***Sherwood*** dealt with standing or pooled water that collected on the roof. The comments about "surface water" were dicta and the court noted the question was res nova in this state.
>
> In the instant case Cochran was covered by an "all risk" policy, that is, all risks are covered unless clearly and specifically excluded. The exclusion here relating to "surface water" is not ambiguous and is clearly not applicable to Cochran's loss from rainwater overflow and seepage.

Id.

Similarly, the Delta Theaters court squarely rejected an interpretation of a roof as "an artificial elevation of the earth's surface," as expressed in Sherwood and as Erie ostensibly urges upon this Court. Delta Theaters, 1997 WL 313413 at **2-3. Rejecting Sherwood and adopting the analysis of Cochran, the court in Delta Theaters concluded that "surface water" is water at ground level, and nowhere else. Id. at *3.

Sherwood has been rejected by its sister state and federal courts in Louisiana. Green Street respectfully contends that this Court should follow the reasoning of the courts in Cochran and Delta Theaters and reject, as *dicta*, the suggestion in Sherwood that water on a roof is necessarily within the definition of "surface water." As discussed herein, most courts have refused to extend a policy exclusion for "surface water," written by an insurer, to include "water on a roof."

Nor do the Pennsylvania decisions cited by Erie stand for the proposition that water on a roof is synonymous with surface water. Erie's representation that the decision by the Third Circuit in Berman v. Aetna Casualty & Sur. Co., 216 F.2d 626 (3d Cir. 1954), "first enunciated the proposition

that rain may be considered surface water once it hits a roof . . .[,]" (Erie's Trial Mem. at 12), misstates, in a most significant way, the facts and holding of Berman. Of obvious import, the question of whether water causing damage to an insured's property is within the definition of a policy exclusion for "surface water" – the issue in this case - was not at issue in Berman; in fact, there was no exclusion for "surface water" in Berman. The policy at issue in Berman was a named peril policy for water damage, but which excluded damage caused by seepage or influx of water through walls, foundations or basement floors. Berman, 216 F.2d at 627.

A review of the facts surrounding the loss in Berman also belies Erie's contention. The insured building was designed whereby water from the roof was drained into a spout or leader, which went down an exterior wall of the building, and entered a ground soil pipe that eventually met with the city sewer. Id. at 628. During a period of heavy rains, the soil pipe broke about three inches near its connection with the exterior spout, at or about ground level, causing water to flow out of the broken pipe and into a hole in the foundation wall and ultimately into the front section of the basement where it damaged the insured's merchandise. Id.

The insured in Berman claimed that the loss was not within the exclusion for damage caused by seepage or influx of water through walls, because the water that damaged its merchandise was "rain." Id. In rejecting this argument, the court found that the loss was within the exclusion contained in the policy. Id. Thereafter, the court, in *dicta*, added: "Actually, under the facts *the water now concerning us at the time it occasioned the damage* in the rear basement, had ceased to be rain and, properly characterized, was *by then* surface water." Id. (emphasis added) (citation omitted). It is presumably based upon this sentence that Erie leaps to describe the Berman decision as standing for the proposition that water on a roof is considered surface water under Pennsylvania law. (Erie's Trial Mem. at 12). This description is wrong.

The water "concerning" the Berman court was not water on a roof; it was the water as it existed "at the time it occasioned the damage in the rear basement . . . ." Berman, 216 F.2d at 628. ***The court was describing the water on and below the surface of the ground that had seeped into the foundation wall, traveled into a basement and damaged the insured's property, when it described the water as being, "by then", "surface water."*** See Id. The court was not holding, or "enunciat[ing] the proposition[,]" as Erie claims, that water *on a roof* is "surface water."

The Loss at issue in this case does not involve the influx of water upon the surface of the ground and its ultimate intrusion through foundation walls, as was the case in Berman. It involves water that went through an interior roof drain and descended upon and damaged the interior of the Property. It does not involve water that was on the surface of the earth at any time. The reference to "surface water" in Berman is inapposite.

In a similar, but equally unfortunate, way, Erie misconstrues the unpublished decision in Cabrelli v. State Farm Fire & Casualty Co., 1997 WL 16624 (E.D. Pa. Jan. 14, 1997). Erie claims that Cabrelli found water that entered an insured's basement from a broken sewer line (albeit below grade) to be "surface water" "`since' it collected on Cabrelli's roof during a rainstorm where [sic] the roof drains channeled the water into the sewer line." (Erie's Trial Mem. at 13). In so doing, Erie suggests that the fact that the water originated from the roof was significant in the court's determination. It was not. From a temporal standpoint, the water began on the roof, but that fact was irrelevant in the court's characterization of the offending water that damaged the insured's property as "surface water."[5] On the contrary, the offending water had already travelled to the

[5] One easily infers that, in describing the basis of the decision in Cabrelli, Erie's use of "since" in its Trial Memorandum is intended to mean "because." (Erie's Trial Mem. at 13). Whether intentional or otherwise, the connotation to be inferred is incorrect.

surface of the ground before the loss, and was at or below grade when it damaged the insured's property. Id. at **1 & 3.

By contending that Cabrelli and Berman support the conclusion that water on a roof, which ultimately travels to the surface and causes damage, was, *at all times*, "surface water," Erie misapprehends the time period when the classification is to be made. The question is: what was the classification of the offending water *when* the damage occurred, not what was its classification at some earlier time. 11 Couch on Insurance 3d, § 153.57, at 153-80 ("Because surface water may lose its character and become some other form of water, arguments may arise whether damage was from surface water, or whether by the time the water damaged the property it was no longer surface water and, therefore the loss falls outside of the exclusion"); Selective Way Ins. Co. v. Litigation Tech., Inc., 606 S.E.2d 68, 71 (Ct. App. 2004), cert. denied, (Ga. 2005) ("Because the damage in this case was not directly or indirectly caused by water that could be considered `surface water' at the time the damage was sustained, the exclusion does not apply.").

This distinction recognizes that the characteristics of water change over time. When it is falling, it is considered rain and not surface water. Berman, 216 F.2d at 628; Paulson, 756 P.2d at 767. Upon hitting the ground, it is no longer rain but surface water, and remains so while it travels in a casual or vagrant way without defined borders. Tom Clark Chevrolet, Inc., 816 A.2d at 1251 n.15; Richman, 94 A.2d at 166; T.H.E. Ins. Co., 455 F. Supp.2d at 296; T.H.E. Ins. Co., 269 Fed. Appx. at 222-23 (citing Berman, 216 F.2d at 628) ("We have held, in construing Pennsylvania law, that rainwater, once it hit the ground, `ceased to be rain and, properly characterized, was *by then* surface water.") (emphasis added); Rock-Epstein, 2008 WL 4425059 at *3 (same).

