[Cite as *Suder-Benore Co., Ltd. v. Motorists Mut. Ins. Co.*, 2013-Ohio-3959.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Suder-Benore Co., Ltd.	Court of Appeals No. L-12-1351
Appellee	Trial Court No. CI0201106043
v.	
Motorists Mutual Insurance Co.	**DECISION AND JUDGMENT**
Appellant	Decided: September 13, 2013

* * * * *

Stuart J. Goldberg and Jeffrey M. Stopar, for appellee.

Robert H. Eddy, Adam P. Sadowski and Colleen A. Mountcastle, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Defendant-appellant, Motorists Mutual Insurance Company, timely appeals the November 20, 2012 judgment of the Lucas County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Suder-Benore Co., Ltd. Motorists Mutual assigns the following errors for our review:

I. The Trial Court Erred in Granting Suder Benore's [sic] Motion for Summary Judgment and Denying Motorists's Cross Motion for Summary Judgment by Determining That the "Renovation" Exception Is Ambiguous. Motorists Does Not Owe Suder Benore [sic] Insurance Coverage for Theft and Vandalism Because There Is No Coverage for a Vacant Building.

II. The Trial Court Erred in Granting Suder Benore's [sic] Motion for Summary Judgment and Denying Motorists's Cross Motion for Summary Judgment Because Turning on the Fire Sprinkler System to Keep the Dollar Store Open Is Not a Renovation of the Vacant Food Town Store So as to Preclude Application of Motorists's Vacancy Exclusion.

III. The Trial Court Erred in Finding That Motorists's Enforcement of an Ordinance Exclusion Is Inapplicable and in Awarding Damages to Suder Benore [sic] for Actions Done at the Fire Department's Directive That Are Not Covered by the Policy.

IV. The Trial Court Erred in Awarding Damages Because Suder Benore [sic] Failed to Properly Submit Proof of Damages and Questions of Fact Exist.

{¶ 2} For the reasons that follow, we find appellant's first, second, and fourth assignments of error well-taken, and its third assignment of error not well-taken. We

reverse the judgment of the trial court and grant summary judgment in favor of Motorists Mutual.

A. Factual Background

{¶ 3} Appellee, Suder-Benore, is the owner of a shopping center called Suder Square in Toledo, Ohio. Located in Suder Square is a Family Dollar Store which is in the same building as what once was a Food Town store. The building is approximately 48,000 square feet; Family Dollar occupies approximately 7,800 square feet of that space and Food Town occupied approximately 42,000 square feet.

{¶ 4} Food Town vacated Suder Square sometime between 2009 and 2010, leaving the building unoccupied. Due to the expense to heat and provide water to maintain the fire sprinkler system, the system was disabled when Food Town left. In January of 2011, Toledo's fire inspector conducted a regular inspection of the building and advised Suder-Benore that it must maintain a functioning sprinkler system or Family Dollar would have to close. Suder-Benore had believed that because Family Dollar occupied less than 12,000 square feet, a sprinkler system was not required. There was only one sprinkler system for the entire building, thus it was not possible to turn on the sprinklers in only the Family Dollar store.

{¶ 5} Suder-Benore hired Marine Fire Sales & Services and on January 13, 2011, Marine Fire Sales began the process of turning on the sprinkler system. On that date, it met with the fire department and checked the sprinkler. On January 14, 2011, it air tested the system and re-filled it with water. As part of that process, it replaced six one-inch

plugs, one 1" x ½" concentric reducer, one 6" x 1" nipple, and one ¾" plug in order to fix holes or leaks in the system. These parts totaled $20.40. Marine Fire Sales returned on January 17, 2011, after receiving a call from Family Dollar indicating that there was a leak. It determined that the leak originated in the roof.

{¶ 6} In activating the sprinkler system, Suder-Benore leased six propane-fueled heaters and bought approximately 1,600 gallons of fuel from Reliance Propane and Fuel Oil. These were needed to heat the area to 45 degrees to keep the water lines from freezing during the cold winter months.

