IN THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT OF ILLINOIS
DANVILLE, VERMILION COUNTY, ILLINOIS

AMJAD ABUDAYYA,	)	
Plaintiff,	)	
	)	**Case No. 2023 – LA- 10**
vs.	)	
	)	
COUNTRY MUTUAL INSURANCE CO.,	)	
Defendant.	)	

DECISION and ORDER
GRANTING IN PART and DENYING IN PART PLAINTIFF'S
MOTION for SUMMARY JUDGMENT
and
DENYING DEFENDANT'S CROSS-MOTION for SUMMARY JUDGMENT as to
COUNT I and GRANTING ITS CROSS-MOTION as to COUNT II of the COMPLAINT

This case is before the court upon the Motion for Summary Judgment filed by Plaintiff, Amjad Abudayya, [Abudayya], on September 11, 2023 [the Motion], and the Cross Motion for Summary Judgment filed by Defendant, Country Mutual Insurance Company [Country Mutual], on October 10, 2023 [the Cross-Motion]. Abudayya and Country Mutual each responded to the Motion and Cross-Motion respectively and then each replied to the Responses. **NOW,** having conducted a hearing and considered the Motion and Cross-Motion, the pleadings, depositions, affidavits, exhibits on file, and the arguments of counsel, and for the reasons set forth in greater detail *infra*, **IT IS ORDERED:** the Motion is **ALLOWED in part** and **DENIED in part**, and the Cross-Motion is **DENIED in part** and **ALLOWED in part**.

The Pleadings and Motions at Issue

The complaint contains two (2) counts. In Count I, Abudayya alleges Country Mutual breached the insurance policy contract sold and issued to him by failing to pay the actual cash value sustained as a result of a fire loss to an insured building. In Count II, Abudayya alleges he is entitled to an award of taxable costs under 215 ILCS 5/155(1) for Country Mutual engaging in vexatious and unreasonable conduct with respect to the claim. Country Mutual denied the material allegations of the complaint and its second affirmative defense asserts it has no duty to pay Abudayya's claim because the fire was intentionally set by some unknown person, the loss from which is expressly excluded under the vacancy exclusion provisions of the policy as an act of vandalism upon a vacant building.

The Motion seeks summary judgment upon Count I of the complaint and the second affirmative defense, arguing that, as a matter of law, the vacancy exclusion provisions of the policy do not exclude coverage for the fire damage to Abudayya's building, despite the facts that it was vacant at the time of the loss and the fire was intentionally set. The Motion also argues there is no genuine issue of material fact as to the extent of Abudayya's damages.

Abudayya asserts fire, regardless of cause, falls under the umbrella of "other covered causes of loss" for purposes of the vacancy exclusion provisions and, therefore, the loss is covered, subject to a fifteen percent (15%) reduction. He argues that, for purposes of the vacancy exclusion, an intentionally set fire is a type of fire, as contrasted to a type of vandalism that is excluded from coverage. He contends even though the fire was intentionally set and thus may qualify as an act of vandalism in its plain and ordinary meaning, the vacancy exclusion provisions do not clearly, plainly, definitively, and unambiguously exclude coverage for such fires. Moreover, Abudayya asserts the term vandalism, in the context of the vacancy exclusion, is susceptible to more than one reasonable interpretation when read in light of the policy as a whole and, therefore, is ambiguous as to whether it encompasses an intentionally set fire. He argues the ambiguity must be construed against Country Mutual as the drafter of the policy, and the fire loss, then, must be covered.

The Cross-Motion seeks summary judgment upon both counts of the complaint, arguing that, as a matter of law, the vacancy exclusion provisions exclude coverage for damage caused by vandalism; and since Country Mutual was justified in denying the claim, its refusal to pay was neither vexatious nor unreasonable. Country Mutual contends that, in the event the Cross-Motion is denied, there are genuine issues of material fact as to the extent of Abudayya's damages.

Country Mutual contends the fire was intentionally set and was, therefore, caused by an act of vandalism. Since the building was vacant for more than sixty (60) consecutive days before the loss occurred, it argues the vacancy exclusion provisions specifically exclude losses for vandalism. It maintains the term vandalism as used in the vacancy exclusion is not ambiguous. Rather, looking at its plain, ordinary, and popular meaning demonstrates an intentionally set fire is a type of vandalism, the coverage for which loss is barred as a matter of law. Country Mutual acknowledges if the loss was caused by one of the other covered causes of loss as defined by the policy, extended coverage under the vacancy provisions would pay for the loss sustained, subject to the fifteen percent (15%) reduction.

The Summary Judgment Standard

735 ILCS 5/2-1005 provides in relevant part:

> (a) For plaintiff. Any time after the opposite party has appeared, … a plaintiff may move with or without supporting affidavits for a summary judgment in his favor for all or any part of the relief sought.

