2020 IL App (1st) 182353-U

Nos. 1-18-2353 & 1-19-0656 cons.

Order filed December 4, 2020

Fourth Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SUSAN S. BARRON,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 17 L 8980
	)	
GREAT AMERICAN ASSURANCE COMPANY, an	)	Honorable
Ohio Corporation, and, GREAT AMERICAN	)	Daniel J. Kubasiak,
INSURANCE COMPANY, an Ohio Corporation,	)	Judge, Presiding.
	)	
Defendant-Appellant.	)	

JUSTICE HALL delivered the judgment of the court.
Presiding Justice Gordon and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's motion to dismiss was properly granted where plaintiff failed to allege specific facts demonstrating a cause of action in her third amended complaint; plaintiff's motion to vacate, or in the alternative, reconsider was properly denied where plaintiff failed to establish sufficient grounds for vacating the judgement; the trial court had jurisdiction to consider the motion for and to award attorney fees; and appellee's brief will not be stricken where plaintiff does not provide a proper basis to do so.

¶ 2 Plaintiff, Susan S. Barron, appeals the circuit court's grant of a motion to dismiss in favor of defendants, Great American Assurance Company and Great American Insurance Company, (collectively Great American), on plaintiff's third amended complaint. The third amended complaint alleged that Great American made improper disclosures of information in violation of common and statutory law and sought $180,455.00 in damages.

¶ 3 Plaintiff raises the following issues on appeal: (1) whether the trial court erred in granting Great American's motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2018)), on August 17, 2018; (2) whether the trial court erred in denying plaintiff's motion to vacate, or in the alternative, reconsider the August 17, 2018, order pursuant to section 2-1301 of the Code (735 ILCS 5/2-1301 (West 2018)); (3) whether the trial court erred in granting Great American's motion for attorney fees pursuant to section 5/1021(C) of the Illinois Insurance Code (Insurance Code) (215 ILCS 5/1021 (C) (West 2018)), subsequent to the August 17, 2018, final order; (4) whether Great American's appellee's brief follows the requirements of Supreme Court Rule 341 (Ill. Sup. Ct R. 341(i) (eff. May 25, 2018)); and (5) whether portions of Great American's appellee's brief should be stricken pursuant to Supreme Court Rule 191 (Ill. Sup. Ct. R. 191(a) (eff. Jan 4, 2013)).

¶ 4 The orders giving rise to plaintiff's appeal were entered on August 17, 2018, October 3, 2018, December 13, 2018, and March 15, 2019. The initial orders were included in plaintiff's notice of appeal in case number 18-2353, filed on November 1, 2018. The later orders were post-judgment orders that plaintiff included in her notice of appeal in case number 19-0656, filed on April 2, 2019. This court consolidated the separate appeals.

¶ 5 For the reasons that follow, we affirm the judgment of the circuit court.

¶ 6 BACKGROUND

¶ 7 A. Factual Background

¶ 8 Plaintiff purchased equine insurance for her horse Coach[1] from Great American in the amount of $12,000 under policy AMP #4587770-07 in February of 2016. The policy period was from February 9, 2016 to February 9, 2017. Plaintiff entered into an agreement with Palladia Farm, LLC (Palladia), which was owned by Margaret Clayton (Clayton) on May 26, 2015, to provide boarding and other services to Coach. On February 15, 2016, while in the care of Palladia, Coach suffered six fractures in his left front leg, which led to him being euthanized. Great American subsequently paid plaintiff the full amount of the policy benefits later that month.

¶ 9 On an unspecified date in February of 2016, plaintiff informed Great American, through its insurance adjuster, Melissa Bell (Bell), of factual details concerning information/data that she considered to be privileged and confidential. Plaintiff alleged that she was required under the policy to disclose material facts or circumstances relating to the policy and the horse insured under the policy.

¶ 10 Specifically, plaintiff indicated that she disclosed the following information to Bell:

- The profound emotional attachment plaintiff's daughter, Amelia Barron (Amelia), had to Coach and who had been riding and caring for Coach since she was a pre-teen;
- The emotional attachment plaintiff had to Coach since she had been caring for him together with her daughter for eight years;
- Plaintiff was present when Coach was euthanized, had witnessed his suffering beforehand, had observed the faces and the demeanor of his grooms, Hector Perez (Perez) and Jose Garcia (Garcia) and directly spoke with Garcia the morning of February 15, 2016;

[1] Coach is the name plaintiff uses throughout her pleadings; however, the horse was also named My Archangel.

- The emotional devastation that Amelia experienced upon hearing of Coach's death;
- The profound guilt Amelia felt because she felt she went away to college, leaving Coach;
- Perez and Garcia were the grooms who were directly responsible for Coach's care and safety and who were responsible for turning Coach outdoors on the morning of February 15, 2016;
- Perez and Garcia were [allegedly] undocumented immigrants;
- Clayton and Palladia did not train any grooms who handled the boarded show horses;
- The National Weather Service issued two winter weather advisories for the morning of February 15, 2016, when the grooms turned Coach outdoors;
- Planned testimony of Frank Wachowski, a retired meteorologist who would testify to the climatic conditions of the entire area of Green Oaks, IL; and
- Planned testimony of Ms. Karen Panaigua (Panaigua), an employee of Clayton and Palladia, who would testify that Clayton required all of her employees, grooms and staff to sign nondisclosure agreements as a condition to working at Palladia and forbade any former employee or employee from communicating any of the internal operations of Palladia. Panaigua would also testify that she was fearful of retribution from Clayton in discussing this matter and that she would not testify without an Order of Protection.