{¶ 7} Also necessary to the functioning of the sprinkler system was a security system. The security system would send an alert if the sprinklers were triggered. A Habitec security system already existed on the property, but like the sprinkler system, it had been deactivated. With the sprinkler system functioning again, it was necessary to reactivate the security system and, as required by fire code, to install smoke alarms in the ducts. On February 3, 2011, a Habitec employee went to the Food Town building but discovered that the electricity was not on. He called Suder-Benore's property manager and informed him that electricity was required for the system. He left without performing any work. He returned on February 8, 2011, but discovered that a break-in had occurred. Again, on this date, Habitec performed no work.

{¶ 8} The February 8, 2011 break-in occurred in the unoccupied portion of the building. Thieves stole copper piping from the building and vandalized security system hardware and a radio unit. Suder-Benore filed a police report and made a claim with its

insurer, Motorists Mutual. Motorists Mutual denied the claim because its policy contained a vacancy exclusion under which it was not obligated to provide coverage for vandalism or theft if more than 31 percent of the building was vacant in the 60-day period preceding the loss.

{¶ 9} Suder-Benore filed this declaratory judgment action on October 17, 2011, asserting, among other things, that the vacancy exclusion was inapplicable because under the terms of the policy, "buildings under construction or renovation are not considered vacant." Suder-Benore argued that repairing and reactivating the sprinkler system constituted "renovations," therefore entitling it to coverage under the policy.

{¶ 10} Suder-Benore filed a motion for summary judgment and Motorists Mutual filed a cross-motion. In an opinion and judgment entry dated November 20, 2012, the trial court found in favor of Suder-Benore, holding that the building was under renovation within the 60 days preceding the theft of copper and that no other exclusion applied. The court awarded damages of $123,316—$2,400 for the vandalized security system hardware and a radio unit, plus $120,916 for the replacement of the copper pipe that was stolen. Motorists Mutual appeals that judgment.

B. Standard of Review

{¶ 11} Appellate review of a summary judgment is de novo, *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996), employing the same standard as trial courts. *Lorain Natl. Bank v. Saratoga Apts.*, 61 Ohio App.3d 127, 129,

572 N.E.2d 198 (9th Dist.1989). The motion may be granted only when it is demonstrated:

> (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 67, 375 N.E.2d 46 (1978), Civ.R. 56(C).

{¶ 12} When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought, *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus, and identify those portions of the record that demonstrate the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996). When a properly supported motion for summary judgment is made, an adverse party may not rest on mere allegations or denials in the pleadings, but must respond with specific facts showing that there is a genuine issue of material fact. Civ.R. 56(E); *Riley v. Montgomery*, 11 Ohio St.3d 75, 79, 463 N.E.2d 1246 (1984). A "material" fact is one which would affect the outcome of the suit under the applicable substantive law. *Russell v. Interim Personnel, Inc.*, 135 Ohio App.3d 301, 304, 733 N.E.2d 1186 (6th Dist.1999); *Needham v. Provident Bank*, 110 Ohio App.3d 817, 826,

675 N.E.2d 514 (8th Dist.1996), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 201 (1986).

C. Analysis

{¶ 13} In evaluating Motorists Mutual's four assignments of error, we must review three provisions in the insurance policy: the "vacancy exclusion," the "ordinance or law exclusion," and the "replacement cost" provisions.

{¶ 14} Insurance contracts are construed using the same rules as other written contracts. *Universal Underwriters Ins. Co. v. Shuff*, 67 Ohio St.2d 172, 173, 423 N.E.2d 417 (1981). Where the policy's language is clear and unambiguous, the court may not "resort to construction of that language." *Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd.*, 64 Ohio St.3d 657, 665, 597 N.E.2d 1096 (1992), citing *Karabin v. State Auto. Mut. Ins. Co.*, 10 Ohio St.3d 163, 167, 462 N.E.2d 403 (1984). The words and phrases used in the policy must be given their natural and commonly accepted meaning. *Id*. at 665. Ambiguous provisions—particularly provisions purporting to exclude or limit coverage— must be construed strictly against the insurer and liberally in favor of the insured. *Westfield Ins. Co. v. Hunter*, 128 Ohio St. 3d 540, 2011-Ohio-1818, 948 N.E.2d 931, ¶ 11 (2011). "However, the rule of strict construction does not permit a court to change the obvious intent of a provision just to impose coverage." *Hybud Equip*. at 665. Moreover, "the mere absence of a definition in an insurance contract does not make the meaning of the term ambiguous." *Belich v. Westfield Ins. Co.*, 11th Dist. Lake No.