Moreover, and as will be discussed more fully below, water that is properly characterized as "surface water" loses its characteristics as such when it is diverted or channeled, although it may

later become surface water a second time. See T.H.E. Ins. Co., 269 Fed.Appx. at 223 (describing water as rain when falling, surface water when it hit the ground, and which "then entered a sewer pipe, and finally *became surface water a second time* as it flowed down a slope after the pipe ruptured.") (emphasis added).

The water that damaged Green Street's Property was never on the surface of the ground, never flowed down a slope of land and never flowed into the ground before the Loss occurred. It came from an area near an interior roof drain, approximately fifteen feet over the interior floor of the Property. (N.T., 9/22/08, at 44). It is unreasonable to interpret the "surface water" exclusion as encompassing such a situation. Erie has shown, at the very most, indeed, that its exclusionary language is ambiguous when applied to the facts of this Loss. Because the exclusion must be interpreted narrowly, and because any ambiguity must be interpreted against Erie, Green Street respectfully contends that Erie has failed to prove that the Loss is excluded by operation of the Policy's "surface water" exclusion.

2. The "Surface Water" Exclusion Does Not Apply, Because The Water On The Roof Had Been Diverted And, As A Result, Was Not Surface Water At The Time Of The Loss.

If, assuming *arguendo*, this Court holds that water on a roof is within the definition of "surface water," the exclusion is inapplicable because the water that ultimately fell into the Property had been diverted and, as such, was no longer considered surface water.

Where surface water is intentionally diverted, it is no longer considered surface water. 11 Couch on Insurance 3d, § 153.57, at 153-80.

The decision of Heller v. Fire Ins. Exch., 800 P.2d 1006 (Col. 1990), is instructive. Heller involved, in the context of an all risk policy, the interpretation of an exclusion for damage caused by

surface water identical to that contained in Erie's Policy. The insureds' home had been damaged by water that had originated from melting snow. Id. at 1007. However, the melted snow had been diverted onto the insureds' property by use of a trench on nearby property. Id. Finding the exclusion unambiguous, the court held that it was nevertheless inapplicable, because what had been surface water had become something else when its natural state was intentionally changed. Id. at 1008-09. Given the active and intentional diversion of the water, the Supreme Court of Colorado held that "the runoff lost its character as surface water when it was diverted by the trenches and therefore was not within the surface water exclusion contained in the [insureds]] property." Id. at 1009.

Similarly, in Georgetowne Sq. v. United States Fid. and Guar. Co., 523 N.W.2d 380 (Neb. Ct. App. 1994), the court held that an exclusion for surface water did not apply when water was diverted into an underground pipe, and the water exited the pipe below ground as designed. Although surface water at one time, its natural state was disturbed when it was intentionally channeled into a pipe. Id. at 385-86. Therefore, the offending water had lost its character as surface water by the time the loss occurred. Id. at 386-87 (citing Heller, 800 P.2d at 1009; see also Transamerica Ins. Co. v. Raffkind, 521 S.W.2d 935 (Tex. Civ. App. 1975)).

Surface water, by definition, stops being surface water when it flows into a drain. Industrial Enclosure Corp. v. Northern Ins. Co. of N.Y., No. 97 C 6850, 2000 WL 1029192, *6 (N.D. Ill. July 26, 2000). In the case *sub judice*, the water on the roof was intentionally diverted from the roof by use of the subject interior roof drain. (P-2, ¶ 7; N.T., 9/22/08, at 10; P-4c & D-4b). When the water flowed into the drain,[6] it lost its character as surface water, as it took a different course than that it

[6] Of course, water that flows from a roof onto the surface of the ground is aptly described as surface water *when it is on the ground*. Additionally, *if* water on a roof is considered surface water, then water that leaked directly from the roof into a structure could be considered surface water. However, these potential circumstances do not accurately characterize the Loss. Indeed, none of the

would have taken if left to its natural state. Specifically, on the day of the Loss, the water on the roof was not left to evaporate, but was diverted into a drain. Once in the drain, the water, which ultimately cascaded into and onto the interior of the Property, was no longer surface water.

Therefore, even if the offending water could be considered surface water when on the roof, it lost its character as surface water when it was actively and intentionally diverted through the use of a roof drain. Accordingly, the water that damaged the Property cannot be considered "surface water," and Erie has not met its burden to prove the applicability of the exclusion.

C. ERIE HAS NOT PROVEN THAT THE LOSS IS EXCLUDED BY THE POLICY EXCLUSION FOR "RUST OR CORROSION."

Erie also contends that the Loss is not covered on account of the Policy's exclusion for "rust or corrosion." In pertinent part, the exclusion states:

> **B. Coverages 1, 2 and 3**
>
> We do not cover under Building(s) (Coverage 1) . . . "loss" caused:
>
> 1. By
>
> a. Wear and tear, *rust or corrosion*, mold or rotting;

---

decisions cited by Erie stand for the proposition that water on a roof that is diverted into a drain, before damage occurs, retains its character as surface water. See Cameron v. USAA Prop. and Casualty Ins. Co., 733 A.2d 965 (D.C. Ct. App. 1999) (water draining from patio, past a blocked drain and under the basement door was surface water); Crocker v. American Nat'l Gen. Ins. Co., 211 S.W.3d 928 (Tex. Ct. App. 2007) (water that drains off a patio and into home was surface water, having never been intentionally diverted); State Fire and Tornado Fund of the N.D. Ins. Dep't v. North Dakota St. Univ., 694 N.W.2d 225 (N.D. 2005) (where tunnel in which water traveled was not designed to carry water, water had not been actively diverted and was still surface water). Smith v. Union Auto. Indem. Co., 752 N.E.2d 1261 (App.), appeal denied, 763 N.E.2d 778 (Ill. 2001) (water entering basement window was surface water where it had not been intentionally diverted, although it did travel over man-made objects); Thorell v. Union Ins. Co., 492 N.W.2d 879, 884 (Neb. 1992) (water that entered property after accumulating on ground outside basement window was surface water)..

> . . .
>
> *unless a covered "loss" ensues, and then only for ensuing "loss".*
> . . . .

(P-3, supra, at § 3 – Exclusions, at p. 4) (italics added).

This exclusion is inapplicable for two reasons. First, Erie has not proven that the Loss was solely caused by rust or corrosion. Second, even if the Loss was caused by rust or corrosion in the manner suggested by Erie, the subsequent water damage was a loss that ensued from the rust or corrosion and, accordingly, the exclusion does not bar coverage for the Loss.

1. The "Rust or Corrosion" Exclusion Does Not Apply, Because Erie Did Not Prove That Either Caused The Loss.

Erie's contention that the Loss was caused by rust or corrosion is based upon the testimony of Rodney J. Blouch, P.E., a civil engineer. Green Street respectfully contends that Mr. Blouch's testimony is an insufficient basis upon which to conclude that the Loss was caused by rust or corrosion.

