

No. 1-12-1875

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LESLIE FOY,)
) Appeal from the
) Circuit Court of
 Plaintiff-Appellant,) Cook County
)
 v.)
)
 SAFECO INSURANCE COMPANY OF ILLINOIS,)
)
 Defendant-Appellee.)
)
) No. 08 L 8841
) (transferred to Chancery)
 SAFECO INSURANCE COMPANY OF ILLINOIS,)
)
 Counter-Plaintiff/Appellee,)
)
 v.)
)
 LESLIE FOY,)
)
 Counter-Defendant/Appellant.)
)
) Honorable
) Nancy J. Arnold,
) Judge Presiding.
 SAM BOREK, JOHN H. WICKERT and DANIEL)
 BOREK,)
)
)
 Attorney Respondents/Appellants.)

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JUSTICE EPSTEIN delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's order granting sanctions against plaintiff and her attorneys in favor of insurer is vacated. Case is remanded to trial court for determination of amount of sanctions to be imposed, consistent with this order.

¶ 2 Plaintiff-counterdefendant Leslie Foy and attorney respondents, Sam Borek, John H. Wickert, and Daniel Borek (collectively appellants) appeal from the circuit court order awarding sanctions in the amount of \$185,285.04 against them and in favor of defendant-counterplaintiff Safeco Insurance Company of Illinois (Safeco) pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994). The underlying dispute involved a claim made by Foy on a homeowner's insurance policy issued by Safeco for property located at 6753 South Ada Street in Chicago (Ada Street property) which was destroyed by arson. Safeco began investigating Foy's insurance claim but before it had made a determination about coverage, the attorney respondents filed suit on Foy's behalf. The circuit court decided that Foy was not entitled to coverage because: (1) Foy had no insurable interest in the property “despite her naked title”; and (2) Foy made material misrepresentations to Safeco, both before and after the loss, thus rendering the policy void. The court subsequently entered a sanctions order against appellants.

¶ 3 Although appellants filed a notice of appeal challenging both the circuit court's coverage decision and the imposition of sanctions, they are no longer appealing the underlying coverage decision. This appeal involves only the propriety of the sanctions order entered against Foy and her attorneys. For the reasons that follow, we vacate in part, affirm in part, and remand.

¶ 4

BACKGROUND

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¶ 5 Since 2003, Foy was employed as an executive assistant for one of the attorney appellants, Sam Borek, of the Law Offices of Borek & Associates (formerly Borek & Goldhirsh) in Wilmette. In February 2007, Foy and her three children moved from one rental property in Skokie to another larger rental property. Each was less than fifteen minutes away from the law firm's office. Although her employer paid for Foy's automobile, fuel, automobile insurance, and personal cell phone, she was “barely making ends meet.”

¶ 6 In 2007, Foy became involved in the purchase of the Ada Street property located in the Englewood neighborhood. Although Foy did not contribute financially to the purchase of the property,¹ she executed a mortgage and promissory note on July 10, 2007, in favor of Washington Mutual Bank and acquired title to the property. Two days after the real estate closing, Safeco issued Foy a homeowner's insurance policy for the property. Six days later, on July 18, 2007, a fire broke out, which damaged the vacant structure. Foy was not residing in the home at the time of the fire. The Chicago Fire Department subsequently determined that the fire was intentionally set, but the identity of the arsonist was unknown. Prior to trial, the parties stipulated that the fire was incendiary in nature, but there was no finding that Foy had any involvement in setting the fire.

¶ 7 On July 23, 2007, Foy reported the loss to Safeco. Sandra Parker, the Safeco complex

¹ On Foy's application for the loan and mortgage, “Sapphire Foundation” is identified as holding the \$10,000 down payment. Foy would later admit she had “no idea” what that company was and had nothing whatsoever to do with that company. She would also later make inconsistent statements regarding who made the down payment, including the claim that her fiancé made the down payment, although it was later shown that he was incarcerated at all relevant times. Foy also never made any mortgage payments.

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cases adjuster who later testified at trial, went to the property on July 24, 2007, and met Foy, an individual named Charles Wright (who will be discussed later), and others. After performing a walk-through, Parker asked Foy to go inside the house with her to identify personal property. Foy declined and said she had never been in the house and did not know what was inside.

¶ 8 Ronald Roszak, the Safeco field investigator, who later testified at trial, telephoned Foy several times between July 31, 2007, and October 9, 2007, to obtain her statement. However, Foy did not return his telephone calls, did not agree to communicate with him, and would not provide him with any information concerning the claim.

¶ 9 Foy did not submit a proof of loss until September 20, 2007. After multiple requests by Safeco, Foy eventually provided testimony under oath. Her first examination under oath was taken on January 10, 2008. The second session of the examination under oath took place on May 8, 2008. As will be discussed in further detail below, Foy later testified inconsistently during her deposition.

¶ 10 Meanwhile, as the record shows, in March 2008, Washington Mutual Bank filed a mortgage foreclosure action against Foy (No. 08 CH 10533). On August 1, 2008, Borek & Goldhirsh filed a verified counterclaim on behalf of Foy alleging that the mortgage application contained fraudulent information and the mortgage loan should never have been issued. Foy, however, would later testify at trial that she was not defrauded by anyone during the course of purchasing the property.

¶ 11 Safeco issued a series of requests for documentation to Foy. She submitted some responsive materials and information. Foy has testified under oath that she had made mortgage

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payments but had stopped in December 2007. However, on July 9, 2008, Foy's attorney, Charles Silverman, of Borek & Goldhirsh wrote a letter to Safeco informing it that Foy had looked for some documents requested by Safeco, notably "Any and all documents evidencing prior mortgage payments for the purchase of the 6753 S. Ada property" but she did not have such documents. The letter stated that "[t]he initial mortgage payments were made by [Foy's] fiancé, Alan Bland." Foy had apparently been in a 15-year relationship with Alan Bland, who was the father of one of her children. Bland had been "in and out of jail" during their relationship. Notably, Bland had been incarcerated since August 2006. Attorney Silverman demanded payment of Foy's insurance claim.