> (b) For defendant. A defendant may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part of the relief sought ....
>
> (c) Procedure. The opposite party may prior to or at the time of the hearing on the motion file counter-affidavits. The judgment sought shall be rendered without delay if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law....
>
> (d) Summary determination of major issues. If the court determines that there is no genuine issue of material fact as to one or more of the major issues in the case, but that substantial controversy exists with respect to other major issues, or if a party moves for a summary determination of one or more, but less than all, of the major issues in the case, and the court finds that there is no genuine issue of material fact as to that issue or those issues, the court shall thereupon draw an order specifying the major issue or issues that appear without substantial controversy, and directing such further proceedings upon the remaining undetermined issues as are just....

A summary judgment motion tests a pleading's underlying factual basis. *Delgatto v. Brandon Associates., Ltd.,* 131 Ill.2d 183, 545 N.E.2d 689, 137 Ill.Dec. 36 (1989). At the summary judgment stage, movants are not required to prove their cases. *Allegro Services, Ltd. v. Metropolitan Pier & Exposition Authority,* 172 Ill.2d 243, 665 N.E.2d 1246, 216 Ill.Dec. 689 (1996). The purpose of summary judgment is not to try a question of fact, but simply to determine whether one exists. *Jackson v. TLC Associates.,* 185 Ill.2d 418, 706 N.E.2d 460, 235 Ill. Dec. 905 (1998). Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Seymour v. Collins,* 2015 IL 118432, 39 N.E.3d 961, 396 Ill.Dec.135. Summary judgment is a drastic measure and should only be granted if the movant's right to judgment is clear and free from doubt. *Bagent v. Blessing Care Corp.,* 224 Ill.2d 154, 862 N.E.2d 985, 308 Ill.Dec. 782 (2007). Where a reasonable person could draw divergent inferences from undisputed facts, summary judgment should be denied. *Pielet v. Pielet,* 2012 IL 112064, 978 N.E.2d 1000, 365 Ill.Dec. 497. In determining the existence of a genuine issue of material fact, courts must consider the pleadings, depositions, admissions, exhibits, and affidavits on file and construe them strictly against the movant and liberally in favor of the opponent. *Williams v. Manchester,* 228 Ill.2d 404, 888 N.E.2d 1, 320 Ill.Dec. 784 (2008); *Land v. Board of Education,* 202 Ill.2d 414, 781 N.E.2d 249, 269 Ill.Dec. 452 (2002); *Purtill v. Hess,* 111 Ill.2d 229, 489 N.E.2d 867, 95 Ill.Dec. 305 (1986). Summary judgment is not appropriate if: (1) there is a dispute as to a material fact, *Jackson,* 418 Ill.2d at 424; (2) reasonable persons could draw divergent inferences from the undisputed material facts, *Id.*; or (3) reasonable persons could differ on the weight to be given the relevant factors of a legal standard. *Calles v. Scripto-Tokai Corp.,* 224 Ill.2d 247, 864 N.E.2d 249, 309 Ill.Dec. 383 (2007).

The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court and appropriate subjects for disposition by summary judgment. *Konami (America) Inc. v. Hartford Insurance Company of Illinois,* 326 Ill.App.3d 874, 761 N.E.2d 1277, 260 Ill.Dec. 721 (2nd Dist. 2002). When the parties file cross-motions for summary judgment, they implicitly agree there are no genuine issues of material fact and the dispute involves only questions of law such that the disposition of the case turns on the court's resolution of purely legal issues based on the record. *Founders Insurance Co. v. Munoz,* 237 Ill.2d 424, 930 N.E.2d 999, 341 Ill.Dec. 485 (2010); *Kuhn v. Owners Insurance Co.,* 2024 IL 129895, 2024 Ill. LEXIS 322; *Maryland Casualty Co. v. Dough Management Co.,* 2015 ILApp(1st) 141520, 36 N.E.3d 953, 394 Ill.Dec. 662.

The Undisputed Facts

Country Mutual issued a commercial line insurance policy [the Policy] to Abudayya. The Policy was effective June 21, 2022 through June 21, 2023 and insured improved property located at 1005 N. Vermilion Street, Danville, Illinois [the Property]. The property coverage portion of the Policy insured the Property against risks of direct physical loss or damage unless limited or excluded. This type of policy is commonly referred to as an all-risk policy, which provides coverage protection against a broad and comprehensive array of losses. The building coverage was determined on an actual cash value basis, with a $203,100.00 limit of insurance.

On December 2, 2022, there was a fire at the Property, which damaged the building. The parties agree that, at the time of the fire, the Property had been vacant for more than sixty (60) consecutive days, and actually agree the period of vacancy exceeded six (6) months.

Abudayya notified Country Mutual of the loss and submitted a claim for coverage. Country Mutual investigated the claim, and employed fire investigator Mike Dilley to determine the origin and cause of the fire. Dilley concluded the cause of the fire was the use by a human of an unknown open flame igniting ordinary combustible materials., such as paper, cardboard, and plastic. Dilley classified the fire as incendiary, *i.e.,* a fire intentionally ignited in an area or under circumstances where and when there should not be a fire. He did not, however, determine a motive or intent for the unknown person setting the fire, because to do so would be speculative.

Two weeks after the fire, Country Mutual sent Abudayya a letter denying his claim. The denial was based on Country Mutual's determination the Property had been vacant for more than sixty (60) consecutive days before the fire, the fire resulted from an act of vandalism, and the Policy's exclusion provisions [the vacancy exclusion] excludes from coverage loss or damage to vacant property caused by vandalism.