Mr. Blouch's testimony was more revealing for what he did not know, or did not consider, than it was helpful in determining how the Loss occurred. Mr. Blouch acknowledged that, as an expert witness, he needed to have as complete an understanding of the facts as possible. He also agreed that the usefulness of his analysis was to be questioned if it was based upon an inaccurate understanding of the facts. (N.T., 9/22/08, at 86; 88-90). Mr. Blouch's testimony proved no more. Mr. Blouch:

- failed to speak with Mr. Fletcher, who he accurately described as the "first responder" on scene at the time of the Loss; (N.T., 9/22/08, at 92);

- failed to speak with Mr. Woidislawsky, who repaired the pipe, or Mr. Krumins, a roofer who had been on the subject roof in the days prior to the Loss; (N.T., 9/22/08, at 91-93);
- failed to review the deposition testimony of Messrs. Fletcher or Woidislawsky;
- failed to attend the trial to hear the testimony of Messrs. Fletcher or Woidislawsky as to their observations at the time of and immediately after the Loss and regarding the nature of the repairs made; (N.T., 9/22/08, at 92 & 100);
- assumed that the drain hub underneath the roof drain had been replaced after the Loss, which was wrong; (N.T., 9/22/08, at 100-03); and
- assumed that Mr. Woidislawsky had put a new Fernco coupling on the top of the PVC pipe to reconnect it to the bottom of the drain, when, in truth and in fact, he had only needed to put a new clamp around the existing black, rubber coupling, because neither the black coupling nor its bottom clamp had been disturbed. (N.T., 9/22/08, at 28-29; 103-05 & 109-11).

Mr. Blouch's analysis is undercut and untrustworthy because it is based upon mistaken beliefs and an inaccurate understanding of the facts surrounding the Loss. This Court should give it no credence whatsoever.

Further, Mr. Blouch never clearly and unequivocally testified as to the cause of the Loss. The only time Mr. Blouch came close to offering such testimony was as follows:

> Q. Did you ultimately determine how you believed this pipe separated from the roof?
>
> A. Yes, I did.
>
> Q. Can you take the Court through your analysis in terms of that specific issue.

> A. That involved both visual observations and some queries and responses that yielded to me the impression that that pipe had been repaired and there was new equipment, new hardware on it, which gave evidence of that.
>
> There was also was a hanger on it that was new in appearance, as well as an old location on the pipe which have the impression of corrosion from the silhouette, made a silhouette in corrosion products of what likely was a former hanger at that location.

(N.T., 9/22/08, at 78).

Mr. Blouch never testified that the "drain hub fasteners" (described in his report) around the Fernco coupling at the top of the PVC pipe, which held the PVC pipe to the underside of the roof drain, caused the Loss. Further, with respect to the lower, lateral pipe, Mr. Blouch did not testify that any "corrosion" where he speculated that a prior pipe "hanger" had once been located caused the Loss, or even caused the pipe hanger to fail.

Indeed, even giving Mr. Blouch's testimony the benefit of more inferences than are fair, his testimony, at best, was that corrosion was found at "what *likely* was a former hanger at that location." (N.T., 9/22/08, at p. 78; l. 17) (emphasis added). Such equivocal testimony is insufficient.[7] McMahon v. Young, 442 Pa. 484, 276 A.2d 534, 535 (1971); Stahl v. Redcay, 897 A.2d 478, 491 n.4 (Pa. Super. 2006), alloc. denied, 591 Pa. 704, 918 A.2d 747 (2007).

Even if the Court finds Mr. Blouch's testimony sufficient, to create a triable issue of fact, as to whether (1) there had been a pipe hanger on the lower, lateral pipe; (2) it rusted and/or corroded before the Loss; and (3) such rust or corrosion caused the Loss, it is not persuasive. The testimony

[7] Mr. Blouch equivocated in his report as well, using "probably" instead of "likely" as he testified. (D-7 at 4 ("and possibly a pipe hanger near the drain inlet")). Mr. Blouch was not permitted to testify beyond the scope of his report. See Walsh v. Kubiak, 661 A.2d 416, 419-21 (Pa. Super. 1995), alloc. denied, 543 Pa. 716, 672 A.2d 309 (1996).

that there was "*likely*" a pipe hanger that corroded before the Loss is based upon what Mr. Blouch describes as a rust stain "where it *could be* the location of the old hanger[.]" (N.T., 9/22/08, at 80). This testimony is highly speculative.

First, if a pipe hanger corroded, one would expect either (1) part of it would have remained attached to the flange or PVC pipe; or (2) the corroded hanger would have been found in Fletcher-Harlee's print room after the Loss. It was not. (N.T., 9/22/08, at 16-18). Second, what Mr. Blouch suggests is a rust stain from a prior hanger is not present on the underside of the PVC pipe, where the hanger would most certainly have been in contact with the PVC pipe and where any water causing the hanger to rust would have traveled. (D-4b; P-4c; P-4d; P4-e).[8] Third, there was no evidence of any leaks or water penetration in the area of the repair at any time before the Loss. The testimony was to the contrary. (N.T., 9/22/08, at 25). If rust formed, where did the water causing it come from? Mr. Blouch never said.

Mr. Blouch also pointed to hangers in other areas above the ceiling tiles at the Property, hangers which he believes show evidence of rust. He specifically pointed to Photograph #25 attached to his report. (N.T., 9/22/08, at 82). This testimony undercuts – rather than supports - Mr. Blouch's theory. In Photograph #25, a rust stain extends around the bottom of the pipe, where the pipe rests against the hanger, unlike the irregular stain seen on D-4b, P-4c and P-4d, where Mr. Blouch suggests the "likely" prior pipe hanger was located. (D-7, Photograph #25). Of course, the pipe hanger depicted in Photograph #25, described by Mr. Blouch as bearing evidence of rust and corrosion, had not failed, either. (N.T., 9/22/08, at 112).

[8] In fact, the photographs before the repair was made do not show the stain to which Mr. Blouch points in the photographs taken weeks after the Loss. (D-3; P-4a; P4-b).

Mr. Blouch also assumes that the lower PVC pipe was pristine when it was installed, and he does not know if what he describes as a rust stain was present when the pipe was installed at the Property. (N.T., 9/22/08, at 111-12). He also offers no explanation for why the stain, if made from the pipe hanger that Mr. Blouch believes was replaced after the Loss, is located some distance from the pipe hanger installed after the Loss. (D-4b; P-4c; P-4d; P4-e).

The testimony of Mr. Blouch is nothing more than conjecture and speculation. Even when considered, it proves nothing. Green Street respectfully contends that Erie has not proven that the Loss was caused by rust or corrosion.

2. Green Street's Claim Is Not Excluded By Operation Of The "Rust or Corrosion" Exclusion, Because A Covered Loss Ensued.