¶ 12 On August 12, 2008, Borek & Goldhirsh filed Foy's verified complaint against Safeco. The complaint alleged violation of the Illinois Consumer Fraud Act, breach of contract, and negligent infliction of emotional distress, and sought damages, including "losses incurred in being unable to move," as well as punitive damages. Even though Foy would later admit at trial that she never planned to make a mortgage payment, a tax payment, or pay "one penny whatsoever" towards the property ("not out of my pocket"), the verified complaint fraudulently alleged that Foy was continuing to incur costs such as mortgage payments, taxes and municipal fees as a result of Safeco's actions. When later questioned at trial by Safeco's counsel about the allegation in the verified counterclaim against Washington Mutual, *i.e.*, that her mortgage should never have been issued, Foy stated, "I don't think that's the reason why we filed the claim against them, but I'm not sure. My attorneys were handling that." Foy conceded that she signed the verified counterclaim but testified: "I did not write this document. My attorney wrote this

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document.”

¶ 13 On September 26, 2008, Safeco filed a motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-619 (West 2006). On March 4, 2009, Safeco filed a verified answer and a counterclaim for declaratory judgment alleging that Foy had no economic interest in the property and did not contribute any money toward the purchase, maintenance, insurance or any other expense related to the Ada Street property. Safeco sought a judgment that it was not liable to Foy under the policy, and that she had no insurable interest in the property. On April 13, 2009, the trial court granted Safeco's motion to dismiss and allowed Foy time to replead.

¶ 14 On May 11, 2009, Foy filed an amended verified complaint. Foy alleged violation of section 155 of the Illinois Insurance Code (215 ILCS 5/155) (West 2006) and breach of fair dealing and good faith, breach of contract, and *quantum meruit*. She did not replead the consumer fraud or negligent infliction of emotional distress claims. The amended verified complaint alleged that a lightning strike damaged the property. It further alleged that Foy was continuing to incur rent costs because she was unable to move into the property as a result of Safeco's actions. The amended verified complaint fraudulently alleged that Foy was continuing to incur costs such as mortgage payments, taxes and municipal fees as a result of Safeco's actions. On July 29, 2009, Safeco filed a motion to dismiss. The motion was granted on September 15, 2009.

¶ 15 On October 2, 2009, Foy filed a second amended verified complaint seeking a declaratory judgment, and alleging breach of contract. Foy now sought coverage from Safeco, bad faith

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damages under section 155 of the Illinois Insurance Code, and breach of contract damages of \$110,000. On October 30, 2009, Safeco sought to strike or dismiss the second amended verified complaint. The matter was transferred to the chancery division. On March 11, 2010, Foy filed a third amended verified complaint that added factual allegations but contained the same claims as the second amended verified complaint, *i.e.* a declaratory judgment and a breach of contract claim, and again alleged that a lightning strike damaged the property. Foy still sought coverage from Safeco and bad faith damages under section 155 of the Illinois Insurance Code, but now sought breach of contract damages not to exceed the policy limits.

¶ 16 Safeco moved to dismiss count I of the third amended complaint which sought a declaratory judgment. The trial court granted the motion on July 6, 2010. Foy was granted leave to replead but did not. Safeco answered count II which sought breach of contract and also pled three affirmative defenses. The first affirmative defense alleged that Foy was barred from recovery based on her material misrepresentations made in violation of the policy provision on concealment or fraud. The second affirmative defense alleged that Foy had no insurable interest in the property. The third affirmative defense alleged that the fire was incendiary and Foy was barred from recovery based on the policy provision barring coverage for intentional loss.

¶ 17 On October 27, 2010, Michael Fanning, whom Foy had testified was the broker who brought the Ada Street property to her attention, and who, according to the record, provided the appraisal for the property, was ordered to surrender his certificate of registration. The record contains a response from the Illinois Department of Financial and Professional Regulation to a subpoena, in which the Department notes that Fanning had been subject to several enforcement

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actions. Notably, Foy had also stated that she first visited the property prior to August 2006 with Bland and Michael Fanning.

¶ 18 On November 19, 2010, Foy was deposed. Her testimony contained numerous inconsistencies from her prior statements under oath.

¶ 19 On July 25, 2011, Safeco filed amended affirmative defenses. As before, the first affirmative defense alleged that recovery by Foy was barred based on her material misrepresentations made in violation of the policy provision on concealment or fraud. Safeco alleged that during its investigation of the loss, Foy concealed or misrepresented “material facts or circumstances before, during, and after the loss.” The second affirmative defense again alleged that Foy had no insurable interest in the property. The third affirmative defense again alleged that the fire was incendiary and Foy was barred from recovery based on the policy provision barring coverage for intentional loss. Safeco's fourth affirmative defense alleged that Foy failed to comply with the terms of the policy in several respects, which was a breach of the insurance policy such that any recovery by Foy was barred.

¶ 20 Trial was scheduled for April 9, 2012. On April 2, 2012, Safeco sent a letter to Foy's counsel and requested that the complaint be dismissed.

¶ 21 Five days before trial, on April 4, 2012, Safeco served its motion for Rule 137 sanctions which, as the trial court noted, “expressly warned the attorneys that the serious discrepancies in Plaintiff's own sworn testimony indicated not only that she was not telling the truth but also that her entire claim was fabricated.” Safeco argued that Foy's statements under oath showed that she had no insurable interest, she breached the terms of the policy, and she misrepresented the cause

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of the fire. As to the latter argument, Safeco noted that Foy and Safeco had already stipulated that the fire was incendiary in nature, arising from a hand held flame to combustibles, yet Foy's third amended complaint alleged that Safeco had made "unfounded" allegations against Foy that the fire damage to the property was intentionally caused.

¶ 22 With respect to their response, as the trial court later noted, "the attorneys have chosen not to respond directly to the arguments in the Defendant's motion or to the question posed by the court in conjunction with it. Instead they have opted to reframe the issue, casting it as whether the attorneys had or *could have had* any legal theory to support this case and therefore *would have had* a 'good faith basis' to continue its prosecution." (Emphasis added.) They focused solely on the issue of whether a plaintiff who incurs liability on a note and executes a mortgage has an insurable interest in a property. The attorneys did not dispute the discrepancies in Foy's testimony or her blatant untruthfulness but instead contended that these were irrelevant details and at most there were falsehoods and unprovable allegations only as to parts of Foy's claim.

