UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1743

September Term, 2015

FIRST APOSTOLIC FAITH INSTITUTIONAL CHURCH, INC.

v.

MAYOR AND CITY COUNCIL OF BALTIMORE CITY, ET AL.

Berger,
Shaw Geter,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: November 16, 2016

This is an appeal from the grant of summary judgment by the Circuit Court of Baltimore City to the Mayor and City Council and Hanover Insurance Company, appellees, in a contract and negligence action brought by First Apostolic Faith Institutional Church, Inc., appellant. In June 2011, a water main ruptured in close proximity to the church, causing flooding and, thus significant property damage to its lower level. First Apostolic notified both the City and Hanover, who insured the property. The City denied any liability and Hanover denied the church's claim for coverage. Subsequently, First Apostolic filed a breach of contract complaint against Hanover, as well as a negligence claim against the City for failing to properly maintain the water main. On appeal, it contends that the court's grant of summary judgment was legally incorrect. It presents the following questions for review which we have reordered:

1) Did the Court error in granting the Appellee Mayor and City Council of Baltimore's Motion for Summary Judgment?
2) Did the Court error in granting the Appellee Hanover Insurance Company's Motion for Summary Judgment?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

BACKGROUND

First Apostolic is a religious institution with its sanctuary located at 27 South Caroline Street in Baltimore, Maryland. On June 18, 2011, a 20-inch city water main, located on an adjoining property, approximately 300 feet from the sanctuary, broke, causing damage to the church's property.

At the time of the flooding, First Apostolic maintained a commercial line insurance policy with Hanover Insurance Company. The policy covered building and business personal property with an effective period from December 21, 2010 through December 21, 2011. Hanover was notified of the incident on the next business day and immediately thereafter, adjuster, Gary Barkman, of Riggs, Counselman, Michaels & Downes Inc. was assigned the claim. He inspected the entire property on several occasions. In a letter dated September 26, 2011, Hanover informed the church that no coverage was available for the loss to the property because of policy provision exclusions. Specifically, it stated:

> Based on the information currently available, we understand the loss took place on June 18, 2011 after a 20 inch city water main located on an adjoining property broke approximately 300 feet from the insured property. As a result of the break, discharged water entered the insured building through the foundation, both above and below grade. The discharged water caused extensive damage to all cosmetic finishes, along with personal property.

The pertinent exclusions specific to this claim are as follows:

> B. Exclusions
>
> 1. We will not pay for loss or damage caused directly or indirectly by any of the following. Such loss or damage is excluded regardless of any other cause or event that contributes concurrently or in any sequence to the loss.
>
> ***
>
> **g. Water**
>
> ***
>
> But if water as described in **g.(1)** through **g.(4)** above, results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.

Hanover further stated that because the broken water main was located on a separate property, it did not qualify as a specified cause of loss. Section G (2)(c) of the policy defined water damage as:

> …(the) accidental discharge or leakage of water or steam as the direct result of the breaking apart or cracking of a plumbing, heating, air conditioning or other system or appliance (other than a sump system including its related equipment and parts), that is located on the described premises and contains water or steam.

First Apostolic filed a Complaint in the Circuit Court for Baltimore City against Hanover and the City of Baltimore on June 17, 2014. Count I of the complaint alleged negligence by the City for failing to properly maintain the water main. They averred that the City allowed "the water mains to deteriorate and become weakened and rusty to such an extent that…the water main burst." Count II of the Complaint asserted that Hanover breached the insurance contract by denying the church's claim for coverage.[1] Thereafter, both the City and Hanover filed Motions for Summary Judgment.

In its motion, the City asserted that there was insufficient evidence to establish that it had actual or constructive notice that the water main would break. Following a hearing held by the court, during which both sides presented arguments, the City's motion was granted. The circuit court found that First Apostolic "failed to show with the requisite precision through detailed facts admissible in evidence that there exists a dispute regarding the material fact of notice (actual or constructive) having been provided to

[1] In its Answer, Hanover generally denied liability, asserted a cross claim against the City for contribution and indemnification, and filed a counterclaim for declaratory relief, requesting that the court declare that Hanover properly denied First's Apostolic's claim for coverage under the policy.

Defendant, Mayor and City Council…." As such, the court concluded that because the City had no notice (actual or constructive) of the alleged defective condition of the water main prior to the rupture or leak, it "owed no duty to [appellant]."

