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THIRD DIVISION
May 11, 2016

No. 1-14-3597

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ACCURATE INSURANCE SERVICES INC., an Illinois corporation,)	Appeal from the Circuit Court of Cook County, Illinois, County Department, Law Division.
Plaintiff-Appellant/ Cross-Appellee,)	No. 2011 L 010695
v.)	
BTI COMMUNICATIONS GROUP, LTD., an Illinois corporation,)	The Honorable Raymond W. Mitchell, Judge Presiding.
Defendant-Appellee/ Cross-Appellant.)	

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices Lavin and Pucinski concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not abuse its discretion in refusing to permit the plaintiff to amend its complaint either before trial or after trial to conform to the proofs, where the amendments would not have cured any defects in the original pleadings. The trial court's determination that the plaintiff was not owed any liquidated damages under the settlement agreement was not against the manifest weight of the evidence. Similarly, there was nothing manifestly erroneous in the court's conclusion that the defendant had failed to state a cause of action for breach of the underlying lease agreement or quantum meruit. The trial court properly concluded that neither party was the "prevailing party" under the settlement agreement's fee-shifting provision, and therefore ordered that each party be responsible for its own attorneys' fees.

¶ 2 This cause arises out of a five-year agreement entered into by the plaintiff, Accurate Insurance Services, Inc., (hereinafter Accurate) and the defendant, BTI Communications Group, Ltd. (hereinafter BTI), to have BTI install, lease, finance, service and maintain a telephone communications system for Accurate. After problems arose with the installation and the initial operation of the system, the parties entered into a settlement agreement, to resolve all of the problems that had arisen between them. Subsequently, Accurate filed, *inter alia*, a breach of contract action against BTI on the basis of both the original and the settlement agreements. BTI responded by filing a counter-claim for breach of contract and unjust enrichment against Accurate. After a bench trial, the trial court entered judgment in favor of Accurate and against BTI, awarding Accurate damages in the amount of \$7944.33 plus costs, arising solely from BTI's breach of the settlement agreement. Accurate then filed a posttrial motion asking the court: (1) to modify its judgment pursuant to section 2-1203 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1203 (West 2012)); and (2) to amend the pleadings to conform to the proofs presented at trial pursuant to sections 2-616(c) and 2-617 of the Code (735 ILCS 5/2-1203 (West 2012)), so as to permit the court, *inter alia*, to award damages in favor of Accurate based on the original contract entered into by the parties. The trial court denied Accurate's motion.

¶ 3 Accurate now appeals, contending that the trial court erred when it refused to: (1) allow Accurate to file an amended complaint prior to trial, so as to permit it to plead enough facts to be able to recover on damages arising from the breach of the original five-year agreement, and not solely from the breach of the settlement agreement; (2) award Accurate attorneys' fees as the prevailing party under fee-shifting provision of the parties' settlement agreement; and (3) award Accurate any liquidated damages. BTI cross-appeals, contending that the trial court erred in failing to award it any damages arising from Accurate's failure to pay over \$18,000 in lease

payments to BTI, as was arranged by the parties' under the settlement agreement. For the reasons that follow, we affirm.

¶ 4

I. BACKGROUND

¶ 5

The record before us is voluminous and sets forth the pertinent undisputed facts and procedural history.

¶ 6

A. The Parties

¶ 7

Accurate is an Illinois corporation, headquartered in Bridgeview, Illinois, providing insurance services, and employing over 30 employees throughout its 6 Illinois locations. Accurate is owned and operated by brothers, Michael Zubi (hereinafter Michael) and Nasser Zubi (hereinafter Nasser). BTI is an Illinois corporation, headquartered in Lemont, Illinois, providing telecommunications services. Eric Brackett (hereinafter Brackett) is BTI's founder and majority owner.