¶ 23 A bench trial was held over the three day period of April 9, 2012, through April 11, 2012. Foy, who had disclosed no witnesses prior to trial, presented the only testimony in favor of her claim. During trial, Foy was impeached numerous times. At the close of Foy's case, the trial court entered judgment in favor of Safeco on the section 155 claims after Foy's counsel acknowledged he had presented no evidence to support those claims.

¶ 24 Safeco questioned Foy in its case. Safeco also presented testimony of Bradley Batka, a Chicago Fire Department investigator; David DeWolf, a Chicago Fire Department investigator; Samuel Sudler, a forensic engineer; Ronald Roszak, the Safeco field investigator, and Sandra

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Parker, the Safeco complex cases adjuster.

¶ 25 Parker, who had met Foy, Wright, and others at the property on July 24, 2007, testified that she recorded “red flags” during her investigation which she testified meant “things that are unusual to a fire that need further investigation to allow [her] potentially to make a coverage decision or a damage assessment.” One of the red flags was that the \$140,000 purchase price of the home was twice its value. Parker also noticed “an awful lot of building materials” and Foy had explained she was doing renovations. Although Foy told Parker that she hoped to move into the house in two weeks, the renovations that Foy told Parker she had planned would have taken four to six months, yet a homeowner's policy is only written if the home will be occupied within 30 days of the policy's issuance. Foy told Parker that she had bought all of the building material from Home Depot and had engaged a contractor, but Foy later told Parker she had not bought any of the material and withdrew her personal property claims. Parker's investigation revealed extensive water damage and mold from prior to the fire. She also noted that the condition of the attached garage was so poor it should have been demolished. The second floor was in very much disrepair.

¶ 26 Parker also testified that when Foy eventually sent a proof of loss form, it claimed a loss to the building in the amount of \$169,216² and a loss to contents in an amount “to be determined.” Parker stated that Safeco sent Foy a reservation of rights letter the same day and a

²As Safeco notes in its brief, the mortgage lender, Washington Mutual Bank, would submit a proof of loss from the fire in the amount of \$33,471.13. Safeco paid the mortgage lender the cash value of \$24,252.38, which was the replacement cost less any applicable depreciation.

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request for documents and information. Parker testified regarding the notes in Safeco's files regarding Foy's noncooperation. Parker testified that when the claim was not paid – due to Foy's noncooperation and her failure to provide the requested material or a statement under oath – Foy started using “foul language and then hung up the phone and ended the conversation.” Parker then identified numerous instances of representations made by Foy to Safeco that Parker believed to be false and material.

¶ 27 By agreement of the parties, the evidence deposition of Arnita Jones, which had been taken shortly before trial, was introduced in Safeco's case. Jones testified that she was married to Charles Wright for twelve years, but she had last seen him in 2011 in New Jersey and she was seeking a divorce. Jones knew Foy as Bland's wife. Wright and Bland were friends. Jones testified that on the night of the fire Foy had called Wright and told him about the fire. She also testified that she and Wright then met Foy at the property on the night of the fire. When asked if she spoke to Foy at the time, Jones said yes, they talked about Jones's truck. Jones testified that she was at the property for approximately an hour with Wright, who spoke to Foy and another individual who lived across the street.³ Jones testified that she did not know the nature of the relationship between Foy and Wright.

¶ 28 Jones also testified that, about a month after the fire, Wright had her write a check out of her own separate account payable to Foy. Jones did not remember the exact amount, but knew it

³According to the deposition testimony of Chicago Fire Department Investigator Bradley Batka, who arrived at the scene of the fire, this individual also claimed to be the owner of the property and stated that his employee started the fire. However, this fact is noted as background information and is not relevant to the appeal of the sanctions order.

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was for \$1,000 or more. Per Wright's directions, Jones delivered the check to Foy at 87th and the Dan Ryan Expressway. When asked if she asked Charles why she was writing a check to Foy, Jones stated: "I don't ask Charles questions. I just do as he asks." Jones testified that she would write a "lot of checks to Charles" from her own account at his direction.

¶ 29 Although the trial court had reserved ruling on Safeco's motion for sanctions, at the close of evidence and before closing arguments, the trial court stated: "I think there is a basis for a Rule 137 motion and I might have brought it *sua sponte* myself having heard this evidence." The court also asked about the fee arrangement with Foy, and attorney Sam Borek told the court he received no fee for the representation. The court directed further briefing on the motion.

¶ 30 Safeco filed a supplemental brief in support of its motion on April 16, 2012. Safeco expanded the number of respondents from Peter Lewis, the attorney who signed the third amended complaint, to include Foy and four additional attorneys: Charles Silverman, Sam Borek, John Wickert, and Daniel Borek. Safeco also argued for sanctions to be imposed where Foy failed to present any evidence in support of her claim for relief under section 155 of the Illinois Insurance Code. 215 ILCS 5/155 (West 2006). Safeco further argued that Foy's attorneys failed to conduct a reasonable investigation of the facts despite Foy's contradictory statements, failed to dismiss the suit despite Foy's misrepresentation of the facts and the filing of inconsistent pleadings regarding Foy's ownership of the property in separate court proceedings, namely her verified counterclaim against Washington Mutual Bank in the mortgage foreclosure action in which she asserted an allegation that she had been defrauded and the mortgage for the property should never have been issued.

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¶ 31 On April 24, 2012, Foy and her counsel filed an emergency motion to strike the motion for sanctions or for an extension of time to file a response.