Although Green Street contends that Erie has not met its burden to prove that a pipe hanger, or even the top clamp to the Fernco coupling, rusted or corroded, the exclusion is inapplicable because a covered loss ensued.

As noted earlier, the Policy does not cover loss caused by "rust or corrosion" "*unless a covered "loss" ensues, and then only for ensuing "loss"*. (P-3, supra, at § 3 – Exclusions, at p. 4) (emphasis added). The import of this "ensuing loss" provision is that rust and corrosion will not bar a claim if a loss ensues from the rust or corrosion, so long as the ensuing loss is not, itself, excluded in the Policy. See Raybestos-Manhattan, Inc. v. Industrial Risk Insurers, 433 A.2d 906, 908-09 (Pa. Super. 1981) (where ensuing loss provision allowed for coverage, court held that ensuing loss provision "severely restricts the exclusion and broadens the coverage provided").

In the matter *sub judice*, Green Street does not seek to recover the value of the allegedly rusted hanger, or clamp. It seeks to recover for the Loss that ensued. According to Erie, the rusted

and corroded hanger caused the PVP pipe to spontaneously separate from the roof drain, causing water to pour into the Property. (P-2, ¶ 7). Green Street agrees that an ensuing loss provision "cannot reinsert an excluded peril into the policy." (Erie's Trial Mem. at 16). However, and as has been demonstrated above, Erie is incorrect in contending that this ensuing loss is excluded, as it does not fall within the Policy exclusions for "rain" or "surface water." (See, infra, at 27-31).

For this reason, the exclusion for "rust or corrosion" does not exclude from coverage the claim brought by Green Street in respect to the Loss. See also Eckstein v. Cincinnati Ins. Co., No. 05:05CV043, 2007 WL 2894049, **2-3 (W.D. Ky. Sept. 27, 2007) (ensuring loss was covered that resulted from excluded peril, interpreting any ambiguity against insurer); Blaine Constr. Corp. v. Insurance Co. of N. Am., 171 F.3d 343, 349-50 & 353(6th Cir. 1999) (ensuing loss that flowed naturally from excluded peril was not barred from coverage); Lake Charles Harbor & Terminal Dist. v. Imperial Casualty & Indem. Co., 857 F.2d 286, 287-89 (5th Cir. 1988) (exclusion inapplicable where covered loss ensued).

D. ERIE HAS NOT PROVEN THAT THE LOSS IS EXCLUDED BY THE POLICY EXCLUSION FOR "DETERIORATION."

Lastly, Erie contends that the Loss is excluded from coverage by operation of the Policy's exclusion for "deterioration." This is incorrect for three reasons.

1. The "Deterioration" Exclusion Does Not Apply, Because Erie Did Not Prove That Rust Or Corrosion Occurred Or Caused The Loss.

First, the only "deterioration" alleged by Erie to have occurred is rust and corrosion. For all the reasons discussed above, Erie has failed to prove that such rust or corrosion occurred, or that it caused any loss. (See, infra, at 27-31). Thus, even if the exclusion for "deterioration" could be

interpreted to include "rust or corrosion," it does not preclude coverage for the Loss.

2. The "Deterioration" Exclusion Does Not Apply, Because It Does Not Include Damage Caused By Rust Or Corrosion.

Second, it is apparent that Erie did not intend that the exclusion for "deterioration" include damages caused by the kind of "rust" or "corrosion" described by Mr. Blouch. "Deterioration" is commonly referred to as involving "the action of normally expected elements of stress, friction and the daily traumas of [] life to the object during its normal life expectancy." Cyclops Corp. v. Home Ins. Co., 352 F. Supp. 931, 936 (W.D. Pa. Jan. 10, 1973) (cited by Erie in its Trial Mem. at 15). Under the facts proffered by Erie, any rust or corrosion resulted not from what was expected but from the unexpected and unintended contact of water upon the allegedly, previously-existing pipe hanger. See Cavalier Gp. v. Strescon Indus., Inc., 782 F. Supp. 946, 955-56 (D. De. 1992) (limiting "deterioration" to "normal and inevitable occurrences"); Travelers Indem. Co. v. Jarrett, 369 S.W.2d 653, 654-55 (Tex. Civ. App. 1963) ("deterioration" exclusion applied only to inherent deterioration, not that caused by an external event).

Erie's placement of the exclusion for "deterioration" with that for "depreciation," an expected and natural event, only strengthens this suggested interpretation. See 401 Fourth St., Inc., 879 A.2d at 172 (should look to entirety of language in policy interpretation); 2 Couch on Insurance 3d, § 22:30, at 22-65 ("Where an entire limitation of liability is contained in one sentence, it must be construed as a whole, not by separating one word or phrase from another.").

Furthermore, Erie added a specific exclusion for "rust or corrosion" after that for "deterioration" in the Policy. (P-3; compare § III Exclusions, at A.1. for "deterioration" on pg. 3 with that at B.1. for "rust or corrosion" on p. 4). By including an exclusion for "rust or corrosion"

after one for "deterioration," it is reasonable to conclude that Erie understood that damages caused by the specific perils of rust or corrosion were not already within the general exclusion for deterioration. See 401 Fourth St., Inc., 879 A.2d at 172 (in ascertaining language's meaning, should look to entirety of language, not just particular word at issue); 2 Couch on Insurance 3d, § 22:44 (specific clauses should prevail over general clauses). At the very least, a fair review of the Policy in its totality supports such an interpretation. Construing any ambiguity against Erie, the drafter of the Policy, the exclusion for "deterioration" cannot be interpreted to include damage caused by "rust or corrosion."

3. The "Deterioration" Exclusion Does Not Apply, Because Application Of It To Deny Coverage For The Loss Would Render Illusory The Coverage Afforded For Loss Ensuing From Rust Or Corrosion.

Third, by operation of the rust and corrosion "ensuing loss" provision, the Policy affords coverage for losses that ensue from rust and corrosion, so long as the ensuing loss is not excluded. In this matter, and as also discussed above, the ensuing loss - the cascading of water into the Property from above - is not excluded by operation of the exclusions for "rain" and "surface water," as Erie alleges. (See, infra, at 10-26). Therefore, by operation of Section III – Exclusions, B.1, the Policy provides coverage for a loss of the kind experienced by Green Street that ensues from rust and corrosion.