The vacancy exclusion contains the following language:

> If the building where loss or damage occurs has been vacant for more the 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.

(2) With respect to Covered Causes of Loss other than those listed in Paragraphs (1)(a) through (1)(f) above, we will reduce the amount we would otherwise pay for the loss or damage by 15%.

Analysis

A. The Vacancy Exclusion.

Prima Facie Case for Coverage. In order to withstand a motion for summary judgment involving an insurer's failure to pay a claim under an all-risk insurance policy, the insured bears the initial burden of presenting, through the pleadings, depositions, admissions, exhibits, and affidavits on file, sufficient facts establishing a *prima facie* case. *Wallis v. Country Mutual Insurance Co.,* 309 Ill.App.3d 566, 723 N.E.2d 376, 243 Ill.Dec. 344 (2nd Dist. 2000). This requires a showing that (1) a loss occurred; (2) the loss resulted from a fortuitous event; and (3) an all-risk policy covering the property was in effect at the time of the loss. *Id.,* 309 Ill.App.3d at 570.

Fortuitous means happening by chance or accident, occurring unexpectedly, or without known cause. *Cincinnati Insurance Co. v. American Hardware Manufacturers Assn*, 387 Ill.App.3d 85, 898 N.E.2d 216, 325 Ill.Dec. 483 (1st Dist. 2008). The Restatement of Contracts defines a fortuitous event as an event that, as far as the parties are aware, is dependent on chance. *Restatement of Contracts* § 291. A loss that was, so far as the parties knew, an inevitable certainty at the time of contracting is not fortuitous and will not be covered by the resulting contract. *Mattis v. State Farm Fire & Casualty Co.,* 118 Ill.App.3d 612, 454 N.E.2d 1156, 73 Ill.Dec. 907 (5th Dist. 1983). The determination of whether a loss is fortuitous is a legal question for the court to determine. *American Hardware,* 387 Ill.App.3d at 109.

The pleadings, depositions, admissions, exhibits, and affidavits on file demonstrate a *prima facie* case that Abudayya's loss was covered under the Policy. Abudayya suffered the loss when his building sustained the fire damage and the loss resulted from a fortuitous event. Country Mutual's expert, Dilley, concluded the cause of the fire was the use by a human of an unknown open flame igniting ordinary combustible materials, such as paper, cardboard, and plastic. Dilley classified the fire as incendiary, *i.e.,* a fire intentionally ignited in an area or under circumstances where and when there should not be a fire. The record demonstrates the fire was an unexpected event that,

as far as the parties are aware, was dependent on chance, rather than being an inevitable certainty. There is no evidence in this record Abudayya expected a fire in the building, or had prior knowledge or involvement in setting the fire. Finally, the Policy was in effect at the time the building sustained damage.

Once an insured establishes a *prima facie* case, the burden then shifts to the insurer to show the loss resulted from a peril expressly excluded from coverage. *Wallis,* 309 Ill.App.3d at 570; *International Surplus Lines* 209 Ill.App.3d at 150; *Wilson v. National Automobile & Casualty Insurance Co.,* 22 Ill.App.2d 34, 159 N.E.2d 504 (4th Dist. 1959). The parties agree the record discloses no genuine issue of material fact precluding the court from determining, as a matter of law, the issue of whether Abudayya's loss is excluded from coverage by the vacancy exclusion.

General Rules of Law Pertaining to Policy Interpretation. An insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies. *Hobbs v. Hartford Insurance Company of the Midwest,* 214 Ill.2d 11, 823 N.E.2d 561, 291 Ill.Dec. 269 (2005). The construction of an insurance policy's provisions is a question of law. The primary objective is to ascertain and give effect to the intention of the parties as expressed in the policy language. *Id.,* 214 Ill.2d at 17; *Travelers Insurance Co. v. Eljer Manufacturing, Inc.,* 197 Ill.2d 278, 757 N.E.2d 481, 258 Ill.Dec. 792 (2001); *Outboard Marine Corp. v. Liberty Mutual Insurance Co.,* 154 Ill.2d 90, 607 N.E.2d 1204, 180 Ill.Dec. 691 (1992); *Pekin Insurance Co. v. Miller*, 367 Ill.App.3d 263, 854 N.E.2d 693, 305 Ill.Dec. 101 (1st Dist. 2006); *Bohner v. Ace American Insurance Co.,* 359 Ill.App.3d 621, 834 N.E.2d 635, 296 Ill.Dec. 78 (2nd Dist. 2005).