¶ 32 At the April 27, 2012 hearing, Safeco withdrew with prejudice its motion for sanctions against Peter Lewis and Charles Silverman, the attorneys who had signed the pleadings (Charles Silverman had signed the original and first amended complaints; Peter Lewis had signed the second and third amended complaints). Apparently, both were no longer with the firm. Instead, Safeco indicated that it intended to seek sanctions only against Foy and the lawyers who represented her at trial. The trial court then set a briefing schedule and set the matter for hearing on May 24, 2012. The court also posed the following question that it wanted counsel for the respondent-attorneys to contemplate as part of the briefing: “[C]an an attorney be held responsible under Rule 137 for proceeding to trial on a complaint based solely on the testimony of his client who he has reason to know has not been truthful about her claims under oath in this case.” The trial court also struck appellants' emergency motion to strike Safeco's supplemental brief in which appellants had contended, among other things, that it was improper for Safeco to seek relief against respondents named for the first time in a supplemental brief without identifying the pleading that each of the respondents was alleged to have signed in violation of Rule 137.

¶ 33 On May 4, 2012, the trial court issued its written coverage ruling. The court's decision had two bases. The court decided that Foy was not entitled to coverage because: (1) she had no insurable interest in the property “despite her naked title”; and (2) she made material misrepresentations to Safeco, both before and after the loss, thus rendering the policy void per its

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Condition #2 (Concealment or Fraud).

¶ 34 On May 24, 2012, the court heard oral argument on Safeco's motion for sanctions. Appellants failed to address the question that had been posed to them. Counsel for respondent-attorneys instead argued that the court's findings (1) that plaintiff lacked an insurable interest and (2) that she misrepresented that she had an insurable interest when she acquired this property and the insurance policy, were legal errors.⁴ Counsel argued the general proposition that a mortgagor has an insurable interest which would provide a good faith basis for pursuing a claim against the insurer. Counsel further argued that Foy had an insurable interest and that the trial court's underlying coverage decision contained factual and legal errors. Counsel did not directly address the court's question: “[C]an an attorney be held responsible under Rule 137 for proceeding to trial on a complaint based solely on the testimony of his client *who he has reason to know has not been truthful about her claims under oath in this case.*” (Emphasis added). Counsel further conceded that every complaint filed - from the original complaint through the third amended complaint - contained a claim for personal property in addition to the building itself, despite the fact that when Safeco's attorney had examined Foy under oath she had been shown to be untruthful as to this claim (as the trial court characterized it, Foy was “caught red handed”). Counsel's argument as to this specific fabricated claim was that the “correspondence” clearly showed Foy had dropped her personal property claim.

¶ 35 On June 7, 2012, the trial court granted the motion for sanctions in a written order. On

⁴ As noted, these findings are no longer challenged directly on appeal but instead are collaterally challenged in the argument against sanctions.

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June 20, 2012, after a hearing, the court denied appellants' motion to reconsider and entered judgment on Safeco's petition for fees against appellants, jointly and severally, in the amount of \$185,285.04.

¶ 36

ANALYSIS

¶ 37 On appeal, appellants' counsel continues to assert the general proposition that one who signs a mortgage to obtain title to a property has an insurable interest in the property and that Safeco's investigation into “who” made the down payment, “who” made the mortgage payments on the property, when Foy visited the property, and with whom she visited the property was an investigation into things that were merely “assorted collateral matters.” Although Safeco contends that the only issue is “whether the trial court abused its discretion when it sanctioned plaintiff and her trial attorneys for prosecuting a frivolous claim for insurance coverage,” appellants list eight separate issues on appeal, as to why the court abused its discretion in awarding sanctions, which we summarize. Appellants first argue that they properly pursued Foy's claim for insurance coverage where her misstatements were neither material to coverage nor made with an intent to deceive. They also contend that the trial court erred when it: concluded that Foy lacked an insurable interest in the subject property; relied upon a policy provision that had been deleted and replaced by the issuing insurance company; would not consider the merits of the underlying suit before imposing sanctions; entered sanctions without adequate notice of the conduct for which sanctions were being considered; and sanctioned attorneys who did not sign or file any complaint. Appellants also challenge the amount of the sanctions and argue that the trial court erred when it: sanctioned attorneys from the inception of

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the suit; ordered them to pay fees and costs incurred in pursuit of a counterclaim; failed to distinguish among respondents; and failed to account for developments that occurred after suit was filed.

¶ 38 Standard of Review

¶ 39 We will not overturn a trial court's ruling on Rule 137 sanctions absent an abuse of discretion. *Schneider v. Schneider*, 408 Ill. App. 3d 192, 199 (2011). A trial court abuses its discretion when “its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court.” *Patton v. Lee*, 406 Ill. App. 3d 195, 199 (2010). “[I]f reasonable people would differ as to the propriety of the court's [imposition of Rule 137 sanctions], a reviewing court cannot say that the trial court exceeded its discretion.” *Senese v. Climatedp, Inc*, 289 Ill. App. 3d 570, 582 (1997). The abuse of discretion standard “is the most deferential standard of review — next to no review at all.” *In re D.T.*, 212 Ill. 2d 347, 356 (2004). “'When reviewing a decision on a motion for sanctions, the primary consideration is whether the trial court's decision was informed, based on valid reasoning, and follows logically from the facts. [Citation.]'” *Whitmer v. Munson*, 335 Ill. App. 3d 501, 514 (2002).

¶ 40 Purpose of Rule 137

¶ 41 “Rule 137 imposes an affirmative duty on *both* litigants and attorneys to conduct an investigation of the facts and law before filing an action, pleading, or other paper.” (Emphasis added.) *Polisky v. BDO Seidman*, 293 Ill. App. 3d 414, 427 (1997). Rule 137 states:

“The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge,

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information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *** If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney fee.” Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994).

Supreme Court Rule 137 is “penal in nature and must be strictly construed.” *Rankin ex rel. Heidlebaugh v. Heidlebaugh*, 321 Ill. App. 3d 255, 260 (2001). Rule 137 has both preventive and remedial aspects. “The purpose of Rule 137 is to prevent parties from abusing the judicial process by imposing sanctions on litigants who file vexatious and harassing actions based upon unsupported allegations of fact or law.” *Dismuke v. Rand Cook Auto Sales, Inc.*, 378 Ill. App. 3d 214, 217 (2007). Additionally, the purpose of Rule 137 is “to engender an additional remedy to parties who are victimized by frivolous filings and to protect courts from lawsuits, filed without a good-faith basis, intended only to harass.” *Sterdjevich v. RMK Management Corp.*, 343 Ill. App. 3d 1, 19 (2003). “Rule 137 is not a means by which trial courts should punish litigants whose arguments do not succeed; instead, it is a tool which they can employ to prevent future abuse of

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the judicial process or discipline in the case of past abuses.” *Schneider v. Schneider*, 408 Ill. App. 3d 192, 200 (2011).