99-L-163, 2001 WL 20751, *2 (Dec. 29, 2000). Where a contract is clear and unambiguous, its interpretation is a matter of law. *Id.*

{¶ 15} Applying these general principles, we address each of Motorists Mutual's assignments of error. Because they are interrelated, we address the first and second assignments of error together.

> I. The Trial Court Erred in Granting Suder Benore's [sic] Motion for Summary Judgment and Denying Motorists's Cross Motion for Summary Judgment by Determining That the "Renovation" Exception Is Ambiguous. Motorists Does Not Owe Suder Benore [sic] Insurance Coverage for Theft and Vandalism Because There Is No Coverage for a Vacant Building.
>
> II. The Trial Court Erred in Granting Suder Benore's [sic] Motion for Summary Judgment and Denying Motorists's Cross Motion for Summary Judgment Because Turning on the Fire Sprinkler System to Keep the Dollar Store Open Is Not a Renovation of the Vacant Food Town Store So as to Preclude Application of Motorists's Vacancy Exclusion.

{¶ 16} Motorists Mutual's first and second assignments of error turn on what constitutes "renovation" for purposes of the vacancy exclusion in the policy. That term is not defined in the contract. Suder-Benore argues that the term is ambiguous, that the meaning should be strictly construed against the insurer, and that repairing and reactivating the sprinkler system was a "renovation." Motorists Mutual argues essentially

the opposite: that the term is not ambiguous, the plain meaning of the term should be applied, construction of the policy is unnecessary, and no reasonable mind could conclude that the work that was done to the property was a "renovation."

{¶ 17} The provision of the policy at issue is as follows:

> 6. Vacancy
>
> a. Description of Terms
>
> (1) As used in this Vacancy Condition, the term building and the term vacant have the meanings set forth in (1)(a) and (1)(b) below:
>
> (a) When the policy is issued to a tenant, and with respect to that tenant's interest in Covered Property, building means the unit or suite rented or leased to the tenant. Such building is vacant when it does not contain enough business personal property to conduct customary operations.
>
> (b) When this policy is issued to the owner or general lessee of a building, building means the entire building. Such building is vacant unless at least 31% of its total square footage is:
>
> (i) Rented to a lessee or sub-lessee and used by the lessee or sub-lessee to conduct its customary operations; and/or
>
> (ii) Used by the building owner to conduct customary operations.
>
> (2) Buildings under construction or renovation are not considered vacant.

b. Vacancy Provisions

If the building where loss or damage occurs has been vacant for more than 60 consecutive days before that loss or damage occurs:

(1) We will not pay for any loss or damage caused by any of the following even if they are Covered Causes of Loss:

(a) Vandalism

(b) Sprinkler leakage, unless you have protected the system against freezing;

(c) Building glass breakage;

(d) Water damage;

(e) Theft; or

(f) Attempted theft.

{¶ 18} We are aware of three decisions directly examining the meaning of "renovation" for purposes of a vacancy exclusion like the one at issue in this appeal.

{¶ 19} In *Belich v. Westfield Ins. Co.*, 11th Dist. Lake No. 99-L-163, 2001 WL 20751, plaintiff's unoccupied building was damaged after the hot water in a shower was left on. The hot water produced steam which caused ceiling tiles to fall into the drain, resulting in blockage of the drain and flooding of the entire building. Plaintiff filed an insurance claim, and the insurer sought to avoid coverage by asserting the vacancy exclusion in the policy. Like the policy in the present case, the contract specified that a building under construction or renovation was not "vacant." The plaintiff argued that the

building was not vacant because he had begun the process of renovating it from a party center to a sports bar by hiring an architect, cleaning, hiring his son to manage the property, obtaining necessary government approvals, and removing a stage and coat racks.

{¶ 20} The insurance policy did not define "renovation"; the court, therefore, turned to the dictionary definition: "to restore to a former state: make over: renew." The court concluded that planning to renovate did not suffice to meet that definition. It also concluded that the work planned would be considered "remodeling" and not "renovating." The court did, however, indicate that the removal of the stage and the coat rack would have constituted "renovation," but plaintiff failed to offer any evidence that the removal of those items took place in the 60 days preceding the loss. It granted summary judgment to the insurer.