In its motion for summary judgment, Hanover claimed that the church's loss was not covered because the policy specifically excluded coverage for water damage. Although the policy contained a fire and explosion exception, Hanover argued that First Apostolic failed to establish through admissible evidence that a fire or explosion occurred and thus, there was no genuine dispute as to the occurrence of a fire or explosion that caused water damage. Following a hearing where both sides presented argument, the circuit court ruled that "First Apostolic Faith Institutional Church, Inc. has failed to show with the requisite precision through detailed, admissible evidence that a fire or explosion occurred, causing water damage at the property." The court further held that the contract provided no coverage for any loss or damage caused directly or indirectly by water regardless of any other cause or event that contributed concurrently or in any sequence to the loss. Hanover's motion for summary judgment was granted.

First Apostolic appealed timely to this Court.

We shall recite additional facts as necessary to our discussion of the issues.

STANDARD OF REVIEW

The question of whether a trial court's grant of summary judgment was proper is a question of law subject to *de novo* review. *Butler v. S & S P'ship*, 435 Md. 635, 665 (2013); *see Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 440 (2007) ("[T]his Court

reviews a trial court's grant of summary judgment *de novo* in order to determine whether the trial court was legally correct."). Under Md. Rule 2–501(f), summary judgment is proper where "there is no genuine dispute as to any material fact and…the party in whose favor judgment is entered is entitled to judgment as a matter of law."

We are first concerned with "whether a genuine dispute of material fact exists…" *Hines v. French*, 157 Md. App. 536, 549 (2004) (citing *Grimes v. Kennedy Krieger Inst., Inc.,* 366 Md. 29, 71 (2001))

> To establish a genuine issue of material fact, a party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. In other words, the mere existence of a scintilla of evidence in support of the plaintiff's claim is insufficient to preclude the grant of summary judgment; there must be evidence upon which the jury could reasonably find for the plaintiff.

Butler, 396 Md. at 665–66 (quoting *Beatty v. Trailmaster Products, Inc.,* 330 Md. 726, 738–39 (1993)) (internal quotation marks omitted). If the material facts were not disputed, or were assumed favorably to the non-moving party, we next inquire whether, on the applicable law, the moving party was entitled to judgment. *Beyer v. Morgan State Univ.*, 369 Md. 335 (2002). We must independently review the record in the light most favorable to the non-moving party and construe against the movant any reasonable inferences which may be drawn from the facts. *Aventis*, 396 Md. at 441 (citing *Jurgensen v. New Phoenix Atl. Condo. Council of Unit Owners,* 380 Md. 106, 114 (2004).

DISCUSSION

I. The Mayor and City Council's Motion for Summary Judgment

First Apostolic contends that the City was liable for damages as a result of the broken water main. It argues that the City failed to maintain properly its waterworks and thus, should be held accountable.

Generally, a municipal corporation has a duty to maintain its public works in good condition. *See Smith v. City of Baltimore*, 156 Md.App. 377, 383 (2004). This duty however, is not absolute and the municipality is not an insurer. *Id.* (internal citation omitted). If however, an entity is injured because the municipality failed to maintain its public works and the municipality had actual or constructive notice of the bad condition that caused the damage, the municipality may be held liable in negligence. *Id.* As such, the City may not be held liable for negligence, unless First Apostolic shows that the City had actual or constructive notice. *Annapolis v. Stallings*, 125 Md. 343 (1915); *see Keen v. City of Havre de Grace*, 93 Md. 34 (1901).

Actual notice is "knowledge on the part of the corporation, acquired either by personal observation or by communication from third persons, of [the] condition of things alleged to constitute the defect." MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS (3rd ed. 2016). Constructive notice, on the other hand, is notice that the law imputes based on the circumstances of the case. *Annapolis*, 125 Md. at 343. "A municipality is charged with constructive notice when the evidence shows that—as a result of the 'nature' of a defective condition or the 'length of time it has existed'—the municipality would have learned of its existence by exercising reasonable care." *Hartford*

Cas. Ins. Co. v. City of Baltimore, 418 F. Supp. 2d 790, 793 (D. Md. 2006) (quoting *Smith v. City of Baltimore*, 156 Md. App. 377, 386 (2004)).