¶ 42 Application of Rule 137

¶ 43 “Courts are instructed to use an objective standard in evaluating what was reasonable under the circumstances as they existed at the time of filing.” *Sterdjevich*, 343 Ill. App. 3d at 19. “It is not sufficient that the plaintiff 'honestly believed' that the allegations raised were grounded in fact or law.” *Id.* “[A]s a general rule, an attorney cannot simply rely on the client's verbal representations when the client has in his possession additional information bearing on the facts, or when the additional information is readily ascertainable from third parties.” *Chicago Title & Trust Co. v. Anderson*, 177 Ill. App. 3d 615, 624 (1988).

¶ 44 Moreover, this court long ago determined that an attorney has a continuing duty of inquiry throughout the pendency of litigation. See *Cmarko v. Fisher*, 208 Ill. App. 3d 440 (1990). As the *Cmarko* court stated: “An attorney has a professional duty to promptly dismiss a baseless lawsuit, even over the objections of the client, when the attorney learns that the client has no case.” *Id.* at 446. As we later explained, although Rule 137 does not expressly state that an attorney has a continuing duty of inquiry throughout the pendency of litigation, this court has implied such an obligation. *Walsh v. Capital Engineering & Manufacturing Co.*, 312 Ill. App. 3d 910, 915-16 (2000); accord *Rankin*, 321 Ill. App. 3d at 267 (“Rule 137 contains an implicit requirement that an attorney promptly dismiss a lawsuit once it becomes evident that it is unfounded.”).

¶ 45 Appellants have decided not to pursue their appeal of the underlying coverage decision

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but they nonetheless challenge the trial court's coverage decision and the purported merits of Foy's lawsuit in support of their argument that sanctions were unwarranted. They contend that the sanctions were premised upon “legal” errors and “factual” errors. They do not directly address the issue of whether they conducted the reasonable inquiry required by Rule 137 before filing suit, or whether they should have dismissed the suit before proceeding to trial but continue to (collaterally) argue that Foy's suit had merit merely because she had documentary evidence consisting of “legal” title, a mortgage, and an insurance policy.

¶ 46 Safeco argues that these documents do not trump the trial court's findings – findings that were based on *all* of the evidence and the facts of this case. Safeco further contends that, even if Foy's attorneys thought there was a good faith basis to assert a claim against Safeco based on the fact that Foy had a deed in her name, this basic assertion did not represent an adequate investigation into the facts of the dispute and a reasonable inquiry would have uncovered the falsity of Foy's claim.

¶ 47 *One* of the bases for the trial court's decision on the merits of Foy's lawsuit was that Foy was not entitled to insurance coverage because she had no insurable interest. In order to collect under an insurance policy, one must have an insurable interest in the insured item.

Hawkeye-Security Insurance Co. v. Reeg, 128 Ill. App. 3d 352, 354-55 (1984); *Reznick v. Home Insurance Co.*, 45 Ill. App. 3d 1058 (1977). An insurable interest at the time the policy is issued and at the time of loss is essential to the validity of an insurance policy. *Patterson v. Durand Farmers Mutual Fire Insurance Co.*, 303 Ill. App. 128 (1940). “A person has an insurable interest in property whenever he or she would profit or gain some advantage by its continued

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existence or suffer loss or disadvantage by its destruction.” *International Insurance Co. v. Melrose Park National Bank*, 145 Ill. App. 3d 286, 290 (1997); see also *Hawkeye-Security Insurance*, 128 Ill. App. 3d at 354 (explaining that a person has an insurable interest if damage to the property involves pecuniary loss to him). An insurance policy is void and unenforceable on public policy grounds where there is no insurable interest in the property. *Wolfram Partnership, Ltd. v. LaSalle National Bank*, 328 Ill. App. 3d 207 (2001).

¶ 48 “[T]he reason for the requirement of an insurable interest is to prevent the use of insurance for illegitimate purposes.” (Internal quotation marks omitted.) *Hawkeye-Security Insurance*, 128 Ill. App. 3d at 355 (quoting *Prince v. Royal Indemnity Co.* 541 F. 2d 646, 649 (7th Cir. 1976)), *cert. denied* 492 U.S. 1094. For example, it has been explained that “there is no insurable interest in the proceeds of a fraud.” *Ryerson Inc. v. Federal Ins. Co.*, 676 F. 3d 610, 613 (7th Cir. 2012). There, the plaintiff corporation sold a group of subsidiaries but fraudulently concealed the fact that one of the subsidiaries' largest customers had threatened to build its own plant and stop buying from the subsidiary unless it slashed its prices. *Ryerson*, 676 F.3d at 612. The buyer later sued and the case settled; the plaintiff agreed to give back \$8.5 million from the original purchase price. *Id.* Plaintiff then sued its insurer seeking coverage for its costs incurred in defending and settling the lawsuit filed by the buyer. The *Ryerson* court concluded that the \$8.5 million refund constituted proceeds plaintiff had procured through fraud. *Id.* As the court explained:

“If disgorging such proceeds is included within the policy's definition of ‘loss,’ thieves could buy insurance against having to return money they stole. No one

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writes such insurance.” *Id.* at 612–13. The court further stated: “You can't, at least for insurance purposes, sustain a ‘loss’ of something you don't (or shouldn't) have.” *Id.* at 613.

¶ 49 Safeco now argues that the evidence at trial showed that the purchase of the property was a pretense to commit insurance fraud, and that, at best, Foy's attorneys “turned a blind eye to this fraudulent effort” instead of performing the required investigation. Appellants contend that such a theory was not established below or found by the trial court. After reviewing the entire record, it seems clear that the trial court recognized the obvious existence of a fraudulent scheme involving the purchase of the property in order to obtain money from Safeco. Foy's counsel claimed that she was “duped.” In any event, there was no finding that Foy was complicit in the arson. However, the trial court did not determine that Foy had “no insurable interest” in the property because of any finding that Foy engaged in a fraudulent scheme. Rather, the trial court determined that Foy had no insurable interest based on the court's finding that Foy would derive no pecuniary benefit or advantage from the preservation of the property, nor did she suffer any pecuniary loss or damage from its destruction.