A policy exclusion cannot negate coverage found elsewhere in a policy, unless it does so specifically and expressly. 401 Fourth St., Inc., 879 A.2d at 174 (disapproving interpretation of policy language that would render illusory coverage provided elsewhere in policy); 2 Couch on Insurance 3d, § 22:31, at 22-66 & 22-67. When Erie wrote the Policy, it made a decision that if rust or corrosion led to a subsequent or ensuing loss, the subsequent or ensuing loss would be covered, so long as it was

not otherwise excluded. For all the reasons discussed, the subsequent loss – the entry of water from above onto and into the interior of the Property – is not an excluded peril. (See, infra, at 10-26). Thus, water damage of the kind experienced by Green Street is covered when it ensues from rust or corrosion. (See, infra, at 30-31). ***This coverage is illusory if the deterioration clause is interpreted to swallow the specific coverage afforded by the ensuing loss provision when water – not deterioration – is the ensuing loss***. See 401 Fourth St., Inc., 879 A.2d at 174 (recognizing that, in Pennsylvania, application of exclusion cannot make coverage provided elsewhere in policy illusory); 2 Couch on Insurance 3d, § 22:31, at 22-66 & 22-67.

Consequently, the deterioration exclusion cannot be interpreted as disallowing the coverage for water loss that follows loss caused by rust or corrosion. Id. § 22:43, at 22-93 ("A construction of an insurance policy which entirely neutralizes one provision should not be adopted if the contract is susceptible of another construction which gives effect to all of its provisions and is consistent with the general intent.").

Accordingly, the Loss is not excluded by operation of the Policy's exclusion for "deterioration."

IV. CONCLUSION

Green Street respectfully contends that Erie has failed to meet its burden to prove that the Loss is excluded by operation of any of the four (4) exclusions upon which it now relies.

First, the exclusion for "rain" does not apply, because it was not raining at the time of the Loss and had not rained for seven (7) hours prior to the Loss. Moreover, even if the offending water could be characterized as "rain," the roof of the Property sustained damage when the cover that had been on the roof, over the interior roof drain, blew away in the high winds on the day of the Loss.

Second, the exclusion for "surface water" does not apply, because Pennsylvania law defines "surface water" as water on the surface of the ground, and the offending water was never on the surface of the ground. Further, even if the water could have been considered surface water while it remained on the roof, it was actively diverted by use of the interior roof drain, and lost its character as surface water at that time. Therefore, by the time the water flowed from the interior drain and into the Property, it was no longer surface water when the Loss occurred, even if it had been surface water previously.

Third, the exclusion for "rust or corrosion" does not apply because Erie has failed to prove that rust or corrosion was either present or the sole cause of the separation of the PVC pipe from the roof drain. In the alternative, the exclusion does not exclude coverage for the Loss, because the Loss that ensued from any rust or corrosion was not otherwise excluded.

Fourth, the exclusion for "deterioration" does not bar coverage for the Loss for three reasons. Deterioration is considered a natural and expected phenomenon, and the only "deterioration" suggested by Erie was neither natural nor expected. It was the result of an external force, water, causing rust or corrosion. Second, the exclusion for "deterioration" cannot be considered to include damage caused by rust or corrosion, as Erie wrote a specific exclusion for "rust or corrosion" and inserted it after that for "deterioration." Such a specific exclusion trumps a more general one, and is informative as to the limitations of the general exclusion. Lastly, because the exclusion for "rust or corrosion" specifically states that coverage will exist for any losses that ensue from rust or corrosion, the deterioration exclusion cannot be interpreted to bar coverage for the Loss. Otherwise, the coverage afforded by the ensuing loss provision in the exclusion for "rust or corrosion" would be illusory.

When Erie wrote and sold the Policy, it knew that it was issuing an all-risk policy. Under an all-risk policy, all fortuitous losses are covered, even those resulting from the insured's negligence, unless the insurer proves that a loss is specifically excluded in the Policy. Miller, 218 A.2d at 278; Betz, ___ A.2d at ___, 2008 WL 4291513 at *6; Spece, 850 A.2d at 683. Erie has not done so in this case.

In an all-risk policy, the unknown risk of loss is borne by the insurance company under Pennsylvania law. Miller, 218 A.2d at 278 (if otherwise "the inclusive character of the coverage afforded [by an all-risk policy] would be a mere delusion"). Having not proven that the Loss is specifically excluded, Erie has failed to meet its burden of proof. Therefore, Green Street respectfully requests that the Court enter judgment in favor of Green Street and against Erie on Erie's Counterclaim. Pursuant to the parties' Stipulation, entry of such judgment shall fully resolve all issues in this case. (P-1, ¶¶ 3, 6 & 7).

PROPOSED FINDINGS OF FACT

1. On or about May 1, 2001, Green Street purchased the real property located at 240 New York Drive, Fort Washington, Pennsylvania (hereinafter "Property'). (P-2; ¶ 1).

2. The Property largely consists of a single-story commercial building (hereinafter "subject property") occupying two-thirds of an acre of ground, or 32,240 square feet of space. (P-2; ¶ 2).

3. At all relevant times before the Loss hereinafter described, the subject property had a flat, modified rubber roofing system. Twelve air conditioning and heating units were mounted on the roof. (P-2; ¶ 3).

4. On the day in question, September 28, 2004, Green Street and the property at New York Drive (hereinafter "Property") were insured under an all-risk, commercial insurance policy issued by Erie, bearing Policy Number Q41 0970052 A, which, in addition to other insurance coverage and protection, provided indemnity to Green Street for damage to the Property (hereinafter "Erie's Policy" or "Policy"). (P-2, ¶ 4; P-3).

5. The Policy was a standard policy issued by Erie and entitled "Ultrasure Package Policy for Property Owners." (P-3; N.T., 9/23/08, at 31).

6. Pursuant to the Policy's Insuring Agreement, Erie agreed to pay for "loss" of or damage to Covered Property . . . caused by or resulting from any Covered Cause of Loss." (P-3 at Ultrasure for Property Owners' Commercial Prop. Coverage Part, at § 1 – Coverages, at p. 1). In turn, the Policy defines "Covered Cause of Loss" as being "risk of "loss" . . . except as excluded in this policy." (Id. at § 2 – Perils Insured Against, at p. 3). "Loss" is defined as "direct and accidental loss of or damage to covered property." (Id. at § 11 – Definitions, at p. 16).

7. Prior to issuing the Policy, Erie inspected the Property to determine its condition, investigate any hazards and to ensure that it wished to insure the Property. Representatives of Erie were permitted to go wherever they chose to conduct the inspection. (N.T., 9/23/08, at 28).

8. Fletcher-Harlee was a tenant in the subject property at the time of the Loss hereinafter described. (P-2; ¶ 5).

9. On September 28, 2004, at approximately 6:00pm., David Fletcher, the President of Fletcher-Harlee, heard a loud bang coming from the interior area of the building. When he came upon the scene, he observed water from above the ceiling tiles pouring into the building in an area that Fletcher-Harlee used as its "print room" (hereinafter "the Loss"). (P-2; ¶ 6; N.T., 9/22/08, at 43 & 45).

10. The Loss was caused when a PVC pipe, located above the ceiling tiles and connected to an interior drain on the roof, spontaneously dislodged. (P-2; ¶ 7).

11. The purpose of the interior drain was to remove water from the roof, take it inside the building and then remove it. (N.T., 9/22/08, at 10; D-4b; P4-c; P-4d & P-4e).