First Apostolic asserts that the City had actual notice of the defective water main because the primary manifestation of a broken water main is water flowing from the surface of the ground. They point to citizenry reports received by the City about water coming from areas close to the church on various occasions. They offer the affidavit of Barbara Thompson who testified that months prior she notified the City "that water was flowing from the ground and streets in close proximity to the June 18th 2011 break," as evidence of the water main break. In addition, First Apostolic posits that the service requests for North Bond Street, during this time, indicating that water was flowing from that street, support its contention that there was a defective water main and that the City knew about it. We disagree.

While it is clear that there were complaints and requests for service within a one block radius of the church, these were, most notably, in the unit block of North Bond Street. Such requests, while evidencing an ongoing effort by the City to make repairs, fall short of establishing that the City was on notice that there was a defective condition in the water main, close to East Lombard Street. Thompson's general observations of water flowing from the ground, several months prior, fail to provide a nexus between the actual break and prior leakage problems in the area.

Further, the City's corporate designee, Art Shapiro, testified in deposition, "The City had no knowledge prior to the occurrence described in the complaint that water was coming from broken or open mains or lines at the subject location." This evidence,

specifically relating to any prior problems at the church's location, was undisputed. Thus, on the record before us, we hold that First Apostolic's claim that the City had actual notice is meritless.

First Apostolic alternatively claims that the City had constructive notice because of the defective condition of the pipe. It contends that the City allowed the pipe to deteriorate and become weakened and rusty to such an extent that it burst. It argues that the community reports of water flowing from the ground establish that the City failed to exercise reasonable care. The City responds that there is no legally sufficient evidence in the record to establish that it failed to exercise reasonable care under the circumstances. It contends that the church has failed to submit evidence regarding the cause of the break, the age of the pipe, or any defective construction or maintenance of the water main segments. According to the City, there were a number of pipes and other construction projects in the area, which could have been the source of the water leaks.

To support its position, the City cites *Hartford Cas. Ins. Co. v. City of Baltimore*, a federal case which relied on Maryland law. In Hartford, a 20-inch cast-iron water main broke and caused flooding at a property located in Baltimore City on Lexington Street. The property was insured by the plaintiff, Hartford Causality Insurance Company, who sought to recoup money paid to its insured from the City. *Id.* at 791. Hartford claimed that the City was negligent for failing to properly maintain its water mains. *Id.* The defective pipe was 93-99 years old and had an average useful life of 120 years. *Id.* at 792. In granting summary judgment in favor of the City, the court held that the City did not have actual or constructive notice. *Id.* at 793-94. The court based its findings on the fact

that the water main did not suffer prior breaks, there was no evidence that the pipe around the break was corroded, and there was no history of structural problems or defects. *Id.* at 793. The Court stated,

> [T]he evidence presented by the parties indicates that the bad condition at issue here was neither readily observable from its mere existence nor had existed for a sufficient length of time that it would have been detected by or reported to the City.

Id. (internal quotations omitted). The *Hartford* court specifically rejected the argument that the City should have taken preventative steps and stated, it is "economically unfeasible to expect the City to dig up water lines in areas where there have been no indication of any leaks or problems." *Id.* at 794.

First Apostolic attempts to factually distinguish *Hartford* from the subject water main break, claiming that (1) there was a prior history of a break, (2) the condition existed prior to the June 18th break, and (3) the City received multiple complaints. We disagree.

The church has submitted no evidence of a prior break in the water main that ruptured on June 8, 2011. There is no documentation or report that establishes when the break actually occurred, whether there was a defect in the water main itself, or how the break impacted the area. Thompson's testimony that she notified the City of an exterior leak in July does not provide a sufficient basis for determining that there was a prior water main break and/or deterioration of the pipes. Affidavits from others do not supply any additional specificity. Furthermore, the nature of the defect in the present case was

not readily observable as the water main was buried beneath the street. The record is, also, lacking any proof regarding the general make-up or age of the subject pipe.[2]

The testimony of Charles Dutill, the church's expert, provides no greater clarity.[3] He opined that while the American Water Works Association, federal government, and State of Maryland may not have standards for the proper operation and maintenance of potable water systems, there are criteria, recommendations and/or guidelines which provide information on the proper operation and maintenance of potable water systems. His testimony, however, provided no evidence regarding whether the City had such criteria and/or whether they failed to comply with any of their operational guidelines. Nonetheless, the question of compliance does not arise unless the City had notice and we hold that it did not.