¶ 50 As the trial court expressly stated:

“The court finds that the subject property on Ada Street meant nothing whatsoever to Leslie Foy, except as a source of some inconvenience. In her own words, she ‘just showed up at the closing’ and accepted a deed to the property, because someone asked her to. *She never paid one penny toward the purchase and intended never to make any of the mortgage payments or any other kind of*

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payment related to the property. She signed the mortgage and took the deed upon others' request, because, as the only one with a job, she had a colorable chance of getting a mortgage. The story that the house was to be a gift from her long-term boyfriend [incarcerated at all relevant times] and that they intended to live there together cannot be believed.

* * *

The court finds that Ms. Foy accepted bare naked title to the property only for the ability to take out fire insurance.

* * *

It was apparent to the court that Ms. Foy has no regard for the truth and that she particularly displayed that lack of truthfulness in pursuing a claim against the Safeco policy. The court finds that Ms. Foy made material misrepresentations to Safeco in pursuit of that claim. First, *the entire purchase of the Ada property was but a pretense*, so that her identifying herself as someone with an ownership interest in the residence, by taking out the policy, was a misrepresentation, one made before the loss. Then there was a series of material misrepresentations made by Foy after the loss. She told Safeco's handling adjuster (Mrs. Parker) that she would be seeking payment of her current living expenses under the policy because she could not afford both the rent payments and the mortgage payments. This was a lie, of course, because at trial she admitted she never made any mortgage payments and never intended to. The court finds that the fact that such a

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claim was not included on the proof of loss when it was ultimately submitted does not negate the misrepresentation, which was made during Safeco's investigation of the claim.” (Emphasis added.)

Regarding the court's conclusions that Foy had no insurable interest despite having “naked” title, neither party has cited, nor have we found, an Illinois case on point. However, we find a case from another jurisdiction instructive: *Balentine v. New Jersey Ins. Underwriting Ass'n*, 406 N.J. Super. 137, 966 A. 2d 1098 (App. Div. 2009). There, a named insured filed a complaint against its insurer after it denied the insured's claim seeking coverage under a policy of liability and fire insurance for vandalism losses. *Id.* Similar to Illinois law, under New Jersey law, the test for whether a person has an insurable interest in property is “whether the insured has such a right, title or interest therein, or relation thereto, that he will be benefited by its preservation and continued existence *or* suffer a direct pecuniary loss from its destruction or injury by the peril insured against.” (Emphasis in original and internal quotation marks omitted.) *Balentine*, 406 N.J. Super at 141-42.

¶ 51 One of the issues raised on appeal by the insurer in *Balentine* was whether the trial court had erred in deciding that title alone gave the insured an insurable interest. *Id.* at 141. The insured had “acknowledged that he did not personally pay the taxes, utilities, and other charges on the building; that he was not involved with its management; that he did not receive rental income; and that he had not claimed depreciation or tax deductions for the property.” *Id.* at 140. The insurer contended that the trial court “strayed” from case law precedent by failing to analyze the “relationship” that the insured had with the property. *Id.* at 143. The insurer argued that

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“[h]ad such an analysis been performed *** the court would have found that [the insured] was merely acting as [another individual's] nominee and had no true pecuniary stake in the building.”

Id. The court disagreed and noted that there “are times when a person who lacks recorded ownership or title in property may, nevertheless, have an insurable interest in those premises because of other nexus factors.” *Id.* However, as the court explained, the case law cited by the insurer *did not* state “that a person *with* such title of record can be deemed outside of the zone of an insurable interest.” (Emphasis added). *Id.* The court held that title ownership to the property was sufficient to create an insurable interest.

¶ 52 As the *Balentine* court further explained:

Even though [the insured] apparently did not maintain the subject premises and had not derived any rents or other financial advantages from his ownership before the vandalism occurred, that does not mean that he was, in effect, a stranger to the property. He still remained the owner of record, and was publicly identified as such in the deed books and in the local tax rolls.

If the real estate taxes were unpaid, the municipality would have had recourse against [him] for the deficiency. Similarly, if an occupant or visitor were injured by a dangerous condition on the premises, [the insured] would face potential liability as the property owner. Consequently, in the absence of insurance coverage, [he] would 'suffer a direct pecuniary loss from [the property's] destruction or injury by the peril insured against.' [Citation.] If the vandals had destroyed the building entirely, the premises might not have been worth enough to

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satisfy the tax collector or a tort plaintiff with a premises liability case.

[The insured] may not have had much of an upside in owning the building (other than perhaps maintaining a friendship), but he surely had a downside if the premises were left uninsured. Nothing in the terms of the insurance policy, on which [he] was explicitly listed as a named insured, negates these common-sense implications.” *Id.* at 143-44.

Of course, *Balentine*, is factually distinguishable in many ways. There, the insured had owned the property for approximately twelve years before vandalism caused damage to the structure, no mortgagee had an interest in the property, the insured had not made numerous false statements, and the “legitimacy” of the losses was uncontested on appeal. However, the court's discussion regarding the insurable interest of a title holder is noteworthy since the insured there, similar to Foy here, was the title holder of the property.

¶ 53 Assuming that there was a fraudulent scheme here (mortgage fraud or insurance fraud), we think it is obvious that Foy played *some* role in it. The trial court found that “Foy accepted bare naked title to the property only for the ability to take out fire insurance” and that “[s]he never intended to live there.” Yet, it must be stressed that there was no finding that Foy committed the arson herself or that she “knowingly” participated in a fraudulent scheme with an intent to commit arson, or whether her role was as an unknowingly passive role as a straw purchaser, *i.e.*, whether she actually was “duped” as her counsel suggested. It is not clear what her attorneys knew – or did not know – about her role in the purchase of the property, or the arson. However, we cannot say it was sanctionable misconduct for appellants to pursue Foy's

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suit *solely* on the basis that Foy had no economic interest, or insurable interest, in the property.