12. Exhibits P-4a and P-4b, as well as D-3, fairly and accurately depict the condition of the underside of the roof drain and the dislodged pipe after the Loss. (N.T., 9/22/08, at 11, 13, 14-15 & 47).

13. In the eighteen (18) hour period prior to the Loss, 0.19 inches of rain fell in the area where the Property was located. No rain fell in the seven (7) hours immediately before the Loss. It was not raining when the Loss occurred. (P-2; ¶ 11).

14. At the time of the Loss, September 28, 2004, there were strong winds in the area of the Property. (N.T., 9/22/08, at 31 & 42).

15. In the month or two before the Loss, a cover was attached to and located above the subject roof drain. (N.T., 9/22/08, at 30 & 37-38).

16. Ivan Krumins was on the roof of the Property no earlier than a day or two before the Loss and has no recollection of noticing any drains to which roof covers were not attached. (N.T., 9/22/08, at 56-58 & 63).

17. On September 29, 2004, the day after the Loss, it was discovered that the cap that had been attached to the roof and over the roof drain had come apart and was now missing. (N.T., 9/22/08, at 30 & 37-38).

18. The roof of the Property sustained damage when the cover that had been attached to the roof and located above the roof drain blew off in the strong winds at the time of the Loss.

19. Mr. Woidislawsky reconnected the PVC pipe to the roof drain by installing a stainless steel clamp around the top of the existing Fernco coupling. (N.T., 9/22/08, at 15). Mr. Woidislawsky also added a pipe hanger to a lower lateral pipe to provide additional security. (N.T., 9/22/08, at 16-18).

20. The area under the dislodged PVC pipe in Fletcher-Harlee's print room at the Property was not cleaned up or the debris removed from it for several days after the Loss. (N.T., 9/22/08, at 49-51).

21. No remnants of a pipe hanger were found connected to either the PVC pipe or the flange, or found on the floor or in the debris at the Property. (N.T., 9/22/08, at 16-18).

22. No pipe hanger had been attached to the lower lateral pipe at any time remotely connected with the Loss.

23. Shortly before advising Green Street in writing as to its coverage decision, Erie's claim professionals spoke to Abraham Woidislawsky, the General Partner of Green Street, and advised that Erie was denying Green Street's claim for building damage relating to the Loss. The claim supervisor, Jacqueline Tirpak, advised Mr. Woidislawsky that Erie would send Green Street a letter outlining the reasons for and the policy exclusions supporting Erie's coverage decision. (N.T., 9/23/08, at 35-36; 36-38).

24. Erie sent the letter described by Ms. Tirpak on or about December 6, 2004. In correspondence dated December 6, 2004, Erie informed Green Street that it was denying its claim for damages relating to the Loss and stated why. In its declination letter, Erie claimed that the Loss was caused "by a drain fastener rusting away" and quoted two exclusions contained within the Policy:

SECTION III – EXCLUSIONS

B. Coverages 1, 2 and 3

> We do not cover under Building(s) (Coverage 1) "loss" caused:
>
> 1. By
>
> a. Wear and tear, rust or corrosion, mold or rotting;
>
> . . .
>
> *unless a covered "loss" ensues, and then only for ensuing "loss".* [9]
>
> . . .
>
> 5. To the interior of the building or the contents by rain, snow, sand or dust, whether driven by wind or not, unless the exterior of the building first sustains damage to its roof or walls by a covered "loss". We will pay for "loss" caused by or resulting from the thawing of snow, sleet or ice on the building.

(P-2; ¶ 13).

25. On or about June 1, 2006, Green Street sold the Property. (P-2, ¶ 15).

26. Following the filing of this action, and after the parties conducted discovery, they entered into a Stipulation, dismissing certain claims and agreeing that the claim is covered under the Policy, unless Erie is able to meet its burden in proving that it is "excluded under the policy, as informed by the facts and circumstances of the loss and events thereafter, Pennsylvania law or any other law the Court deems to be persuasive[.]" (P-2, ¶ 19; P-1, ¶¶ 3-5).

27. The Court does not find the testimony of Rodney J. Blouch, P.E., a civil engineer offered by Erie as an expert witness, persuasive or helpful in reaching its verdict in this matter.

28. The water that damaged the Property was not "surface water."

29. Erie has not proven that the Loss is excluded from coverage under the Policy.

[9] Erie did not include the italicized language in its declination letter.

CONCLUSIONS OF LAW

1. Interpretation of an insurance contract is a question of law for a court. Gamble Farm, Inc. v. Selective Ins. Co., 656 A.2d 142, 143 (Pa. Super. 1995).

2. The goal in interpreting an insurance policy is to ascertain the intent of the parties. 401 Fourth St., Inc. v. Investors Ins. Gp., 583 Pa.445, 879 A.2d 166, 171 (2005) (citation omitted). Words and phrases of common usage should be given their ordinary and customary meanings. Madison Constr. Co. v. Harleysville Mut. Ins. Co., 557 Pa. 595, 735 A.2d 100, 108 (1999).

3. Clauses in an insurance policy providing coverage are interpreted broadly, "so as to afford the greatest possible protection to the insured." Eichelberger v. Warner, 434 A.2d 747, 750 (Pa. Super. 1981). Conversely, "[p]olicy exclusions are strictly construed against the insurer." Continental Casualty Co. v. County of Chester, 244 F. Supp.2d 403, 408 (E.D. Pa. 2003) (citations omitted) (interpreting Pennsylvania law); Miller v. Boston Ins. Co., 420 Pa. 566, 218 A.2d 275, 280 (1966); Eichelberger, 434 A.2d at 750 (citations omitted). These rules are necessary because insurance policies generally, as is the case with Erie's Policy, are contracts of adhesion. Eichelberger, 434 A.2d at 750 (citation omitted).

4. Where, as here, an insurer relies upon a policy exclusion to deny coverage, the insurer has the burden of proving that the exclusion applies. Miller, 218 A.2d at 277 (citations omitted). "The insurer can sustain its burden only by establishing [an] exclusion's applicability by uncontroverted facts in the record." Continental Casualty Co., 244 F. Supp.2d at 407 (citing Mistick, Inc. v. Northwestern Nat. Casualty Co., 806 A.2d 39, 42 (Pa. Super. 2002); Butterfield v. Giuntoli, 670 A.2d 646, 651-52 (Pa. Super. 1995), alloc. denied, 546 Pa. 635, 683 A.2d 875 (1996)).

5. A court should not interpret policy language in a vacuum; rather, the insurance contract should be interpreted with a view toward the entire policy, "so as to avoid rendering portions of it contradictory and inoperative by giving effect to some clauses and nullifying others." 2 Lee R. Russ and Thomas F. Segalia, Couch on Insurance 3d, § 22.30, at 22-65 & § 22:43, at 22-92 & 22-93 (1995) (citations omitted); 401 Fourth St., Inc., 879 A.2d at 171.