{¶ 21} In *Farbman Group v. Travelers Ins. Co.*, E.D.Mich. No. 03-74975, 2006 WL 2805646 (Sept. 28, 2006), plaintiff's property, which General Motors had formerly leased, flooded, causing extensive water damage. During the lease period, GM had installed a walkway between the subject building and an adjacent property. The walkway, which was 100 feet by 12 to 20 feet, was constructed by removing a set of exterior doors and replacing them with interior-style doors connecting the building to the walkway. The walkway rested on its own concrete foundation, but to attach the walkway, a portion of the building's façade was chipped away. The structures were caulked at the point where the walkway touched the building.

{¶ 22} Within the 60 days preceding the loss, GM's contractors had begun the process of removing the walkway and restoring the building to its original condition as required by the lease. This involved removing the walkway and restoring the facade of the building, sidewalks, doors, and landscaping. In deciding whether the insurer could avoid coverage, the court had to determine whether this constituted "renovation" for purposes of the vacancy exclusion contained in the insurance policy.

{¶ 23} As in *Belich*, the term "renovation" was not defined. The court considered the definitions supplied by three different dictionaries. Among the definitions were "to restore to a former better state (as by cleaning, repairing, or rebuilding)"; "to restore to an earlier condition, as by repairing or remodeling"; "to renew materially; to repair; to restore by replacing lost or damaged parts; to create anew." Applying those definitions, the court held that the vacancy exclusion did not apply. It concluded that under any of the definitions supplied, the work being performed by GM's contractors constituted "renovations." The court rejected the notion that "substantial" work was required and "minor" work was insufficient. However, it recognized that "'renovation' lies somewhere in the middle of the spectrum that spans between 'repair' and 'remodeling.'" *Id.* at *8. It also acknowledged that "an activity could be so minimal in its degree or scope as to fail to constitute 'renovation.'" *Id.* at 9. As an example, it raised the possibility that an activity such as replacing a single light fixture may not qualify. Because of the extent of the GM renovation, however, it concluded that the case

presented "no occasion to decide whether the commonly understood meaning of 'renovation' might exclude 'de minimis' levels of activity." *Id.*

{¶ 24} Finally, recently in *Baker v. Nationwide Mut. Ins. Co.*, 9th Dist. Lorain No. 12CA010236, 2013-Ohio-1856, the court found that a genuine issue of material fact existed as to whether a property was "under renovation." *Baker* involved an unoccupied multi-unit rental property that the plaintiff was preparing to lease to tenants. In March 2007, a water pipe had burst causing damage to the building. Plaintiff repaired the water lines in the basement and the drywall on the first floor, but before finding new tenants, he began making repairs to other parts of the building. Between March 2007 and June 2010, he painted and he repaired or replaced front porch flooring, the roof on the back porch, ceiling tiles throughout the building, a broken toilet, a lock, rear porch steps, drywall, and carpet. He also intended to replace a hot water tank and perform additional repairs. Before he completed the project, thieves broke into the property sometime between June 8 and June 15, 2010, and stripped the building of its copper plumbing and fixtures.

{¶ 25} The appellate court noted that "renovation" was not defined in the insurance policy and recognized various dictionary definitions for the term: "to restore to life, vigor, or activity: revive, regenerate"; or "to restore to a former state (as of freshness, soundness, purity or newness of appearance): make over: renew <a house>[.]." *Id.* at ¶ 10. Reversing the trial court's conclusion that these were "intermittent repairs" that did not rise to the level of "construction or renovation," the

court found that reasonable minds could differ as to whether plaintiff's activities constituted "renovation" under the policy. *Id.* at ¶ 11.

{¶ 26} Applying these three cases to the facts at issue in this case, we conclude that reactivating the sprinkler system did not constitute "renovation." The sprinkler system was one unit that provided protection for both the occupied Family Dollar store and the unoccupied Food Town building. Suder-Benore turned the sprinklers on only because it was mandated by the fire inspector and for the sole purpose of assuring that Family Dollar could continue to operate. The reason for the work was not "to renew," "to repair," or "to restore" the Food Town building. The purpose was simply to provide a functional sprinkler system for the adjacent business.