In sum, First Apostolic has failed to show that there exists a genuine dispute regarding the material fact of notice. Pure speculation and conjecture cannot form the basis for materiality. Although water problems existed in the area, the church has not established that the City had actual or constructive knowledge of a defective condition in

[2] In appellant's responses to the City's Rule 2-424 Request for Admissions, appellant acknowledged that it does not know the material composition of the water main that broke or when the water main was installed.

[3] This Court will not consider the expert's complete 131 page deposition transcript because the complete deposition was not presented to the lower court and was not made a part of the record. *See Barclay v. Briscoe*, 427 Md. 281-82 ("[W]e review the trial court's ruling on the law, *considering the same material from the record*, and deciding the same legal issues as the circuit court." (citations omitted) (emphasis added)). We will only consider the four pages of deposition testimony that was before the lower court.

the water main that is the subject of this case. As such, the circuit court did not err in granting the City's motion for summary judgment.

II. Hanover Insurance Company's Motion for Summary Judgment

First Apostolic's policy with Hanover Insurance Company included a water exclusion clause. The clause, however, contained an exception, which allowed damage coverage if water resulted in a fire or explosion. First Apostolic asserts that on June 18th, when the water main broke and flooded its facility, a fire occurred in the electrical outlets into which sump pumps were plugged, making them inoperable and thus, exacerbating the water damage. As such, it asserts that a portion of its loss is covered under its insurance policy. Alternatively, it contends that the policy issued by Hanover should not be given full effect because the concurrent causation clause and the water exclusion exception are ambiguous.

Generally, insurance policies are interpreted in the same manner as other contracts. *Collier v. MD-Individual Practice Ass'n*, 327 Md. 1, 5 (1992). The primary goal of contract interpretation is to ascertain and give effect to the intention of the parties during the contract's inception. *Id.* (citing *Pacific Indemnity Co. v. Interstate Fire & Casualty Co.*, 302 Md. 383, 388 (1985)). Consequently, Maryland courts construe the instrument as a whole. *Id.* We "examine the character of the contract, its purpose, and the facts and circumstances of the parties at the time of execution." *Id.* Words are accorded their ordinary meaning. *Id.* at 5-6. If the language is ambiguous, extrinsic evidence may be consulted. *Id.* at 6. On the other hand, "clear and unambiguous language…must be

enforced as written and may not yield to what they later say they meant. *Bd. Of Trs. Of State Cools, v. Sherman*, 280 Md. 373, 380 (1977)).

In the present case, the contract provides in pertinent part:

> 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.
>
> ***
>
> **g. Water**
>
> **(1)** Flood, surface water, waves, tides, tidal waves, overflow of any body of water, or their spray, all whether driven by wind or not;
> **(2)** Mudslide or mudflow;
> **(3)** Water that backs up or overflows from a sewer, drain or sump; or
> **(4)** Water under the ground surface pressing on, or flowing or seeping through:
> **(a)** Foundations, walls, floors, or paved surfaces;
> **(b)** Basements, whether paved or not; or
> **(c)** Doors windows or other openings.
>
> But if water as described in **g.(1)** through **g.(4)** above, results in fire, explosion or sprinkler leakage, we will pay for the loss or damage caused by that fire, explosion or sprinkler leakage.

In our view, the language of the insurance policy is clear and unambiguous. While the policy does not cover loss due to water, regardless of any other cause or event, it does cover loss or damage caused if water results in fire or explosion. In our view, therefore, First Apostolic can only recover if it can establish that a fire or explosion occurred and it suffered damage as a result thereof.