¶ 11 Plaintiff indicated that in one of the phone calls with Bell, Bell informed her that she told Clayton about plaintiff's communications. Plaintiff indicated that it was only after she provided Great American with this information that she was told that she and Palladia shared the same insurance.

¶ 12 On February 22, 2016, plaintiff wrote to Great American and warned them not to disclose her private and confidential communications to Clayton and any of her agents or any third party.

¶ 13 On March 1, 2016, plaintiff wrote a second directive to Great American, in which she again warned them not to disclose her private and confidential communications/information to Clayton and any of her agents or any third party.[2]

¶ 14 On May 26, 2016, plaintiff filed a lawsuit against Palladia and Clayton in Lake County, under case number 16 L 413. In that suit, plaintiff raised the following claims: (1) rescission of contract due to fraudulent inducement; (2) recession of contract due to unlawful exculpatory provision; (3) breach of fiduciary duty; (4) willful, wanton, misconduct and the disregard of care and safety of a companion animal; (5) consumer fraud and deceptive business practices; (6) breach of duty of care; (7) wrongful death and loss of companion; and (8) emotional distress.

¶ 15 Plaintiff indicated that another insurance representative, Stephanie Berryman (Berryman), subsequently contacted her about her claim. Plaintiff indicated she told Berryman the same information given to Bell as well as the following information: (1) plaintiff's mental impressions; (2) Perez and Garcia responsibility for Coach's safety and their responsibility for turning out Coach on the day he sustained multiple fractures; (3) trial strategies; (4) subjects and information subpoenaed; (5) the names of expert and lay witnesses who would be called as witnesses in the Lake County litigation; (6) their planned testimonies; (7) plaintiff's intended discovery requests; and (8) plaintiff's intent to seek to disqualify Attorney Ocrant for a conflict of interest.

¶ 16 B. Procedural Background

¶ 17 During the pendency of the Lake County case, plaintiff filed suit against Great American in Cook County on September 6, 2017, in case number 17 L 8980. In her complaint, she alleged: (1) bad faith, improper claims practices in violation of 215 ILCS-5/154.6 (West 2017); (2) bad

[2] Plaintiff identifies the second directive as exhibit five, reiterating that prior written authorization was required for Great American to have any communications with a third party. This exhibit was included in the common law record.

faith, improper claims practice in violation of 215 ILCS 5/154.5 (West 2017); (3) breach of confidential and privileged information of an insured in violation of 215 ILCS 5/1014 (West 2017); (4) intentional willful, wanton misconduct and disregard of dissemination of confidential and privileged information of insured to third parties; (5) reckless willful, wanton misconduct and disregard of confidential and privileged information of insured to third parties; (6) consumer fraud and deceptive business practices, and; (7) breach of the implied covenant of good faith and fair dealings.

¶ 18 On October 23, 2017, plaintiff sought leave to file her first amended complaint based on her receiving additional information from Great American. She sought to replace her initial complaint with the first amended complaint. On October 25, 2017, the motion was granted.

¶ 19 On September 8, 2017, the parties in the Lake County case entered into an agreed order, dismissing it without cost to any party and plaintiff was barred from litigating any of the claims against the named defendants (Margret Clayton and Palladia Farm LLC).

¶ 20 On October 25, 2017, plaintiff filed her first amended complaint in Cook County alleging: (1) that a declaratory judgement should be issued pursuant to 735 ILCS 5/2-701 (West 2016), to show that Great American was prohibited from disclosing plaintiff's information; (2) intentional willful, wanton misconduct and disregard of dissemination of confidential and privileged information of insured to third parties; (3) reckless willful, wanton misconduct and disregard of confidential and privileged information of insured to third parties; (4) consumer fraud and deceptive business practices; and (5) breach of the covenant of confidence; and (6) breach of the implied good covenant of good faith and fair dealing.

¶ 21 On November 8, 2017, Great American filed a motion to dismiss plaintiff's first amended complaint pursuant to section 2-615 of the Code (735 ILCS 5/2-615(a) (West 2016)).

¶ 22 On January 10, 2018, the trial court entered an order granting Great American's motion to dismiss the plaintiff's first amended complaint without prejudice, finding that plaintiff failed to allege facts showing she suffered damages for counts two through six. Additionally, the court held that plaintiff failed to allege a tangible, legal interest for which the court could grant a declaratory judgment.