{¶ 27} Suder-Benore did not want to have any of this work done. It had no plans for the property. It repeatedly contacted the fire department, asking it to reconsider its demand that the sprinkler system be turned on. It successfully appealed the ruling and turned off the system nine months after the break-in. Although Suder-Benore argues that reactivating the sprinkler system was not a matter of merely flipping a switch, the extent of the work was de minimis—changing out a few parts, testing the air, and turning on the water—and more comparable to changing out light fixtures, the example used by the *Farbman Group* court.

{¶ 28} In contrast, the work performed in *Baker, Belich.* and *Farbman Group* was extensive and the purpose of the work was consistent with the common understanding of what it means to perform "renovations." The *Baker* plaintiff was readying rental property

for future tenants by replacing flooring, drywall, roofing, and fixtures. The *Farbman Group* plaintiff removed significant alterations it made to leased property by pouring concrete, repairing the façade of the building, and repairing what the project manager described as a "soffit area that extend[ed] away from the building, almost like a little roof, like a covered walkway." And the *Belich* plaintiff removed a stage and a coat rack from an event center to convert it into a sports bar. Suder-Benore did not perform the work to the vacant Food Town building to prepare it to be leased or even to be useable. In fact, it had the doors to the building welded shut and obtained estimates for demolishing the building. It shut down the sprinkler system as soon as it obtained approval to do so. Merely reactivating a sprinkler system is simply not consistent with the commonly understood meaning of "renovation." *Farbman Group,* E.D.Mich. No. 03-74975, 2006 WL 2805646, at *5 ("Where, as here, 'a term is not defined in the policy, it is accorded its commonly understood meaning.'"). Just as the *Farbman Group* court found no genuine issue of material fact that the removal of the walkway was a "renovation," we find no genuine issue of material fact that reactivating a sprinkler system is not a "renovation."

{¶ 29} Because we agree with Motorists Mutual that "renovation" is not an ambiguous term and that no reasonable fact-finder could characterize the de minimis work performed as a "renovation," we find Motorists Mutual's first and second assignments of error well-taken. In light of our disposition of Motorists Mutual's first

and second assignments of error, consideration of the remaining assignments of error is unnecessary; however, we briefly address those assignments nonetheless.

III. The Trial Court Erred in Finding That Motorists's Enforcement of an Ordinance Exclusion Is Inapplicable and in Awarding Damages to Suder Benore [sic] for Actions Done at the Fire Department's Directive That Are Not Covered by the Policy.

{¶ 30} Motorists Mutual argues that coverage is excluded under the "ordinance or law" exclusion contained in the policy. That exclusion provides:

B. EXCLUSIONS

1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.

(a) Ordinance or Law

The enforcement of any ordinance or law:

(1) Regulating the construction, use or repair of any property; or

(2) The increased costs incurred to comply with an ordinance or law in the course of construction, repair, renovation, remodeling or demolition of property, or removal of its debris, following a physical loss to the property.

{¶ 31} The trial court held that this exclusion was inapplicable because the losses claimed by Suder-Benore for vandalism and theft were not caused by Suder-Benore's efforts to comply with the ordinance requiring that the building be equipped with a functioning fire sprinkler system. We agree. The damages sought by Suder-Benore were for stolen copper piping and vandalized security equipment. At least with respect to the stolen copper, those damages resulted solely from the February 8, 2011 break-in and were not among Suder-Benore's expenses to repair and reactivate the sprinkler system at the insistence of the Toledo fire inspector. The ordinance or law exclusion does not apply. Motorists Mutual's third assignment of error is not well-taken.

IV. The Trial Court Erred in Awarding Damages Because Suder Benore [sic] Failed to Properly Submit Proof of Damages and Questions of Fact Exist.

{¶ 32} The trial court awarded damages to Suder-Benore of $123,316—$2,400 for the vandalized security system hardware and a radio unit, plus $120,916 for the replacement of the stolen copper pipe. In support of its damages claim, Suder-Benore submitted affidavits of Bruce Liebenthal (Suder-Benore's property manager) dated February 13, 2012 and July 9, 2012; the affidavit of Terry Martin dated July 25, 2012; letter from Paul Avery dated February 22, 2011; and invoices from Habitec Security, Inc.