To ascertain the meaning of an insurance policy's words and the intent of the parties, the court must construe the policy as a whole, and take into account the type of insurance purchased, the nature of the risks undertaken, and the overall purpose of the contract. *Eljer Manufacturing,* 197 Ill.2d at 292; *Miller,* 367 Ill.App.3d at 267. The construction a court must give to an insurance policy should be a natural and reasonable one. *De Los Reyes v. Travelers Insurance Co.,* 135 Ill.2d 353, 553 N.E.2d 301, 142 Ill.Dec. 787 (1990); *Gillen v. State Farm Mutual Automobile Insurance Co.,* 215 Ill.2d 381, 830 N.E.2d 575, 294 Ill.Dec. 163 (2005). If the words of the policy are undefined or unambiguous, a court must afford them their plain, ordinary, and popular meaning. *i.e.,* they will be construed with reference to the understanding of the average, ordinary, normal, reasonable person, *Id.,* 215 Ill.2d at 393, and the provisions will be applied as written. *Menke v. Country Mutual Insurance Co.,* 78 Ill.2d 420, 401 N.E.2d 539, 36 Ill.Dec. 481 (1980); *Economy Fire & Casualty Co. v. Bassett,* 170 Ill.App.3d 765, 525 N.E.2d 539, 121 Ill.Dec. 481 (5th Dist. 1988). In determining whether an ambiguity exists, the provision in question must be read in its factual context. *Glidden v. Farmers Automobile Insurance Association,* 57 Ill.2d 330, 312 N.E.2d 247 (1974); *Menke,* 78 Ill.2d at 424; *Bassett,* 170 Ill.App.3d at 769. The issue is not what the term or provision means in isolation, but what it means in the context of the entire policy. *Outboard*

Marine, 154 Ill.2d at 108; *Konami* 326 Ill.App.3d at 879. All the provisions of the insurance contract, rather than an isolated part, then, should be read together to interpret it and determine whether an ambiguity exists. *United States Fire Insurance Co. v. Schnackenberg,* 88 Ill.2d 1, 429 N.E.2d 1203, 57 Ill.Dec. 840 (1981). Courts will not strain to find an ambiguity where none exists. *Miller*, 367 Ill.App.3d at 267; *American Family Mutual Insurance Co. v. Niebuhr,* 369 Ill.App.3d 517, 860 N.E.2d 436, 307 Ill.Dec. 782 (1st Dist. 2006).

If the words in the policy are susceptible to more than one reasonable interpretation or meaning, they are deemed ambiguous or equivocal, *Eljer Manufacturing,* 197 Ill.2d at 293; *Outboard Marine,* 154 Ill.2d at 108-9; *Strowmatt v. Sentry Insurance,* 2021 ILApp(5th) 190537, 175 N.E.3d 204, 447 Ill.Dec. 836; *State Automobile Mutual Insurance Co. v. Kingsport Development, LLC,* 364 Ill.App.3d 946, 846 N.E.2d 974, 301 Ill.Dec. 371 (2nd Dist. 2006); *Saline County Agricultural Assn. v. Great American Insurance Co.,* 144 Ill.App.3d 394, 494 N.E.2d 1278, 98 Ill.Dec. 951 (5th Dist. 1986), and a court is not permitted to choose which interpretation it will follow. Rather, where competing reasonable interpretations of a policy exist, the court must construe the policy in favor of the insured and against the insurer who drafted the policy. *Employers Insurance of Wausau v. Ehlco Liquidating Trust,* 186 Ill.2d 127, 708 N.E.2d 1122, 237 Ill.Dec. 82 (1999); *Sproull v. State Farm Fire & Casualty Co.,* 2021 IL 126446, 184 N.E.3d 203, 451 Ill.Dec. 616.

The insurer has the burden to affirmatively demonstrate the applicability of an exclusionary clause denying coverage, which serves the purpose of taking out events otherwise included within the defined scope of coverage. *Johnson Press of America, Inc. v. Northern Insurance Company of New York,* 339 Ill.App.3d 864, 791 N.E.2d 1291, 274 Ill.Dec. 880 (1st Dist. 2003); *Miller*, 367 Ill.App.3d at 267; *Hartford Accident & Indemnity Co. v. Case Foundation Co.,* 10 Ill.App.3d 115, 294 N.E.2d 7 (1st Dist. 1973). The law presumes the insured intended to obtain coverage and the insurer would have stated all exclusions clearly and specifically. *Strzelczyk v. State Farm Mutual Automobile Insurance Co.,* 138 Ill.App.3d 346, 485 N.E.2d 1230, 93 Ill.Dec. 20 (1st Dist. 1985); *International Surplus Lines Insurance Co. v. Pioneer Life Insurance Co.,* 209 Ill.App.3d 144, 568 N.E.2d 9, 154 Ill.Dec. 9 (1st Dist. 1990); *State Farm Fire & Casualty Co. v. Moore,* 103 Ill.App.3d 250, 430 N.E.2d 641 (2nd Dist. 1981). Exclusion provisions which limit or exclude coverage must be read narrowly. *Guillen v. Potomac Insurance Company of Illinois,* 203 Ill.2d 141, 785 N.E.2d 1, 271 Ill.Dec. 350 (2003); *Empire Indemnity Insurance Co. v. Chicago Province of Society of Jesus*, 2013 ILApp(1st) 112346, 990 N.E.2d 845, 371 Ill.Dec. 657. They must be construed liberally in favor of the insured and against the insurer. *Standard Mutual Insurance v. Mudron,* 358 Ill.App.3d 535, 832 N.E.2d 269, 295 Ill.Dec. 118 (3rd Dist. 2005). Their applicability must be clear, definite, specific, and free from doubt, *Gillen,* 215 Ill.2d at 393; *National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Glenview Park District,* 158 Ill.2d 116, 632 N.E.2d 1039, 198 Ill.Dec. 428 (1994); *International Minerals & Chemical Corp. v. Liberty Mutual Insurance Co.,* 168 Ill.App.3d 361, 522 N.E.2d 758, 119 Ill.Dec. 96 (1st Dist. 1988), since any doubts as to coverage will be resolved in favor of the insured. *Yamada Corp. v. Yasuda Fire &*