¶ 23 On February 2, 2018, plaintiff filed her second amended complaint alleging: (1) breach of fiduciary duty; (2) intentional, malicious, and willful wanton misconduct; (3) malicious, willful, and wanton reckless misconduct; (4) consumer fraud and deceptive practices; (5) breach of confidences; and (6) breach of implied covenant of good faith and fair dealings.

¶ 24 On February 23, 2018, Great American filed a section 2-615 (735 ILCS 5/2-615 (West 2018)) motion to dismiss plaintiff's second amended complaint, which the circuit court granted on April 27, 2018, without prejudice.

¶ 25 The court found that multiple counts of plaintiff's second amended complaint stated claims for conduct that violated section 5/1014 of the Insurance Code (215 ILCS 5/1014 (West 2018)). Since section 5/1021 of the Insurance Code provides the exclusive remedy for occurrences that violate section 5/1014, the court found that plaintiff could not allege any other theories of recovery for these actions.

¶ 26 On May 18, 2018, plaintiff filed her third amended complaint, which is at issue on appeal, alleging: (1) a statutory violation of section 5/1014 of the Insurance Code (215 ILCS 5/1014 (West 2018)) occurred when Great American failed to keep in confidence and not disclose any personal or privileged information that was collected and received from plaintiff in connection with her policy; (2) breach of contract under Great American's data policy; and (3) that Great American's

disclosures to Attorney Ocrant and Clayton amounted to "vexatious and unreasonable actions" pursuant to section 5/155 of the Insurance Code (215 ILCS 5/155 (West 2018)).

¶ 27 On June 8, 2018, Great American filed a motion to dismiss plaintiff's third amended complaint pursuant to sections 2-615(a) and 2-619(a)(9) of the Code (735 ILCS 5/2-615(a), 5/2-619(a)(9) (West 2018)), alleging that: (1) plaintiff's claims must be dismissed pursuant to section 2-619 because she could not establish any actual damages due to her voluntary dismissal of the underlying case with prejudice and she could not re-litigate discovery disputes from the Lake County case; (2) counts two and three must be dismissed pursuant to section 2-615 because section 5/1021 of the Insurance Code provides the exclusive remedy for the alleged disclosures of any personal or privileged information and limits plaintiff to actual damages; (3) plaintiff's claims must be dismissed pursuant to section 2-615 because she failed to allege facts demonstrating any improper disclosures by Great American; and (4) counts one and two must be dismissed pursuant to section 2-615 because plaintiff failed to allege any actual damages caused by Great American.

¶ 28 On July 11, 2018, plaintiff filed a response to Great American's motion to dismiss the third amended complaint alleging that: (1) Great American's section 2-619 motion should be denied pursuant to Supreme Court Rule 191(a) (Ill. Sup. Ct. R. 191(a) (eff. Jan. 4, 2013)); (2) Great American's *res judicata* argument was inapplicable, which should result in the denial of its section 2-619 motion; (3) Great American's collateral estoppel argument was inapplicable, which should result in the denial of the section 2-619 motion; (4) counts two and three were not within the purview of section 5/1021 of the Insurance Code, therefore, Great American's section 2-615 motion must be denied; (4) count two was a cause of action for breach of contract and was not a violation of section 5/1014 or within the purview of section 5/1021; (5) count three was a cause of action under section 5/155 and raised an issue of liability under the Great American policy AMP

#4587770-07 against Great American and its vexatious and unreasonable actions of violating the data provision of the policy; (6) Great American's section 2-615 motion must be denied because section 5/155 of the Insurance Code was applicable to the contract which was in full force and affect when Great American breached the data provisions of policy AMP #4587770-07; (7) Great American's section 2-615 motion must be denied because the alleged facts clearly demonstrate Great American's unlawful and illegal disclosure to third parties to policy AMP #4587770-07; and (8) Great American's section 2-615 motion must be denied because counts one and two clearly alleged damages caused by Great American's disclosure of plaintiff's communications, data and information to third parties.

¶ 29 On August 17, 2018, the trial court granted Great American's motion to dismiss plaintiff's third amended complaint with prejudice pursuant to section 2-615, finding that plaintiff failed to allege that Great American wrongfully disclosed any confidential information under all three counts. The court found that plaintiff failed to allege that she suffered damages in counts one and two. The trial court also noted that although plaintiff claimed certain pieces of evidence were eliminated, she did not specifically identify what or how. The trial court found that, at most, plaintiff mentioned that Attorney Ocrant would not produce employment related files and contact information for the grooms responsible for Coach. Even though plaintiff alleged that those items were not produced, she did not clearly allege that they were destroyed or "eliminated" because of any confidential information that was disclosed.

¶ 30 The court also concluded that plaintiff failed to allege facts that showed she was entitled to receive a remedy under section 5/155 on count three. The trial court found that section 5/155 was unavailable for plaintiff's third claim because she did not allege that the payment from Great American was untimely and could not allege that Great American's actions were vexatious and

unreasonable. The trial court did not make a ruling on Great American's section 2-619 motion since it granted the section 2-615 motion.