{¶ 33} Motorists Mutual argues that the trial court's award of damages was improper because (1) Suder-Benore has not, and does not intend to, replace the stolen copper; (2) Suder-Benore failed to properly support its damages claims because it

presented affidavits from affiants who lacked personal knowledge and relied on inadmissible hearsay; (3) a factual issue was created based on discrepancies between two estimates presented by Suder-Benore; (4) there was no foundation for Avery's opinions as to damages; and (5) Martin's affidavit contained unsubstantiated conclusory statements of the cost to replace the copper.

{¶ 34} In an unsworn letter dated February 22, 2011, Paul Avery, of Paul T. Avery Co., Inc., estimated the cost to replace the stolen copper. That letter was first attached as an exhibit to Liebenthal's February 13, 2012 affidavit and submitted in support of Suder-Benore's motion for summary judgment. Avery's estimate was $119,419. He estimated the cost of the copper at $37,344 plus sales tax. The remainder of that figure was for labor, general contractor overhead and profit, and other installation costs. In an affidavit dated July 25, 2012, submitted as an exhibit to Suder-Benore's July 31, 2012 reply brief, Terry Martin, a licensed plumber, indicated that he had provided the estimates that were contained in Avery's February 22, 2011 letter. He stated that the costs of copper and labor had increased and estimated that as of July 25, 2012, the cost to replace the copper would be $120,916. Of that amount, $48,577 plus sales tax was attributable to the cost of the copper. The remainder was for installation, labor, and materials.

{¶ 35} Liebenthal also attached to his affidavit invoices from Habitec reflecting the cost of replacing the damaged security equipment at $2,400. Handwriting on the invoice indicates that payment was made via check on May 5, 2011.

{¶ 36} The Motorists Mutual policy provides as follows:

> d. We will not pay on a replacement cost basis for any loss or damage:
>
> (1) Until the lost or damaged property is actually repaired or replaced; and
>
> (2) Unless the repairs or replacement are made as soon as reasonably possible after the loss or damage.

{¶ 37} Without any discussion, the trial court awarded the full amount of damages requested by Suder-Benore. However, as raised by Motorists Mutual, there is no evidence that Suder-Benore has replaced, or intends to replace, the stolen copper. Given the plain language of the replacement cost provision in the policy, the trial court's damages award was in error, especially given that most of the damages claimed was for the labor and materials necessary to install the copper.

{¶ 38} As far as Motorists Mutual's other challenges, we first address the alleged deficiencies in Liebenthal's affidavit. Under Civ.R. 56(E) supporting and opposing affidavits must be made on personal knowledge, must set forth facts that would be admissible into evidence, and must affirmatively show "that the affiant is competent to testify to the matters stated in the affidavit." "Personal knowledge" is defined as: "'[k]nowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay.'" *IPI, Inc. v. Monghan*, 6th Dist. Lucas No. L-07-1101, 2008-Ohio-975, ¶ 35. (Internal citations omitted.) "Absent evidence to

the contrary, an affiant's statement that his affidavit is based on personal knowledge will satisfy the requirement of Civ.R. 56(E)." *Id*., citing *Smith v. Board of Cuyahoga Cty. Commrs.*, 8th Dist. Cuyahoga No. 86482, 2006-Ohio-1073, ¶ 40.

{¶ 39} Motorists Mutual claims that Liebenthal lacked personal knowledge of the cost of the loss and relied on inadmissible hearsay, specifically Avery's unsworn letter. Given that the trial court awarded damages in the amount provided in Martin's affidavit, it appears that the trial court relied on Martin's affidavit—not Liebenthal's—in arriving at that award. There is, therefore, no merit to Motorists Mutual's argument in this regard.