Marine Insurance Co., 305 Ill.App.3d 362, 712 N.E.2d 926, 238 Ill.Dec. 822 (2nd Dist. 1999). The burden of showing that a claim falls within an exclusion rests with the insurer for two reasons: (1) the insured's intent in purchasing insurance is to obtain coverage, therefore, any ambiguity jeopardizing coverage should be construed consistently with the insured's intent; and (2) the insurer drafted the policy and could have drafted the exclusions to be clear, definite, and specific. *Transamerica Insurance Co. v. South*, 975 F.2d 321 (7th Cir. 1992); *Potomac Insurance Co. v. NCUA,* 1996 U.S. Dist. LEXIS 9844, 1996 WL 396100. Courts should not torture the language of a policy to find coverage where it is clear that none exists. *Cohen Furniture Co. v. St. Paul Insurance Co.,* 214 Ill.App.3d 408, 573 N.E.2d 851, 158 Ill.Dec. 38 (3rd Dist. 1991); *Pope ex rel. Pope v. Economy Fire & Casualty Co.,* 335 Ill.App.3d 41, 779 N.E.2d 461, 268 Ill.Dec. 847 (1st Dist. 2002).

Findings Pertaining to Policy Language Interpretation. At issue is the interpretation of the property insurance policy Country Mutual drafted, sold, and issued to Abudayya. To ascertain the meaning of the Policy's words and the intent of the parties, the court must construe the Policy as a whole, and take into account the type of insurance purchased, the nature of the risks undertaken, and the overall purpose of the contract. The Policy is an all-risk policy, providing protection against a broad and comprehensive variety of perils or causes of loss. Fire and vandalism are identified by the Policy as separate and distinct covered perils or causes of loss. The Policy does not define fire, nor vandalism, and does not differentiate between types of fires, *i.e.,* arson, intentionally set, accidental, electrical, mechanical, or chemical. Specifically, the Policy provides Country Mutual will pay for direct physical loss of or damage to the Property caused by or resulting from any Covered Cause of Loss. The Covered Causes of Loss are defined as direct physical loss unless the loss is excluded or limited. And Causes of Loss are defined as fire; lightening; explosion; windstorm or hail; smoke; aircraft or vehicles; riot or civil commotion; vandalism; leakages from fire extinguishing equipment; sinkhole collapse; volcanic action; falling objects; weight of snow, ice or sleet; water damage. Therefore, any fire, regardless of causation, is a Covered Cause of Loss under the Policy, unless otherwise excluded or limited.

Under the Policy, if fire caused by vandalism, *i.e.,* the deliberately mischievous or malicious destruction or damage of property, occurred at a non-vacant building and caused a loss, Country Mutual must pay for the losses sustained. This is so because the statutorily-mandated standard fire insurance policy [the Standard Fire Policy] requires coverage for all fires (with limited exceptions not applicable here) unless the building is vacant for more than sixty (60) days prior to the loss. *Lundquist v Allstate Insurance Co.,* 314 Ill.App.3d 240, 732 N.E.2d 627, 247 Ill.Dec. 572 (2nd Dist. 2000). Neither the Standard Fire Policy, nor any other statutory or regulatory scheme, mandates an insurer cover any loss to a building which has been vacant for more than sixty (60) days prior to the loss. But the Policy offers Abudayya greater protection. Its coverage provisions exceed Country Mutual's statutory and regulatory obligations and does provide protections to vacant buildings through its vacancy exclusion provisions. Under the vacancy exclusion, if a

building is vacant for sixty (60) consecutive days before a loss occurs, protection against and coverage for losses caused by specified events (see pages 4-5 *supra*), including vandalism, is barred. However, the vacancy exclusion also specifically extends and covers losses caused by other of the Policy's designated Covered Causes of Loss, which include fire. Country Mutual acknowledges not all fires are excluded under the vacancy exclusion. Rather under Country Mutual's interpretation of the vacancy exclusion, if an accidental, electrical, mechanical, or chemical fire (in other words, a fire started without the intentional act of a human) was the cause of loss, the building is nonetheless still covered regardless of the fact it was vacant. However, Country Mutual maintains that, for purposes of the vacancy exclusion, intentionally set fires fall under the umbrella of vandalism, not of fire, and are, therefore, specifically excluded from coverage. Abudayya insists that, for purposes of the vacancy exclusion, all fires, regardless of causation, fall under the umbrella of fire, as an Other Covered Cause of Loss, and, therefore, are covered perils, subject, of course to the fifteen percent (15%) reduction. Here, since the Property was vacant for at least six (6) months prior to the loss, the only issue the court must decide is whether a fire, intentionally set, is vandalism or fire for purposes of the vacancy exclusion.