¶ 31 C. Post-Judgment Proceedings

¶ 32 On September 13, 2018, plaintiff filed a motion to vacate or in the alternative reconsider the August 17, 2018, order, alleging that the trial court misapplied the law.

¶ 33 On September 14, 2018, Great American filed a motion for attorney fees pursuant to section 5/1021(C) of the Insurance Code (215 ILCS 5/1021(C) (West 2018)) or in the alternative as a sanction pursuant to Ill. Sup. Ct. R. 137(a) (eff. Jan. 1, 2018). In seeking this remedy, Great American noted the behavior of counsel in not only this case but the Lake County case.

¶ 34 On October 3, 2018, the trial court entered an order denying plaintiff's motion to vacate or in the alternative reconsider the August 17, 2018, order. Plaintiff filed a notice of appeal on November 6, 2018 (case number 18-2353).

¶ 35 On October 31, 2018, plaintiff filed a response to Great American's motion for attorney fees, arguing that the trial court had no jurisdiction to consider the motion, Great American waived its right to attorney fees, and the motion was not an appropriate posttrial motion.

¶ 36 On December 13, 2018, the trial court granted Great American's motion for attorney fees pursuant to section 5/1021 of the Insurance Code (215 ILCS 5/1021 (West 2018)) and entered judgment in the amount of $48,519.27.

¶ 37 On February 4, 2019, plaintiff filed a brief in opposition to Great American's requested attorney fees. Plaintiff contended that the invoices were not accurate and could not be considered reasonable. Plaintiff argued that an attorney overcharged a five-minute task at one hour and billed for appearances that did not occur. Plaintiff contested a total of 16.4 hours' worth of charges and

argued that those amounts should have been deducted from the judgment. Further, plaintiff contended that the redacted time entries that Great American provided should not be allowed.

¶ 38 On February 21, 2019, Great American filed a response, contending that the invoices were accurate and reflected the developments in the case. Great American argued that its redactions were proper because billing records are subject to attorney-client privilege, however, they made un-redacted entries available for an in-camera review in order for the court to exercise its discretion and to judge its reasonableness.

¶ 39 On March 15, 2019, after a prove-up hearing, the trial court entered an order granting Great American $48,519.27 in attorney fees. The trial court noted that it assessed the reasonableness of fees and found that Great American's attorneys exercised proper billing judgment. In making its determination, the trial court stated that, according to its notes, the attorney whose time plaintiff questioned was present in court on the relevant dates. It also considered the unredacted billing statements that were viewed during an in-camera inspection, since plaintiff argued that the redacted statements could not be given credence. Plaintiff filed a notice of appeal from the post-judgment orders on April 5, 2019 (case number 19-0656).

¶ 40 ANALYSIS

¶ 41 Plaintiff raises the following issues on appeal: (1) whether the trial court erred in granting Great American's motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2018)) on August 17, 2018; (2) whether the trial court erred in denying plaintiff's motion to vacate, or in the alternative, reconsider the August 17, 2018, order pursuant to section 2-1301 of the Code (735 ILCS 5/2-1301 (West 2018)); (3) whether the trial court erred in granting Great American's motion for attorney fees pursuant to section 5/1021(C) of the Insurance Code, subsequent to the August 17, 2018, final order; (4) whether Great American's response brief

follows the requirements of Rule 341(i) (Ill. Sup. Ct R. 341 (i) (eff. May 25, 2018); and (5) whether portions of Great American's response brief can be stricken pursuant to Rule 191(a) (Ill. Sup. Ct. R. 191(a) (eff. January 4, 2013)).

¶ 42 A. Violations of Rule 341

¶ 43 As a preliminary manner, plaintiff contends that Great American's brief should be stricken or disregarded because it fails to comply with Rule 341 (Ill. Sup. Ct. R. 341 (i) (eff. May 25, 2018)). While plaintiff did not file a motion to strike the brief, she nevertheless contends that Great American's brief failed to prove that sections of plaintiff's appellate brief were unsatisfactory. Plaintiff maintains that Great American fails to even mention sections of her brief (nature of the case, statement of issues presented for review, and statement of facts), and such failure should result in Great American's brief being stricken pursuant to Rule 341(i).

¶ 44 Rule 341 (i) states:

> "Briefs of Appellee and Other Parties. The brief for the appellee and other parties shall conform to the foregoing requirements, except that items (2), (3), (4), (5), (6), and (9) of paragraph (h) of this rule need not be included except to the extent that the presentation by the appellant is deemed unsatisfactory." Ill. Sup. Ct. R. 341 (i) (eff. May 25, 2018).

These rules are not mere suggestions, but are compulsory. *U.S. Bank Trust Nat. Ass'n v. Junior*, 2016 IL App (1st) 152109, ¶17. The purpose of these rules is to require the parties to present clear and orderly arguments before a reviewing court, so that the court can properly ascertain and dispose of the issues involved. *Id.* Here, Great American's response brief had its own nature of the case, issues presented and statement of facts. Each section differs from plaintiff's respective sections. By providing these contrasting sections, Great American did, to the extent that it deemed it unsatisfactory, included the sections listed pursuant to Rule 341(i). Great American followed

Rule 341(i) and it has helped to make it a clear and orderly argument. *Id*. This court will not strike Great American's response brief when it is not in violation of the Rule 341(i).