{¶ 40} With respect to the invoices from Habitec, we agree with Motorists Mutual that there were deficiencies in establishing the amount of damages to the security system. Liebenthal testified at deposition that work to the security system was required in order to activate the sprinkler system. An affidavit from Habitec employee, Jeff Szymanski, indicates that Habitec twice went to the building to perform the necessary work, but performed no work before the February 8, 2011 break-in. Szymanski's affidavit describes that the alarm system was "reactivated" and "upgraded" after the February 2011 break-in. On the other hand, Habitec's April 19, 2011 invoices (which we agree contain hearsay statements) state that Habitec "added a leased radio" and "performed a commercial security system update" "due to damage at break-in." It is unclear what work was necessitated by the break-in and what was required in the normal course of reactivating the sprinkler system. It was, therefore, improper to award damages in the full amount of the Habitec invoices without first resolving that issue.

{¶ 41} Finally, Motorists Mutual challenges Martin's qualifications to provide opinions as to the cost of replacing the copper. It also claims that Martin's opinions were conclusory, and argues that a question of fact was created when Suder-Benore submitted differing damages estimates from Martin and Avery. First, we disagree that the two estimates created a question of fact because (1) Avery's unsworn letter was not proper Civ.R. 56 evidence, and (2) Martin adequately explained the reason for the discrepancy—the increase in the cost of copper in the 17-month gap between Avery's letter and Martin's affidavit. Turning to the alleged defects in Martin's affidavit, we disagree that Martin, a licensed master plumber with 18 years' experience, was not qualified to render opinions. We also disagree that his opinions were conclusory. Martin described that he went to the site, performed measurements, estimated the cost by using wholesale pricing, and approximated the labor charges based on his knowledge of current union rates. Nevertheless, because of our disposition of Motorists Mutual's first and second assignments of error and because Suder-Benore did not repair or replace the copper, the trial court's award of damages was in error.

{¶ 42} Motorists Mutual's fourth assignment of error is well-taken.

V. Conclusion

{¶ 43} The trial court erred in finding that Suder-Benore's unoccupied building was "under renovation" for purposes of avoiding the vacancy exclusion in the Motorists Mutual insurance policy. The trial court also erred in awarding damages to Suder-Benore. We, therefore, reverse the November 20, 2012 judgment of the Lucas County

Court of Common Pleas granting Suder-Benore's motion for summary judgment and denying Motorists Mutual's motion. Because there exists no genuine issue of material fact but that the vacancy exclusion bars coverage, summary judgment is hereby entered in favor of Motorists Mutual. The costs of this appeal are assessed to appellee pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

James D. Jensen, J.
CONCUR. _____
JUDGE

Arlene Singer, J.,
DISSENTS.

SINGER, P.J.

{¶ 44} I respectfully dissent.

{¶ 45} The vacancy provision at issue is an exclusionary provision and thus should be applied to deny coverage only when a circumstance is clearly intended to be excluded from coverage. *Moorman v. Prudential Ins. Co. of America*, 4 Ohio St.3d 20, 22, 445 N.E.2d 1122 (1983).

{¶ 46} The policy excludes coverage for certain losses if the building has been vacant more than 60 days. A building is deemed vacant if less than 31 percent of its total square footage is used to conduct customary operations. "Buildings under construction or renovation are not considered vacant." Appellee's building was less than 31 percent occupied and had been for more than 60 days, therefore, if the building was not under construction or renovation, coverage would be excluded.

{¶ 47} The question is whether the work on the building's sprinkler system constitutes "renovation." The term is not defined. Words and phrases used in insurance policies must be given their natural and commonly accepted meaning. *Hybud Equip., Corp. v. Sphere Drake Ins. Co*., 64 Ohio St.3d 657, 665, 597 N.E.2d 1096 (1992).

{¶ 48} The word "renovate" is defined as "1: to restore to a former better state (as by cleaning, repairing, or rebuilding) 2: to restore to life, vigor, or activity: revive." Merriam-Webster On-line Dictionary, http://www.merriam-webster.com/dictionary/renovate (accessed Aug. 14, 2013). The definition contains no minimum measure of the scope of a renovation project. Neither does the purpose of the project restrict coverage.

{¶ 49} In my view, the restoration of the sprinkler system to its former utility through repair is a renovation. Since the work benefits the whole building, it is a building renovation. I simply can see no other conclusion.

{¶ 50} Accordingly, I would find appellant's first three assignments of error not well-taken and affirm the trial court's grant of summary judgment on coverage. With

respect to damages, however, I concur with the majority. The matter should be remanded to determine whether appellee is entitled to replacement cost.