After reviewing the pleadings, depositions, affidavits, exhibits on file, and the arguments of counsel, for the two reasons set forth in greater detail *infra*, the court **FINDS** the term vandalism, for purposes of the vacancy exclusion, is ambiguous as to whether intentionally set fires fall under the umbrella of fire or vandalism, and, therefore, construing the Policy in favor of the insured and against the insurer as the drafter of the Policy, **FINDS** as a matter of law, Country Mutual cannot deny coverage for Abudayya's claim based upon the contention the December 2, 2022 fire loss was caused by vandalism, and further **FINDS** Abudayya's loss qualifies as a covered loss under the Policy, subject to the fifteen percent (15%) reduction.

1. Competing Interpretations of Terms.

That the Policy identifies fire and vandalism, among other things, as separate covered causes of loss indicates fire and vandalism have independent meanings for purposes of the contracted insurance coverage. In the context of policy coverage, Country Mutual recognizes these independent, *albeit* undefined, meanings. But it argues an intentionally set fire may only be reasonably equated with vandalism under the vacancy exclusion. In other words, it argues the term vandalism has one meaning (which does not include intentionally set fires) for purposes of the coverage provisions of the Policy and another meaning (which does include such fires) for purposes of the vacancy exclusion. In isolation, the term vandalism may certainly include intentionally set fires. However, the court must construe the term not in isolation but rather in the context of the Policy as a whole, taking into account the type of insurance purchased, the nature of the risks undertaken, and the overall purpose of the contract. The Policy is an all-risk policy, providing protection against a broad and comprehensive variety of perils or causes of loss. In other words, the Policy was intended to expand, rather than limit Abudayya's protections against losses.

Exclusions limiting coverage must be clear, definite, specific, and free from doubt. *Gillen,* 215 Ill.2d at 393.

In the context of the Policy as a whole, the court **FINDS** the term vandalism, for purposes of the vacancy exclusion, may also be reasonably interpreted as not including intentionally set fires. This is so because such fires might just as reasonably fall within the "other causes of loss" still protected and insured under the vacancy exclusion. By failing to define vandalism as specifically including intentionally set fires, Country Mutual left open the opportunity for the term to be interpreted as excluding such fires because they also reasonably fall under the umbrella of "other causes of loss." Ambiguity exists if a term is susceptible to more than one reasonable interpretation. *Nicor,* 223 Ill.2d at 417. Where competing reasonable interpretations of a policy exist, a court is not permitted to choose which interpretation it will follow. Rather, the court must construe the policy in favor of the insured and against the insurer who drafted the policy. *Employers Insurance of Wausau*, 186 Ill.2d at 141; *Nicor,* 223 Ill.2d at 417. Mindful that all provisions of the insurance contract should be read together to interpret it and determine whether an ambiguity exists, and noting fire and vandalism have independent meanings in the coverage provisions of the Policy, and further having found the term vandalism is susceptible to more than one reasonable interpretation, the court **FINDS** Country Mutual failed to show that, for purposes of the vacancy exclusion, the term vandalism unambiguously includes intentionally set fires.

Provisions virtually identical to the vacancy exclusion have been construed in the context of fires and vandalism by a variety of jurisdictions. Some courts have held the provision to be unclear and ambiguous, while others have declared it to be clear and unambiguous; each decision providing contrary, yet reasonable interpretations of the vacancy exclusion. Country Mutual asserts the court is bound to follow *Lundquist,* 314 Ill.App.3d 240, and contends the appellate court "reached the conclusion that a fire by vandalism is excluded by a vacancy provision," excluding losses caused by "vandalism or malicious mischief." However, *Lundquist* held the insurer's vacancy exclusion was void since it did not meet the minimum requirements of the Standard Fire Policy because it shortened the allowable vacancy period to thirty (30) days. The appellate court was not required to find, and did not specifically decide the issue before this court, *i.e.,* whether intentionally set fires are vandalism or fire under a vacancy exclusion. Its *dictum* is not controlling. The court agrees with those decisions finding the vacancy exclusion is ambiguous as to whether it excludes a fire caused by vandalism because it is unclear whether the term vandalism clearly, specifically, and expressly includes the act of an intentionally set fire. Country Mutual certainly had the capacity to draft a clear, definite, specific, and intelligible contract. Had it intended to exclude intentionally set fires under the vandalism exclusion, it easily could have done so.[1]

[1] An example of clear, plain, definitive, and unambiguous language is found in *Verzura v. Allstate Indemnity Co.,* 2016 IL App (1st) 142907-U, 2016 Ill. App.Unpub. LEXIS 1812, where the policy included vandalism as a named peril, but excluded "vandalism or loss caused by fire resulting from vandalism" if the property was vacant.