6. When policy language is clear and unambiguous, the language should be given effect. Madison Constr. Co., 735 A.2d at 108 (citation omitted). However, "[a] contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense." 401 Fourth St., Inc., 879 A.2d at 171 (citations omitted). Stated another way, terms of an insurance policy are ambiguous if they "are subject to `more than one interpretation when applied to a particular set of facts." Gamble Farm, 656 A.2d at 143 (quoting DiFabio, 531 A.2d at 1143).

7. When ambiguous language is found, it must be interpreted against the insurance company. Motor Coils, 454 A.2d at 1049 (citation omitted); 401 Fourth Street, Inc., 879 A.2d at 174.

8. Erie's Policy is an all-risk policy. "[U]nder an all-risk property policy, the insuring agreement gives a broad grant of coverage and then specifically enumerates in the policy the types of losses that are excluded from coverage." 1 Jeffrey W. Stempel, Stempel on Insurance Contracts, § 15.01[B], at 15-5 (3d ed.) (Supp. 2007). "[A]ll losses are covered except for those specifically excluded." Spece v. Erie Ins. Gp., 850 A.2d 679, 683 (Pa. Super. 2004) (characterizing all-risk policy). Put another way, "[a]ll risk coverage covers all losses which are fortuitous no matter what caused the loss, including the insured's own negligence, unless the insurer expressly advises otherwise." 1 Stempel, supra, at§ 15.01[B], at 15-5 n.3 (citation omitted); see also Miller, 218 A.2d at 278 (holding that all-risk policy must be "given a broad and comprehensive meaning as to covering any loss other than a willful or fraudulent act of the insured."); Betz v. Erie Ins. Exch., ___

A.2d at ___, 2008 WL 4291513 *6 (Pa. Super. Sept. 22, 2008) (same).

9. "Consistent with these general rules, under an all-risk policy, the unknown risk of loss is borne by the insurer." 1 Peter J. Kalis, Thomas M. Reiter and James R. Segerdahl, Policyholder's Guide to the Law of Insurance Coverage, § 13.09[A], at 13-66 (Supp. 2008); see also Miller, 218 A.2d at 278 (if otherwise "the inclusive character of the coverage afforded [by an all-risk policy] would be a mere delusion.").

10. In this respect, the Loss is covered unless Erie is able to meet its burden in proving that it is "excluded under the policy, as informed by the facts and circumstances of the loss and events thereafter, Pennsylvania law or any other law the Court deems to be persuasive[.]" (P-2, ¶ 19; P-1, ¶¶ 3-5).

RAIN

11. "Rain" is not defined in the Policy. "Rain," the term used by Erie in its Policy exclusion, is best defined as water falling from the sky. Berman, 216 F.2d at 628; see also Thorell v. Union Ins. Co., 492 N.W.2d 879, 883 (Neb. 1998) (citing State Farm Fire and Casualty Co. v. Paulson, 756 P.2d 764 (Wyo. 1988)). Therefore, the most reasonable interpretation of the "rain" exclusion is that it applies only to those circumstances where it is actually raining.

12. The "rain" exclusion does not bar coverage for the Loss, because it was not raining when the Loss occurred.

13. In the alternative, the "rain" exclusion does not bar coverage, because, as noted above, the roof sustained damage at the time of the Loss.

SURFACE WATER

14. "Surface water" is not defined in the Policy. However, "surface waters are commonly understood to be waters on the surface of the ground, usually created by rain or snow, which are of a casual or vagrant character, following no definite course and having no substantial or permanent existence." Richman v. Home Ins. Co. of N.Y., 94 A.2d 164, 166 (Pa. Super. 1953) (citations omitted) (emphasis added). Commonwealth Court has defined "surface water" in similar fashion. See Tom Clark Chevrolet, Inc. v Pennsylvania Dep't of Protection, 816 A.2d 1246, 1251 n.15 (Pa. Commw.), alloc. denied, 574 Pa. 763, 831 A.2d 601 (2003) ("[T]he term 'surface water' means water from rain, melting snow, springs, or seepage, or detached from subsiding floods, that lies or flows on the surface of the earth but does not form a part of a watercourse or lake.") (quoting, e.g., Restatement (Second) of Torts § 846 (1977)) (emphasis added).

15. Where surface water is intentionally diverted, it is no longer considered surface water. 11 Couch on Insurance 3d, § 153.57, at 153-80; Heller v. Fire Ins. Exch., 800 P.2d 1006, 1008-09 (Col. 1990); Georgetowne Sq. v. United States Fid. and Guar. Co., 523 N.W.2d 380 (Neb. Ct. App. 1994); Transamerica Ins. Co. v. Raffkind, 521 S.W.2d 935 (Tex. Civ. App. 1975)).

16. Surface water, by definition, stops being surface water when it flows into a drain. Industrial Enclosure Corp. v. Northern Ins. Co. of N.Y., No. 97 C 6850, 2000 WL 1029192, *6 (N.D. Ill. July 26, 2000).

17. The water that damaged the Property and caused the Loss was never surface water. Moreover, even if it could be considered to have been surface water while on the roof, it was intentionally diverted from the roof by use of the subject interior roof drain. (P-2, ¶ 7; N.T., 9/22/08, at 10; P-4c & D-4b). When the water flowed into the drain, it lost its character as surface water, as it

took a different course than that it would have taken if left to its natural state. Specifically, on the day of the Loss, the water on the roof was not left to evaporate, but was diverted into a drain. Once in the drain, the water, which ultimately cascaded into and onto the interior of the Property, was no longer surface water. Therefore, even if the offending water could be considered surface water when on the roof, it lost its character as surface water when it was actively and intentionally diverted through the use of a roof drain.

RUST OR CORROSION

18. Erie did not prove to the Court's satisfaction that rust or corrosion caused the PVC pipe to separate from the interior roof drain, thereby allowing water to pour into the Property.

19. However, even if such rust or corrosion was the sole cause of the separation, the exclusion is inapplicable because a covered loss ensued. The Policy does not cover loss caused by "rust or corrosion" "*unless a covered "loss" ensues, and then only for ensuing "loss"*. (P-3, supra, at § 3 – Exclusions, at p. 4) (emphasis added). The import of this "ensuing loss" provision is that rust and corrosion will not bar a claim if a loss ensues from the rust or corrosion, so long as the ensuing loss is not, itself, excluded in the Policy. See Raybestos-Manhattan, Inc. v. Industrial Risk Insurers, 433 A.2d 906, 908-09 (Pa. Super. 1981) (where ensuing loss provision allowed for coverage, court held that ensuing loss provision "severely restricts the exclusion and broadens the coverage provided").