While the trial court here found that Foy never intended to make mortgage payments, she did have a mortgage debt. A mortgagor has an insurable interest in the mortgaged property.

Trustees of Schools v. St. Paul Insurance Co., 296 Ill. 99, 102 (1920); *Great-West Life Assurance Co. v. General Accident Fire & Life Assurance Corp., Ltd.*, 116 Ill. App. 3d 921, 926 (1983).

¶ 54 However, we cannot ignore the untruths told by Foy, her lack of cooperation with Safeco's investigation, the other strange and peculiar circumstances here, and the inferences that arose therefrom. We take special note that the insurer in *Balentine* made another argument that is somewhat apropos here. The insurer “warn[ed] as a matter of public policy, that allowing record title to suffice to create an insurable interest could encourage untoward or illicit behavior.” *Id.* at 144. “At oral argument [the insurer] suggested, by way of illustration, that an arsonist could buy property, assign it to a friend, and then torch the premises and have the friend collect and share the insurance proceeds.” *Id.* In response, however, the court stated that “in that hypothetical scenario, the insurer would have a right of subrogation against the wrongdoer. [Citations.]” *Id.* Unfortunately, in the instant case, it appears that the “wrongdoer” is beyond reach.

¶ 55 Both sides devote a considerable portion of their briefs to the issue of whether Foy had an insurable interest. Nonetheless, regardless of whether Foy had an insurable interest or whether her attorneys had a good faith basis for believing that she had an insurable interest when they filed suit, the court denied coverage on two bases. The second basis for the trial court's coverage decision was that, *both before and after the loss*, Foy made material misrepresentations to Safeco thus rendering the policy void.

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¶ 56 As Safeco notes in its brief, and as the trial court noted in its ruling on sanctions, Foy's testimony contained numerous inconsistencies. We note that some of these appeared to have occurred during the same examination, while others were inconsistent among the various examinations. Notably, although Foy testified regarding Bland's role in the purchase and claimed he visited the property with her both before and after the purchase, the trial court noted that Bland could not have done so since the evidence at trial included a certificate of incarceration that demonstrated he was incarcerated continuously at all pertinent times. Her testimony also contained inconsistencies as to whether she received money from Bland and whether he had been to her rental apartment in Skokie. There were inconsistencies in her testimony as to who paid the deposit or down payment on the property, Bland or Charles Wright.⁵ Foy admitted she did not make a down payment; she also claimed the property was 100% financed (which was not consistent with the documentation). Also, Foy admitted to being untruthful in her claim for loss of personal property. Foy's testimony regarding when, and how many times, she visited the

⁵As noted earlier, Wright was present with Foy at the property when Safeco's complex case adjuster Sandra Parker went to the property on July 24, 2007, which was the day after Foy reported the loss to Safeco. At the time of trial, Wright was apparently living in New Jersey and attempts to have him appear had failed. Prior to its purchase, the property had been appraised twice and Wright was listed as the borrower on the second appraisal. Also, Wright paid a \$261.82 water bill for the property. Foy's testimony regarding Wright's role and her relationship with him were inconsistent. Although she testified at her deposition that she had not met Wright prior to the fire, she changed her testimony at trial. Foy claimed that Wright's role with respect to the purchase was "running around for [her] ... because [she] worked." She also stated that Wright, along with the incarcerated Bland, brought the drywall, windows and tub to the property. Although Foy testified at her deposition that she never spoke to Wright prior to the fire loss, she changed her testimony at trial. She also gave inconsistent accounts of whether she called Wright, or Wright called her, regarding the fire at the property (later determined to be arson to which the parties stipulated before trial).

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property before the purchase, before the arson, and after the arson was extremely inconsistent.

There were also inconsistencies regarding who paid the mortgage payments on the property.

¶ 57 Although appellants contend that Safeco has cited a plethora of facts to this court that were never considered by the circuit court as a basis for imposing sanctions, the circuit court's written order clearly addressed "What Plaintiff's Attorneys Knew *Before* They Proceeded to Trial" (emphasis added). More importantly, the record clearly contains facts that Foy's counsel should have, or would have, known before filing the lawsuit had they conducted a reasonable inquiry. The trial court concluded that Foy's attorneys, "both before suit was even filed and later, before proceeding to trial, had notice of inconsistencies and strange circumstances that should have put them on notice that further inquiry into the facts was necessary in order for them to have made 'reasonable inquiry' within the meaning of Rule 137." The trial court discussed these inconsistencies in further detail.

¶ 58 This court has upheld sanctions entered against a law firm for the conduct of its lawyer employee where the sanctionable act was committed within the scope of the employee's authority. *Brubakken v. Morrison*, 240 Ill. App. 3d 680 (1992). However, other decisions have held to the contrary. For example, in *Medical Alliances, LLC v. Health Care Service Corp.*, 371 Ill. App. 3d 755, 757 (2007), the court held that Rule 137 "permits the trial court to sanction only the person who signed the document and/or the client." Although appellants cite *Medical Alliances* in support of their argument that the trial court's sanction order failed to differentiate among respondents, the case is inapposite because here the court did not sanction the law firm itself but, instead, sanctioned the individual attorneys who had a continuing duty of inquiry

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throughout the pendency of litigation yet never dismissed the lawsuit.

¶ 59 Safeco has also argued that the attorneys may be liable for violating Rule 137 under an agency theory. Appellants assert that Safeco's argument was never raised below and is meritless. This court has stated that “the knowledge of one member of a law firm is imputed to the other members.” *Sanchez v. City of Chicago*, 352 Ill. App. 3d 1015, 1022 (2004) (citing *People v. Dace*, 153 Ill. App. 3d 891, 896 (1987)). However, the trial court made no finding that sanctions were appropriate, *or being imposed*, under an “agency” theory or due to a mere imputation of knowledge on their part. Instead, the three sanctioned attorneys were actually involved in Foy's lawsuit. Thus, the “agency” issue is irrelevant.