The issue is not whether any Illinois court has found a relationship between vandalism and intentionally set fires. Rather, the issue is whether the average person, for whom the policy is written, would reasonably understand Country Mutual's liability under the vacancy exclusion is excluded for intentionally set fires. In other words, is the vacancy provision clear, definite and specific? The term vandalism, in the context of the entire Policy, where fire and vandalism are treated as separate covered causes of loss, and, therefore, with independent meanings, would not convey to the average, ordinary, reasonable person an intention to include intentionally set fires under the umbrella of vandalism for purposes of the vacancy exclusion alone, particularly where the vacancy exclusion specifically insures the other identified Covered Causes of Loss.

Because the Policy terms must be construed most favorably to the insured and against the insurer, the court concludes it is unclear and ambiguous whether the term vandalism, in the context of the vacancy exclusion, necessarily includes, as a matter of law, acts of intentionally set fires, and, therefore, **FINDS** the vacancy exclusion does not clearly, plainly, definitively, and unambiguously exclude from coverage a fire intentionally set to a vacant building and Country Mutual, therefore, as a matter of law, cannot deny coverage for the claim based on the fire being caused by vandalism.

2. Plain, Ordinary, Popular Meaning.

In drafting the Policy, Country Mutual chose not to define the terms vandalism or fire. The mere absence of a definition does not render a term ambiguous, nor is an ambiguity created simply because the parties disagree about the meaning of that term or suggest alternate possibilities for its meaning. *Nicor, Inc. v. Associated Electric & Gas Insurance Services Ltd.,* 223 Ill.2d 407, 860 N.E.2d 280, 307 Ill.Dec. 626 (2006). Where a term in an insurance policy is not defined, it is afforded its plain, ordinary, and popular meaning, *i.e.,* courts look to its dictionary definition. *Founders Insurance Co. v. Munoz,* 237 Ill.2d 424, 930 N.E.2d 999, 341 Ill.Dec. 485 (2010).

Vandalism is generally defined as the willful or malicious destruction or defacement of property. Malice is, then, an essential element of vandalism. It is the intentional doing of a wrongful act without just cause or excuse, with an intent to inflict an injury or under circumstances the law infers an evil intent. *Black's Law Dictionary.* The term malice, in ordinary usage, means ill will against a person, but in the legal sense means a wrongful act done intentionally without just cause or excuse. *Cole v. Country Mutual Insurance Co.,* 5 Ill.App.3d 335, 282 N.E.2d 216 (4th Dist. 1972).

By definition, malice -- an essential element of vandalism -- requires intent to damage or to destroy property. And while there is no genuine issue of fact disputing the fire was intentionally set, Dilley never characterizes the fire as arson -- the willful or malicious burning of property. There is no evidence on this record, the fire was set with the intent to damage or destroy the Property. Country Mutual nonetheless argues the fire, because intentionally set, was arson and, for purposes of the vacancy exclusion, is a type of vandalism. But the court **FINDS** that, in the context of the vacancy

exclusion, interpreting the term vandalism to include any and all intentionally ignited fires without evidence of a specific intent to damage or destroy the property is contrary to the plain and ordinary meaning of the term. Therefore, the court **FINDS** the Policy, on this record, is ambiguous as to whether the vacancy exclusion excludes Abudayya's claim for the December 2, 2022 fire loss, and Country Mutual, as a matter of law, cannot deny coverage for the claim based on the fire being caused by vandalism.

B. §155 of the Insurance Code for Vexatious and Unreasonable Conduct

In Count II of the complaint, Abudayya alleges he is entitled to an award of taxable costs under 215 ILCS 5/155(1) [§155] for Country Mutual engaging in vexatious and unreasonable conduct with respect to his claim. Country Mutual asserts that, as a matter of law, it can have no liability to Abudayya under §155 for denying his claim because (1) there is a genuine, *bona fide* dispute as to coverage under the Policy for the loss; and (2) where the loss is not covered by the Policy, Country Mutual cannot be liable for taxable costs for not paying the claim. Abudayya has not asked for summary judgment upon Count II, but argues there are genuine issues of material fact Country Mutual's disclaimer of coverage was unreasonable.

§155 provides in relevant part:

> In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus [additional amounts set forth in the statute.] 215 ILCS 5/155(1).

§155 affords an extracontractual remedy to an insured who encounters unnecessary difficulties when an insurer withholds policy benefits. *Evergreen Real Estate Services LLC v Hanover Insurance Co.,* 2019 ILApp(1st) 181867; *McGee v. State Farm Fire & Casualty Co.,* 315 Ill.App.3d 673, 734 N.E.2d 144, 248 Ill.Dec. 436 (2nd Dist. 2000); *Green v. International Insurance Co.,* 238 Ill.App.3d 929, 605 N.E.2d 1125, 179 Ill.Dec. 111 (2nd Dist. 1992). It is intended to make lawsuits by policyholders economically feasible and to punish insurers for misconduct. *O'Connor v. Country Mutual Insurance Co.,* 2013 ILApp(3d) 110870, 999 N.E.2d 705, 376 Ill.Dec. 530; *McGee,* 315 Ill.App.3d at 681. Its purpose is not only to aid the insured, but also to discourage insurers from profiting by their superior financial positions while delaying in the payment of contractual obligations. *Keller v State Farm Insurance Co.,* 180 Ill.App.3d 539, 536 N.E.2d 194, 129 Ill.Dec. 510 (5th Dist. 1989).