¶ 45 Plaintiff further contends that Great American's brief should be stricken because it relies on unverified, uncertified, and unsworn facts that were not a part of the record in violation of Rule 191(a) (Ill. Sup. Ct. R. 191(a) (eff. January 4, 2013)).

¶ 46 Rule 191(a) states, in pertinent part:

> "(a) Requirements. Motions for summary judgment under section 2-1005 of the Code of Civil Procedure and motions for involuntary dismissal under section 2-619 of the Code of Civil Procedure must be filed before the last date, if any, set by the trial court for the filing of dispositive motions. Affidavits in support of and in opposition to a motion for summary judgment under section 2-1005 of the Code of Civil Procedure, affidavits submitted in connection with a motion for involuntary dismissal under section 2-619 of the Code of Civil Procedure, and affidavits submitted in connection with a motion to contest jurisdiction over the person, as provided by section 2-301 of the Code of Civil Procedure, shall be made on the personal knowledge of the affiants * * *." Rule 191(a) (Ill. Sup. Ct. R. 191(a) (eff. January 4, 2013)).

¶ 47 Rule 191 specifically applies to proceedings in the trial court under sections 2-1005, 2-619, and 2-301(b) of the Code (735 ILCS 5/2-1005, 2-619, 2-301(b) (West 2018)). It has been held that Rule 191(a) "should be construed according to the plain and ordinary meaning of its language." *Robidoux v. Oliphant*, 201 Ill.2d 324, 347 (2002). Further, "its provisions should be adhered to as written." *Id*. Plaintiff cannot apply Rule 191(a) to Great American's response brief on appeal, the plain language of the rule indicates it only applies to proceedings under sections 2-1005, 2-619

and 2-301(b); none of which are before this court on appeal. This court finds no reason to strike Great American's response brief.

¶ 48 B. Estoppel Per the Terms of the Lake County Case Dismissal

¶ 49 As an additional preliminary matter, Great American contends that plaintiff is estopped from raising the claims contended on this appeal based on the terms of the agreed dismissal of the Lake County case against Palladia Farms and Clayton.

¶ 50 Great American contends that this court is unable to hear the appeal because the plaintiff is estopped from bringing these claims due to her previous Lake County lawsuit. Plaintiff alleged the following claims in Lake County against Palladia Farms and Clayton: (1) rescission of contract due to fraudulent Inducement; (2) rescission of contract due to unlawful exculpatory provision; (3) breach of fiduciary duty; (4) willful, wanton, misconduct and the disregard of care and safety of a companion animal; (5) consumer fraud and deceptive business practices; (6) breach of duty of care; (7) wrongful death and loss of companion; and (8) Emotional distress.

¶ 51 Collateral estoppel prevents a party from relitigating an issue if the following elements are present: (1) the issue decided in the prior litigation is identical to the one presented in the current case, (2) there was a final adjudication on the merits in the prior case, and (3) the party against whom estoppel is asserted was a party to, or in privity with a party to, the prior litigation. *Pine Top Receivables of Illinois, LLC v. Transfercom, Ltd*., 2017 IL App (1st) 161781, ¶ 8. The theory of collateral estoppel does not bar plaintiff from raising these claims. Although Great American may be privy to the prior litigation and a final adjudication on the merits; the issues presented in Lake County are not identical to the issues raised in this case. The Lake County lawsuit raised different claims against Palladia and Clayton. This case is dealing with the determinations that the trial court made in Cook County against Great American. We now turn to the merits of petitioner's appeal.

¶ 52 C. Section 2-615 Motion to Dismiss

¶ 53 On appeal, plaintiff contends that she properly pled specific facts and presented exhibits showing that specific communications were disclosed without her authority in her third amended complaint. Additionally, she maintains that she pled facts that showed she was forced to voluntarily dismiss the Lake County litigation. Plaintiff contends that she specifically alleged that the grooms were unreachable, and that their employment work files, and work records were made unavailable in the Lake County case because of the disclosures.

¶ 54 A motion to dismiss pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2018)) challenges a complaint's legal sufficiency based on defects apparent on its face. *Marque Medicos Archer LLC v. Liberty Mutual Ins. Corp*., 2018 IL App (1st) 163350, ¶ 13. In determining the sufficiency of a complaint, we must construe the allegations in the light most favorable to the plaintiff and determine whether they state a cause of action upon which relief can be granted. *Id.* All well-pleaded facts and all reasonable inferences drawn from those facts, are taken as true. *Id*. Dismissal is appropriate only where it is apparent that no set of facts can be proven that would permit the plaintiff to recover. *Id*. The standard of review for a motion to dismiss pursuant to section 2-615 is *de novo*. *Id.*

¶ 55 1. Violation of Section 5/1014 (Count I)

¶ 56 Plaintiff first contends that she pled specific facts that showed Great American was in violation of section 5/1014 of the Insurance Code when it made improper disclosures of her information. Plaintiff alleged in Count I of her third amended complaint that Great American owed her a statutory duty under section 5/1014 to keep in confidence and not disclose any personal or privileged information that was collected or received from plaintiff in connection to her equine policy AMP #4587770-07.