To support its fire or explosion claim, First Apostolic relies on the testimony presented by two lay individuals, the church's corporate designee, Harvey Richeson and the church's sexton, Harvey Morgan, as well as photographs. Morgan testified that, "after the flood the sump pumps were burnt with fire indications." Richeson, deposed on May 18, 2015, testified that the breaker tripped and no fire resulted. He stated:

> Q. And two of the pumps were not operable due to water penetrating the receptacles causing them to arc and trip the breakers. Can you further describe what is meant by causing them to arc and trip the breakers?
> A. Well, I guess in common knowledge, if electricity come into contact with the socket, you are going to have some type of explosion. Fire explosion or either the breaker is going to trip.
>
> Q. So there was a fire and explosion, or did the breaker trip?
>
> A. The breaker tripped. The resulting of the short of the plug.
>
> Q. Did you have a fire?
>
> A. No. All that water we couldn't have a fire
>
> Q. Did you have an explosion?
>
> A. No. Not that I know of.
>
> Q. Okay. But you had breakers that tripped?
>
> A. Yes.
>
> Q. From water entering?
>
> A. Yes.

Three months later, on August 11, 2015, he submitted an affidavit wherein he stated:

> At the deposition, the attorney for Hanover asked if the church was on fire, I misunderstood and answered no. I believed that he was asking if the entire church was on fire. It was not. I clarified on record that there was a fire in the receptacles in the furnace room.

Hanover argues that the statements in Richeson's affidavit, while insufficient even if admitted, must be stricken because they materially contradict his previous deposition testimony. It points to Maryland Rule 2-501(e)(2), which provides, "If a court finds that

[an] affidavit…materially contradicts [a] prior sworn statement, the court shall strike the contradictory part…" However, the court need not strike the contradictory part if:

> (A) the person reasonably believed the prior statement to be true based on facts known to the person at the time the prior statement was made and (B) the statement in the affidavit or other statement made under oath is based on facts that were not known to the person and could not reasonably have been known to the person at the time the prior statement was made.

Id. A material contradiction is "a factual assertion that is significantly opposite to the affiant's previous sworn statement so that when examined together the statements are irreconcilable." *Marcantonio v. Moen*, 406 Md. 395, 410 (2008).

Hanover also argues that both Morgan and Richeson's testimonies constitute inadmissible lay opinion. It further submits that even if the statements are admissible as lay opinions, they do not establish whether a fire or explosion occurred or its cause and/or origin.

Maryland Rule 5–701 governs the admissibility of lay witness testimony:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

MD. RULE 5–701.

As previously stated, Morgan testified that the sump pumps were burnt with fire indications and Richeson averred that "there was a fire in the receptacles in the furnace room." Neither, however, witnessed an actual fire. In fact, according to Richeson, no one saw a fire. Thus, the opinions proffered are based on observations made in the

aftermath. No timeframe or detail was given as to when these perceptions were made, nor was a causal connection between the perceptions and the cause of the damage established. As such, the witnesses' conclusions are not dispositive or helpful to a determination of whether water caused a fire or explosion.

First Apostolic's position that an electrical fire occurred required the specialized testimony of an expert to opine as to how when water came into contact with the receptacle a fire resulted. *See Holzhauer v. Saks & Co.,* 346 Md. 328, 339 (1997) (quoting *Meda v. Brown*, 318 Md. 418, 428 (1990) ("In some cases…'because of the complexity of the subject matter, expert testimony is required…'")). When a subject matter is far removed from the usual and ordinary experience of the average man, expert knowledge is essential to the formation of an intelligent opinion. *See Id.* Speculation in the aftermath of an event is insufficient.

Thus, even assuming arguendo, that the lay opinion statements are admissible and Richeson's second statement is not a contradiction to the first, the testimonies do not establish the church's claim that there was, in fact, a fire or explosion.

In addition, the church's photographs offer no support to its claim. The subject receptacles were removed and disposed of four years ago and while there are photographs of the alleged burnt sump pumps and receptacle boxes, the pictures do not evidence a fire or explosion. Rather, they depict rusted and corroded metal receptacle boxes and piping.

To survive summary judgment "general allegations of conclusory assertions will not suffice" to generate a dispute of material fact. *Beatty v. Trailmaster Prods*., 330 Md. 726, 738 (1993). Without a witness of a fire, tangible evidence of a fire, or expert opinion

as to the happening of a fire or explosion, First Apostolic simply cannot meet its burden in proving that a fire or explosion occurred. Further, the policy's concurrent causation clause is clear and unambiguous. Because the church's damages were the result of a breached water main, recovery is not warranted. As such, no reasonable jury could find for First Apostolic and we, therefore, affirm the circuit court's grant of Hanover's motion for summary judgment.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED; COSTS TO BE PAID BY APPELLANT.