¶ 8

B. The Original Agreement

¶ 9

In March 2007, Accurate and BTI entered into a contract to have BTI provide a telephone system for Accurate's insurance business and to service the equipment if it became inoperable. The contract consists of four sets of documents: (1) the "Installation, Service and Warranty of Equipment Agreement" (hereinafter the service agreement); (2) the "Scope of Accurate Auto Insurance" (hereinafter the scope of work agreement); (3) the lease agreement; and (4) the "Addendum to Lease: Authorization for funding Prior to Delivery/Installation of Equipment" (hereinafter the lease agreement addendum).

¶ 10

Under the service agreement, BTI agreed to furnish Accurate with a new telephone system—Inter-Tel 5000 (hereinafter the equipment), as well as install, service and warranty that equipment. In exchange, Accurate would pay BTI an initial down payment of \$3532.00 and then

lease the equipment from BTI over a 60 month period. The equipment was described by two schedules: (1) Schedule 1, itemizing all components of the Inter-Tel 5000 system, including 24 telephone lines, telephones, voice mails, a "tracer" which recorded all calls as they occurred, lighting protection, and an Interactive Voice Response system (hereinafter IVR), including, *inter alia*, automated outbound dialing campaigns to increase renewals; and (2) Schedule 2 titled, "Program Service Agreement," describing add-on equipment rates, renewal options, upgrade capability, costs for system relocation, and a disaster recovery plan. The disaster recovery plan states in pertinent part:

"BTI will maintain a back-up copy of the current Inter-Tel 5000 System software database at an off-site location. In the event of a catastrophic loss of the system that is covered by the Risk of Loss provision of this agreement, the back-up database will be re-loaded on the replacement equipment as soon as the customer's facilities allow. The current copy of the database will be as of the last changes or modifications to the database that were performed by BTI. Any changes to the database not performed by BTI may not be included in the back up database."

¶ 11 The scope of work agreement defined BTI's responsibilities as to installation and configuration. Specifically, BTI was responsible for delivering, installing, and maintaining the equipment, including user training, system administration training, and consultation. In addition, BTI was obligated to provide Accurate with an IVR unit, capable of handling 24 telephone calls at any one time, with automated account balance and due date lookup, payment acceptance, and outbound dialing capabilities. As to payment acceptance, the scope of work agreement provided that: "the insured [Accurate's customers] would be able to make credit card

or direct debit payments 24x7. These payments would be made immediately, but would not post automatically; they would need to be reconciled daily to update the account in QuotePro."

¶ 12 As to the automated outbound dialing, according to the scope of work agreement, BTI was obligated to create an IVR with certain customizable outgoing recorded messages to be delivered to Accurate's customers at about the time when they were to renew their insurance policies and when payments on their current policies were past due (hereinafter the outbound IVR). BTI agreed to work with Accurate to design the IVR programs.

¶ 13 The scope of work agreement also included a money back guarantee policy according to which a customer had the option of "returning any product purchased at any time up to 30 days after delivery, installation, or project completion (whichever comes later) for a full refund or cancelation of any rental, lease or outsourcing contract.")

¶ 14 According to the lease agreement (and addendum), BTI agreed to lease the equipment to Accurate for 60 monthly payments of \$3532.00. In addition, BTI agreed to secure financing for Accurate's purchase and installation of the equipment. According to the addendum, in that vein, BTI would secure a financing source. That financing source would then advance funds to BTI on Accurate' behalf (hereinafter equipment acquisition payments) to acquire and install the equipment, as well as provide the staff with training on how to use the equipment, provided that BTI demonstrated to that financing source that Accurate made an unconditional commitment to pay the amounts called for under the parties' lease, namely the 60 installments of \$3,532.00 to lease the equipment.¹

¹ The parties subsequently amended the scope of BTI's obligations to add additional equipment by completing two equipment add-on schedules: the first on May 23, 2007 (adding \$95.34 to the original monthly lease fee) and the second on August 8, 2008 (adding \$17.98 to the original

¶ 15 The lease agreement also contains a risk of loss provision which states in pertinent part:
"[BTI] will bear the risk of direct physical loss or damage to the equipment, except as provided herein. If the equipment is lost or damaged, [BTI's] sole obligation will be to repair the equipment or replace it with equipment having substantially similar functionality. [BTI] may require proof of loss in a form acceptable to [BTI]. In no event shall [BTI] be liable for interruption of [Accurate's] business, loss or damage to [Accurate's] property or any other loss, including injury to any of [Accurate's] employees, agents or any other person on [Accurate's] premises."