¶ 57 Section 5/1014 of the Insurance Code is part of Article XL, Insurance Information and Privacy Protection. The scope of Article XL is set out in section 5/1002 of the Code, which specifies the type of insurance policies that are covered under the article:

> "Scope. (A) The obligations imposed by this Article shall apply to those insurance institutions, agents or insurance-support organizations which, on or after the effective date of this Article: (1) in the case of life, health or disability insurance: * * * (B) The rights granted by this Article shall extend to: (1) in the case of life, health or disability insurance, the following persons who are residents of this State * * *. " 215 ILCS 5/1002(A)(1)(B)(1)(West 2018)

¶ 58 To benefit from the protections provided by section 5/1014, section 5/1002 requires that the subject insurance policy must be a policy insuring life, health, or disability. The equine insurance that insured Coach, is not included in the scope of Article XL. "It is a fundamental principle of statutory construction that the express mention of one thing in a statute excludes all other things not mentioned." *Mitchell v. Village of Barrington*, 2016 IL App (1st) 153094, ¶35 (citing *Requnea v. Cook County Officer's Electoral Board*, 295 Ill. App. 3rd 728, 733). Plaintiff's allegation that Great American violated section 5/1014 is not supported by the statute. The express mention of the obligations and rights regarding life, health, and insurance policies, excludes all other policies, including equine insurance. Count one in plaintiff's third amended complaint provided an allegation that was insufficient to establish Great American made an improper disclosure pursuant to section 5/1014.

¶ 59 2. Breach of Insurance Contract (Count II)

¶ 60 Plaintiff alleges that she properly pled specific facts and presented exhibits showing that there were specific communications that were disclosed without her authority in violation of Great

American's policy. Plaintiff's breach of contract claim alleged that Great American violated specific terms in their agreement which promised to not share, disclose, or allow access to her data to those not allowed to by law, and to only allow access to provide support or to the extent necessary for certain purposes. Plaintiff alleges that because of the breach, she was forced to abandon her Lake County case.

¶ 61 Plaintiff cites to the following provisions to show that Great American promised it would not share the data of the insured are as follows:

> "The members of Great American Insurance Group ("Great American," including those companies listed in this Notice) respect your right to privacy. We want you to know about our procedures for protecting your privacy and your rights and responsibilities regarding nonpublic personal information (referred to as "data" in this notice) we receive about you. We want you to understand how we gather data about you and how we protect it. The terms of this Notice apply to those individuals who inquire about or obtain insurance from Great American primarily for personal, family or household purposes. Great American does not share your data except as allowed by law. As a result, you do not need to take any action under this Notice."

Plaintiff cites to the following provisions to show that Great American promised it would not share the data to outside groups without prior authorization:

> "Data about you will be kept in our records. We may disclose data to issue and service policies and settle claims. Generally, we will not disclose data about you to any outside group without your prior authorization. However, we may, as allowed by law, share data that we collect as set forth below… When we disclose your data to third parties for certain purposes described above, we will require them to use your data only for its

> intended purpose...The only people who have access to your data are those who need it to provide or support the provision of products or services to you. We use a system of passwords and other appropriate physical, electronic and procedural safeguards to protect against unauthorized access to your data. We have educated our employees about this Notice and the importance of customer privacy."

¶ 62 To prevail on a claim of breach of contract, a plaintiff must show: (1) the existence of a valid and enforceable contract (2) performance by the plaintiff (3) breach of the contract by the defendant, and (5) damages or injury to the plaintiff resulting from the breach. *Carlson v. Rehabilitation Institute of Chicago,* 2016 IL App (1st) 143853, ¶ 13.

¶ 63 The parties agree that they had a valid contract and that plaintiff performed by making payments on the policy. They of course do not agree that Great American breached the contract. The policy indicates that the sharing of information might happen if needed, but Great American would attempt to limit the sharing. Plaintiff does not identify what specific disclosures were made; she indicates all the information that was told to Great American was improperly disclosed. Plaintiff does not distinguish which information created a breach and which information was legitimately used to assist in determining what her eligibility was under the policy, which Great American reserved the right to do. Plaintiff does not provide specific allegations of an improper disclosure based on the contract between the parties.

¶ 64 Plaintiff intertwines clearly permissible disclosures of the events surrounding the injuries sustained by Coach, which lead to him being euthanized, and general concepts (mental impressions of her lawsuit, trial strategies, subjects and information subpoenaed, plaintiff's intended discovery requests), without making distinctions. *Turner v. Memorial Medical Center,* 233 Ill. 2d 494, 508 (2009) (motion to dismiss upheld when general concepts are plead). Plaintiff failed to specifically

allege improper disclosures in violation of the Great American policy; the pleadings cannot survive a section 2-615 motion to dismiss.