20. Green Street does not seek to recover the value of the allegedly rusted hanger, or clamp. It seeks to recover for the Loss that ensued. According to Erie, the rusted and corroded hanger caused the PVP pipe to spontaneously separate from the roof drain, causing water to pour into the Property. (P-2, ¶ 7). Erie correctly argues, and Green Street agrees, that an ensuing loss

provision "cannot reinsert an excluded peril into the policy." However, Erie is incorrect in contending that this ensuing loss is excluded, as it does not fall within the Policy exclusions for "rain" or "surface water." For this reason, the exclusion for "rust or corrosion" does not exclude from coverage the claim brought by Green Street in respect to the Loss. See also Eckstein v. Cincinnati Ins. Co., No. 05:05CV043, 2007 WL 2894049, **2-3 (W.D. Ky. Sept. 27, 2007) (ensuring loss was covered that resulted from excluded peril, interpreting any ambiguity against insurer); Blaine Constr. Corp. v. Insurance Co. of N. Am., 171 F.3d 343, 349-50 & 353(6th Cir. 1999) (ensuing loss that flowed naturally from excluded peril was not barred from coverage); Lake Charles Harbor & Terminal Dist. v. Imperial Casualty & Indem. Co., 857 F.2d 286, 287-89 (5th Cir. 1988) (exclusion inapplicable where covered loss ensued).

DETERIORATION

21. The only "deterioration" alleged by Erie to have occurred is rust and corrosion. For all the reasons discussed above, Erie has failed to prove that such rust or corrosion occurred, or that it caused any loss.

22. "Deterioration" is commonly referred to as involving "the action of normally expected elements of stress, friction and the daily traumas of [] life to the object during its normal life expectancy." Cyclops Corp. v. Home Ins. Co., 352 F. Supp. 931, 936 (W.D. Pa. Jan. 10, 1973). Under the facts proffered by Erie, any rust or corrosion resulted not from what was expected but from the unexpected and unintended contact of water upon the allegedly, previously-existing pipe hanger. See Cavalier Gp. v. Strescon Indus., Inc., 782 F. Supp. 946, 955-56 (D. De. 1992) (limiting "deterioration" to "normal and inevitable occurrences"); Travelers Indem. Co. v. Jarrett, 369 S.W.2d 653, 654-55 (Tex. Civ. App. 1963) ("deterioration" exclusion applied only to inherent deterioration,

not that caused by an external event).

23. Erie's placement of the exclusion for "deterioration" with that for "depreciation," an expected and natural event, only strengthens this suggested interpretation. See 401 Fourth St., Inc., 879 A.2d at 172 (should look to entirety of language in policy interpretation); 2 Couch on Insurance 3d, § 22:30, at 22-65 ("Where an entire limitation of liability is contained in one sentence, it must be construed as a whole, not by separating one word or phrase from another.").

24. Furthermore, Erie added a specific exclusion for "rust or corrosion" after that for "deterioration" in the Policy. (P-3; compare § III Exclusions, at A.1. for "deterioration" on pg. 3 with that at B.1. for "rust or corrosion" on p. 4). By including an exclusion for "rust or corrosion" after one for "deterioration," it is reasonable to conclude that Erie understood that damages caused by the specific perils of rust or corrosion were not already within the general exclusion for deterioration. See 401 Fourth St., Inc., 879 A.2d at 172 (in ascertaining language's meaning, should look to entirety of language, not just particular word at issue); 2 Couch on Insurance 3d, § 22:44 (specific clauses should prevail over general clauses). At the very least, a fair review of the Policy in its totality supports such an interpretation. Construing any ambiguity against Erie, the drafter of the Policy, the exclusion for "deterioration" cannot be interpreted to include damage caused by "rust or corrosion."

25. In addition, by operation of the rust and corrosion "ensuing loss" provision, the Policy affords coverage for losses that ensue from rust and corrosion, so long as the ensuing loss is not excluded. As already held, the ensuing loss - the cascading of water into the Property from above - is not excluded by operation of the exclusions for "rain" and "surface water," as Erie alleges. Therefore, by operation of Section III – Exclusions, B.1, the Policy provides coverage for a loss of the kind experienced by Green Street that ensues from rust and corrosion.

26. A policy exclusion cannot negate coverage found elsewhere in a policy, unless it does so specifically and expressly. 401 Fourth St., Inc., 879 A.2d at 174 (disapproving interpretation of policy language that would render illusory coverage provided elsewhere in policy); 2 Couch on Insurance 3d, § 22:31, at 22-66 & 22-67.

27. When Erie wrote the Policy, it made a decision that if rust or corrosion led to a subsequent or ensuing loss, the subsequent or ensuing loss would be covered, so long as it was not otherwise excluded. For all the reasons discussed, the subsequent loss – the entry of water from above onto and into the interior of the Property – is not an excluded peril. Thus, water damage of the kind experienced by Green Street is covered when it ensues from rust or corrosion. This coverage would be rendered illusory if the deterioration clause is interpreted to swallow the specific coverage afforded by the ensuing loss provision when water – not deterioration – is the ensuing loss. See 401 Fourth St., Inc., 879 A.2d at 174 (recognizing that, in Pennsylvania, application of exclusion cannot make coverage provided elsewhere in policy illusory); 2 Couch on Insurance 3d, § 22:31, at 22-66 & 22-67.

28. Consequently, the deterioration exclusion cannot be interpreted as disallowing the coverage for water loss that follows loss caused by rust or corrosion. Id. § 22:43, at 22-93 ("A construction of an insurance policy which entirely neutralizes one provision should not be adopted if the contract is susceptible of another construction which gives effect to all of its provisions and is consistent with the general intent.").

29. Therefore, the Loss is not excluded by operation of the Policy's exclusion for "deterioration."

CONCLUSION AND JUDGMENT

30. Under an all-risk policy, all fortuitous losses are covered, even those resulting from the insured's negligence, unless the insurer proves that a loss is specifically excluded in the Policy. Miller, 218 A.2d at 278; Betz, ___ A.2d at ___, 2008 WL 4291513 at *6; Spece, 850 A.2d at 683.

31. In an all-risk policy, the unknown risk of loss is borne by the insurance company under Pennsylvania law. Miller, 218 A.2d at 278 (if otherwise "the inclusive character of the coverage afforded [by an all-risk policy] would be a mere delusion").

32. Having not proven that the Loss is specifically excluded, Erie has failed to meet its burden of proof.

33. Judgment will be entered in favor of Green Street and against Erie.

Respectfully submitted,

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Dated: October 20, 2008

CERTIFICATE OF SERVICE

I, Charles K. Graber, hereby certify that on this date a copy of the Trial Memorandum, Proposed Findings of Fact and Conclusions of Law of Plaintiff/Counterclaim Defendant, 1804-14 Green Street Associates, L.P., was served on the following counsel via U.S. First Class Mail, postage prepaid:

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