Whether a delay is vexatious and unreasonable is a question of fact that must be assessed based on the totality of the circumstances taken in broad focus. *Keller,* 180 Ill.App.3d at 556; *Fassola v. Montgomery Ward Insurance Co.,* 104 Ill.App.3d 825, 433 N.E.2d 378, 60 Ill.Dec. 581 (3rd Dist. 1982). Neither the length of time, the amount of money involved, nor any other single factor taken by itself is controlling in determining if a delay is vexatious or unreasonable. *Deverman v. Country Mutual Insurance Co.,* 56 Ill.App.3d 122, 371 N.E.2d 1147, 14 Ill.Dec. 94 (4th Dist. 1977). Attorney fees and penalties are not awarded simply because the insurer refuses to settle or was unsuccessful in litigation. *Id.*, 56 Ill.App.3d at 124; *Keller,* 180 Ill.App.3d at 555. Additional considerations include whether there is a *bona fide* dispute concerning coverage, the extent of the insurance company's evaluation and investigation of the claim, and the adequacy of communications between the insurer and insured. *Buais v. Safeway Insurance Co.,* 275 Ill.App.3d 587, 656 N.E.2d 61, 211 Ill.Dec. 869 (1st Dist. 1995).

Where a *bona fide* dispute concerning coverage exists, costs and sanctions are inappropriate. *State Farm Mutual Automobile Insurance Co. v. Smith,* 197 Ill.2d 369, 757 N.E.2d 881, 259 Ill.Dec. 18 (2001). Where an insurer asserts a legitimate policy defense which is argued vigorously and supported by relevant case law, the mere fact the insurer did not prevail does not render it liable under §155. *Herrera v. Benefit Trust Life Insurance Co.,* 126 Ill.App.3d 355, 466 N.E.2d 1172, 81 Ill.Dec. 370 (1st Dist. 1984). *Bona fide* is defined as real, actual, genuine, and not feigned, but rationally based in fact. *McGee,* 315 Ill.App.3d at 683. In other words, in order to state a claim under §155, an insured cannot merely allege the insurer's conduct was vexatious and unreasonable, but he must include a modicum of factual support. *Id.; Bedoya v. Illinois Founders Insurance Co.,* 293 Ill.App.3d 668, 688 N.E.2d 757, 228 Ill.Dec. 59 (1st Dist. 1997).

Having reviewed the pleadings, depositions, affidavits, exhibits on file, and the arguments of counsel, the court **FINDS**, a *bona fide* dispute concerning coverage exists, specifically the applicability of the vacancy exclusion, and, therefore, costs and sanctions under §155 are, inappropriate as a matter of law. Abudayya suggests purported factual determinations which he argues must be submitted to a trier of fact. However, the court **FINDS** those suggestions to be questions of law (particularly those involving the interpretation of policy terms) for the court's determination, rather than fact questions for a jury. The court **FINDS** Country Mutual's denial of coverage was not totally without merit such that §155 is satisfied. It put forth a good faith defense the vacancy exclusion applied to Abudayya's claim (and cited authorities from several jurisdictions supporting its position). An insurer is not liable for a violation of §155 when it takes a reasonable and arguable but erroneous position on its coverage obligations. *Dominick's Finer Foods v. Indiana Insurance Co.,* 2018 ILApp(1st) 161864, 102 N.E.3d 692, 422 Ill.Dec. 23 (Though we have disagreed with [the insurer's] interpretation of the policy language at issue, we do not believe that its position was so unreasonable as to warrant damages under §155. There is a difference between disagreeing with a party's position and finding that position so untenable as to

be unreasonable and evidence of bad faith.); *Rozenfeld v. Medical Protective Co.,* 73 F.3d 154 (7th Cir. 1996); *Evergreen Real Estate Services.,* 436 Ill Dec. at 489.

C. Damages.

The Motion also argues there is no genuine issue of material fact as to the extent of Abudayya's damages. Country Mutual, in its Response to the Motion, avers discovery is still on-going as to the issue of Abudayya's damages. The court, accepting that representation, then, **FINDS** genuine issues of material fact exist as to the extent of Abudayya's damages, and therefore, **DENIES** the Motion as to damages.

Conclusion

WHEREFORE, IT IS ORDERED:

1. For the above reasons, Plaintiff's Motion for Summary Judgment is **ALLOWED** as to Count I of the Complaint and Defendant's Second Affirmative Defense, and judgment is entered in favor of Plaintiff and against Defendant as to Count I of the Complaint, but the issue of Damages is reserved for further consideration by the court.
2. For the above reasons, Defendant's Cross-Motion for Summary Judgment is **DENIED** as to Count I of the Complaint, but **ALLOWED** as to Count II of the Complaint and judgment is entered in favor of Defendant and against Plaintiff as to Count II of the Complaint.
3. The Clerk of the Circuit Court is directed to transmit a true copy of this Order to the attorneys of record.

ENTERED this 1st day of October, 2024

Thomas M. O'Shaughnessy,
Circuit Judge