¶ 65 3. Amounts Available Pursuant to Section 5/155 (Count III)

¶ 66 Plaintiff alleges that she pled specific facts to show a cause of action pursuant to section 5/155 of the Insurance Code (215 ILCS 5/155 (West 2018)) because Great American disclosed confidential information to a third party, which was vexatious and unreasonable conduct. Plaintiff sought the $60,000.00 allowed by the statute. Plaintiff indicates the court misconstrued her allegations and she did not allege the policy payment was "untimely."

¶ 67 The statute provides, in pertinent part:

> "(1) 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 an amount not to exceed any one of the following amounts: (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs; (b) $60,000 * * *. " 215 ILCS 5/155 (West 2018)

An unreasonable delay is required under this statute. Neither plaintiff nor Great American allege that there was a delay. Without an unreasonable delay, a claim cannot be brought under the statute. Further, it has been held that the purpose of section 5/155 is " 'to provide a remedy to an insured who encounters unnecessary difficulties when an insurer withholds policy benefits.' " *Williams v. American Country Ins. Co.*, 833 N.E. 2d 971. No policy benefit was withheld, there was no

unreasonable delay, thus plaintiff cannot bring forth this claim. Plaintiff is unable to plead facts sufficient to survive a section 2-615 motion to dismiss**.**

¶ 68 Taking all factual allegations in plaintiff's third amended complaint to be true, none of the allegations alone or collectively allege any improper disclosures by Great American that were unnecessary pursuant to section 5/1014 or the contract between the parties. There exists no set of facts where plaintiff would be entitled to recover. The trial court properly granted the motion to dismiss plaintiff's third amended complaint.

¶ 69 D. Motion to Vacate, or in the Alternative Reconsider

¶ 70 Plaintiff next challenges the trial court's denial of her motion to vacate, or in the alternative reconsider the August 17, 2018**,** order. Plaintiff alleges that the trial court erred by misreading her third amended complaint, and then denying her motion to vacate or reconsider. Plaintiff contends the trial court erred by misapplying the law and granting Great American's motion to dismiss and then by denying plaintiff's motion to vacate or reconsider, without setting a briefing or schedule or hearing.

¶ 71 The moving party has the burden of establishing sufficient grounds for vacating the judgement. *Standard Bank and Trust Co. v. Madonia*, 2011 IL App (1st) 103516, ¶ 8. This court must determine whether the trial court's ruling denying the motion was a fair and just result, which did not deny the moving party of substantial justice. *Id.* The standard of review is abuse of discretion. *Id.* An abuse of discretion occurs when the trial court acts arbitrarily without judgement or its decision exceeds the bounds of reason and ignores principles of law. *Id.*

¶ 72 Plaintiff fails to argue how this was an error. Her allegation regarding her motion to vacate, or in the alternative, reconsider, is conclusory and it simply cites to the law regarding a motion to reconsider and not the law on a motion to vacate. Plaintiff concludes that the trial court erred but

does not provide an analysis to support this contention. *Simpkins v. CSX Transp., Inc.*, 2012 IL 110662, ¶ 26 (a plaintiff may not rely on conclusions of law or fact unsupported by factual allegations). Plaintiff has not established sufficient grounds for vacating the judgment.

¶ 73 When asking a trial court to reconsider based on its misapplication of law, the standard of review is *de novo*. *Belluomini v. Zaryczny*, 2014 IL App (1st) 122664, ¶ 20. Plaintiff's motion alleged that the court misapplied the Insurance Code in making its determination for count one. Plaintiff alleged Great American made improper disclosures in violation of section 5/1014 and she was able to recover under section 5/1021. For count two, plaintiff alleged she sufficiently pled the elements establishing a breach of contract claim for an insurance contract. Plaintiff alleged that the plain language of the data provision under policy AMP #4587770-07 clearly stated Great American was prohibited from disclosing plaintiff's information, data, and communications to the parties in the Lake County case. Lastly, for count three plaintiff alleged the court misconstrued the pleadings and misapplied the Insurance Code. Plaintiff alleged that Great American's conduct amounted to "vexatious and unreasonable" behavior that is prohibited under section 5/155 of the Insurance Code and the court. Plaintiff alleged the court's finding that section 5/155 is only available when an insurer makes an untimely payment was an error.

¶ 74 The allegations and supporting authorities that plaintiff used in her motion to reconsider did not demonstrate that the trial court misapplied the law. Plaintiff restated her positions and cited to case law that demonstrated that statutory construction should be used, and the plain language of the statute should be given effect for counts one and three. In regard to the contractual allegation contained in count two, plaintiff supported her allegation with case law that demonstrated that the plain language of a contract and Insurance Code could be the basis of analysis. When it comes to statutory construction, it is correct that the plain language should be given effect. *Advincula v.*

United Blood Services, 176 Ill.2d 1, 18 (1996). However, the plain language "operates only when the statute under consideration is free from apparent ambiguity." *Id*. Ambiguity is "when it is capable of being understood by reasonably well-informed persons in two or more different senses, thus warranting the consideration of other sources to ascertain the legislative intent." *Id.* Plaintiff seeks a determination that improper disclosures were made even though statutory and contractual language exists that permits disclosures to be made. The omitted and relevant language requires other considerations to be made outside of strict statutory construction. Plaintiff's motion and the record are not free from ambiguity. Plaintiff has not established a sufficient ground for the court to reconsider its decision.