¶ 60 As Safeco notes, Foy's employer, Sam Borek of Borek & Associates, was also her trial attorney. As Sam Borek stated in his affidavit: “[t]his litigation has been conducted by attorneys employed by me and under my supervision.” Foy was represented by attorneys with the law firm of Borek & Associates (formerly Borek & Goldhirsh) throughout the entire litigation. Charles Silverman initially handled the case, then John Lewis, and then Daniel Borek. John Wickert and Sam Borek tried the case and went to trial with only Foy's testimony. This court has explained that “Rule 137, *** 'creates duties to one's adversary and to the legal system.' [Citation.]” *Hernandez v. Williams*, 258 Ill. App. 3d 318, 323 (1994). The court explained that an attorney who puts a party “through the unnecessary burden of a trial” breaches “its duty to the legal system by taking the time of the judge, jury and other officers away from matters more in need of resolution.” Although attorney John Wickert did not represent Foy throughout the entire litigation, he did for several months in 2009, and represented her from March 1, 2011 through

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trial. Attorney Daniel Borek began representing Foy on August 24, 2009 and does not dispute that he represented her during trial. These attorneys, under Illinois law, had a continuing duty to dismiss this lawsuit once it was determined it lacked merit. Therefore, although none of the sanctioned attorneys signed the original verified complaint or any of the three verified amended complaints, as this court has explained “[a] successor attorney cannot hide behind his predecessor.” *Nissenson v. Bradley*, 316 Ill. App. 3d 1035, 1041 (2000).

¶ 61 Interestingly, counsel for appellants has also raised an argument that the trial court erred in denying coverage and imposing sanctions on the basis of a deleted policy provision. Counsel attempted to raise this argument before the trial court after the trial was completed and during the hearing on sanctions, although the argument had never been raised before. Nonetheless, noting that the test for whether an attorney has a good faith basis for bringing a claim is an “objective” one, counsel contended that the trial court erroneously relied on a deleted policy provision instead of its replacement provision, the latter of which a line of authority (from other jurisdictions) had suggested was ambiguous and must be construed in favor of coverage. The reason the test for whether an attorney has a good faith basis for bringing a claim is an objective one, is to clarify that an attorney's subjective belief of the merits is irrelevant, not to allow a sanctioned attorney to engage in hindsight analysis in order to hit upon some objective basis for bringing a claim that was never contemplated during the litigation. Moreover, the cases cited by appellants are distinguishable. They stand for the proposition that a false claim for personal property may not affect coverage for the dwelling where the policy provision (similar to the one in the instant case) is ambiguous. Those cases are irrelevant. The trial court's decision here was

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not based solely on Foy's untruths regarding her personal property loss. The decision was based on all of the evidence and the court's conclusion that the property meant nothing to Foy.

¶ 62 Regarding the imposition of sanctions for the failure to withdraw Foy's section 155 claims, appellants argue that Rule 137 does not warrant the imposition of sanctions every time a claim fails at trial. However, in the instant case, it cannot be said that Foy's section 155 claims failed. Rather, there was no claim and she presented no evidence whatsoever at trial. Appellants ignored the fact that they lacked evidence in support of a section 155 bad faith claim and nevertheless proceeded with the claim at trial. We agree with Safeco that not only should this claim have been dropped years before trial, it should never have been alleged in the first place. We further note the trial court's comment that Foy's attorneys declined withdrawing the section 155 claims, “[n]o doubt strategizing that the continued presence of these claims had some settlement value.” The trial court found that the refusal to withdraw the claims, with full knowledge that there would be no evidence to support them was an additional ground for the imposition of sanctions under Rule 137. This decision was not an abuse of discretion.

¶ 63 Appellants have also contended on appeal that the fees assessed against them were excessive. They argue that the trial court imposed fees without, among other things, “differentiating between Safeco's defense of the claim and the pursuit of its own counterclaim.” No citation to authority is presented for this particular argument. Safeco, however, has cited *Dayan v. McDonald's*, 126 Ill. App. 3d 11 (1984), a case in which this court granted reimbursement for fees and expenses incurred in litigation in the amount of \$1,842,905.38. As the court concluded in *Dayan*, an “isolated focus on each reimbursable component *** is not

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necessary where the false allegations made without reasonable cause are the cornerstone of the entire baseless lawsuit.” *Dayan*, 126 Ill. App. 3d at 23-24. Although appellants attempt to distinguish the instant case from *Dayan*, their argument is meritless. This case did not involve mere testimonial inconsistencies. Rather, Foy's false assertions regarding her interest in the property, her intent to move into the home, her request for her personal property losses, the cause of the fire, and her right to coverage were the basis for the entire action “without which there would be no dispute and no need for trial.” See *Dayan*, 126 Ill. App. 3d at 24. Here, similar to the aggrieved party in *Dayan*, all of Safeco's expenses and fees in defending this suit were incurred as a result of Foy's untrue pleadings and appellants' failure to dismiss the baseless lawsuit.

¶ 64

CONCLUSION

¶ 65 In view of the foregoing, although the trial court's decision to award sanctions appears to be informed, based on valid reasoning, and followed logically from the facts, we must vacate the order. Although we express no opinion on the court's ultimate decision that *this* particular plaintiff had no insurable interest in the insured premises, we do not believe that appellants should have been sanctioned for pursuing their argument that Foy had an insurable interest. The reasoning of the court regarding Foy's lack of an insurable interest and the material misrepresentations she made that voided the policy are somewhat intertwined. We cannot discern from the order how the finding that Foy lacked “an insurable interest” as compared with the finding that the policy was void by reason of the material misrepresentations Foy made to Safeco both before and after the loss, affected the decision to grant sanctions under Rule 137, or

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how the trial court allocated the amount of sanctions. Also, in view of the continuing professional duty on the part of an attorney to promptly dismiss a lawsuit when the attorney learns that the client has no case, we must remand for a reconsideration of whether appellants violated their duty to conduct a reasonable inquiry under Rule 137 (apart from any consideration of Foy's insurable interest or lack thereof).

¶ 66 We therefore vacate the judgment of the circuit court of Cook County granting sanctions against Foy and her attorneys in favor of Safeco, and remand for further proceedings consistent with this order.

¶ 67 Vacated and remanded.