¶ 75 E. Grant of Attorney Fees

¶ 76 Finally, plaintiff contends that the trial court erred in granting Great American's petition for attorney fees. Plaintiff contends that because the fee petition was granted after the trial court dismissed the third amended complaint it was outside of the court's jurisdiction. A trial court's order to grant attorney fees will not be disturbed absent an abuse of discretion. *Herlehy v. Bistersky*, 407 Ill. App. 3d 878, 898 (2010).

¶ 77 The trial court dismissed the third amended complaint on August 17, 2018. Great American filed its motion for attorney fees on September 14, 2018. The circuit court has jurisdiction to entertain a motion for attorney fees within 30 days of a final order. *Herlehy*, 407 Ill. App. 3d at 898. The trial court had jurisdiction to hear the motion because it was filed within 30 days of the court's final order. The court correctly found that it was within its jurisdiction to hear the motion for attorney fees, no abuse of discretion can be found.

¶ 78 1. Award of Attorney Fees

¶ 79 Plaintiff contends that the award of attorney fees was in error. Plaintiff argues that counsel for Great American overcharged a five-minute task for an hour. Plaintiff also contends that counsel for Great American had a law student/law clerk deliver documents to the court and labeled those tasks as various hearings, for which the attorney was never present for. Specifically, at issue is the awarding of 16.4 hours of fees that the trial court granted.

¶ 80 In assessing the reasonableness of fees, the trial court should consider a variety of factors, including the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation. *Chicago Title & Trust Co. Trustee under Trust No. 89-044884 v. Chicago Title & Trust Co. Trustee under Trust No. 1092636*, 248 Ill. App. 3d 1065, 1072 (1993).

¶ 81 Here, the trial court considered the affirmations of Great American and its counsel that billing judgment was exercised. The trial court considered the type of services performed, the amount of time expended, the usual and customary charge for the type of services. Additionally, the trial court reviewed its own notes and verified that the attorney in question was in court on the contested dates. The trial court made its decision in accordance with established case law and was in the best position to make the determination on reasonableness. *Id.* Given the considerations made by the trial court, there was no abuse of discretion in awarding attorney fees.

¶ 82 2. *Ex Parte* Interactions

¶ 83 Plaintiff contends that an *ex parte* interaction occurred when an in-camera inspection allowed the trial court to view unredacted billing statements without her being present in violation of cannon 3 of the Code of Judicial Conduct found in Supreme Court Rule 63 (Ill. S. Ct. R. 63 (eff.

Feb. 2, 2017)). Plaintiff cites to the March 15, 2019, order which states that the trial court viewed the unredacted billing statements, she indicates it was only after she read the order that she was made aware of the in-camera inspection. Plaintiff indicates this act was an abuse of discretion and seeks to have the case reassigned to a new trial court on remand. Great American argues that plaintiff was made aware of the in-camera inspection by March 15, 2019. On March 15, 2019, both parties made their arguments, and the order awarding attorney fees was entered. It is unclear from the record when the inspection occurred, but the trial court mentioned it in the order dated March 15, 2019.

¶ 84 Plaintiff admits that she read the order and does not state she raised an objection or filed a motion to contest the matter. Plaintiff's appeal was pending at the time, which limited what the trial court had jurisdiction over. While an appeal is pending, "the trial court may amend the record to correct matters of inadvertence or mistake, but it is denied the power to remedy defects of substance which would make it a new case." *City of Chicago v. Scandia Books Inc.*, 102 Ill. App. 3d 292, 298 (1981). The potential remedy that plaintiff was seeking of changing trial judges, could create substantial changes that would make a new case. Plaintiff has not waived this issue.

¶ 85 An *ex parte* communication is improper when it is "not for scheduling, administrative purposes, or an emergency." *Kamelgard v. American College of Surgeons*, 385 Ill.App.3d 675, 682 (2008). Reviewing an unredacted invoice is not administrative in nature. *Id.* Instead, it is substantive in nature because it goes to the heart of the issue of awarding attorney fees. *Id.* However, even if an *ex parte* communication is improper, for a reversal to be improper, there needs to be a suggestion of bias or improper influence. *Id*. at 683. Otherwise, the error committed constitutes harmless error. *Id*. Plaintiff has not argued a bias or improper influence existed at trial. The in-camera inspection occurred after Great American argued the redacted invoices were

privileged and plaintiff argued the fees were a misrepresentation. It appears the trial court attempted to strike a balance, which goes against the contention that a bias or improper influence existed. Although it was an error to conduct the in-camera inspection *ex parte*, the error was harmless and should not be reversed on this basis.

¶ 86 CONCLUSION

¶ 87 For the forgoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 88 Affirmed.