¶ 16 C. The Settlement Agreement

¶ 17 By August 2008, the parties had failed to arrive at an end-of-project schedule. In addition, the outbound IVR system, which had been contemplated in the scope of work agreement, had not become operational. Accordingly, on March 16, 2009, the parties entered into a settlement agreement to settle all outstanding claims related to the service agreement and the scope of work agreement and hold each other harmless.

¶ 18 According to the settlement agreement, on February 25, 2009, BTI agreed to make a one-time lump payment sum of \$11,316.09 to Accurate for inconveniences Accurate might have experienced from both parties' failure to agree on an end-of-project schedule. BTI and Accurate further agreed to use their "best efforts" to complete the project, including making the outbound IVR operational, by March 30, 2009. In this vein, they agreed to use their best efforts to coordinate both between themselves and "any collateral parties" involved. In addition, the parties agreed that BTI would notify Accurate in writing within 24 hours if for any reason it was unable to carry out any of the work necessary to make the telephone system fully operational

monthly lease fee). The parties agree that both of these amendments were contemplated under and are part of the original lease agreement.

consistent with the terms of the settlement agreement, and that Accurate would use its best efforts to remedy any such problem if they were caused by or within its control.

¶ 19 The parties agreed that all changes through December 14, 2008, that had been made to the scope of work agreement would be included in the "outgoing script," except for IVR Recording #87. In addition, Accurate agreed that no other changes were to be included in the scope of work agreement going forward. If Accurate wanted changes then it agreed to be solely responsible for their cost, which the parties agreed would be \$175 per hour. In addition, Accurate agreed that each additional request for work would have to be in writing, and executed by both parties.

¶ 20 The parties further agreed that in exchange for the \$11,316.09, Accurate would continue making all of its monthly lease payments (to Great American Leasing (hereinafter GAL)), and never speak disparagingly of BTI to any person. The parties also agreed to a mutual release of claims, which stated:

"A. Accurate agrees to release BTI from any and all claims, demands, obligations, losses, cause of action, costs, expenses, attorneys' fees and liability of any nature whatsoever, whether based on contract, tort, statutory or other legal or equitable theory of recovery, whether known or unknown, which Accurate has, had or claims to have against BTI stemming from the matters giving rise to this agreement.

B. BTI agrees to release Accurate from any and all claims, demands, obligations, losses, causes of action, costs, expenses, attorneys' fees and liabilities of any nature whatsoever, whether based on contract, tort, statutory or other legal or equitable theory of recovery, whether known or unknown, which [BTI] has, had or claims to have had against Accurate as of the date of this agreement."

¶ 21 The settlement agreement further contained a provision titled "Continuation of Agreements,"

stating that the parties agreed that the lease agreement and service agreement "shall remain in effect, notwithstanding the resolution reached under [the settlement] agreement. "

¶ 22 The parties also agreed that each would bear its own costs and attorneys' fees with respect to executing the mutual release and the settlement agreement. However, a separate provision of the agreement titled "Attorney's Fees," provided that in the event it was necessary to "enforce" a provision of the settlement agreement, "all costs, expenses and attorneys' fees, whether taxable or not, shall be paid by the non-prevailing party or parties to the prevailing party or parties."

¶ 23 With respect to remedies, the parties agreed, *inter alia*, that if as of March 30, 2009, BTI failed through its own fault (and no fault of Accurate and its agents, including its then database vendor) to make features included in the scope of work agreement operational, BTI would pay Accurate "for each day the telephone system is not operational based on one-half (1/2) of Accurate's monthly lease payment at the time." Similarly, if Accurate disparaged BTI or failed to make payments to GAL subject to the terms of the settlement agreement, Accurate would have to pay BTI \$11,316.09.

¶ 24 C. Procedural History

¶ 25 1. Pretrial

¶ 26 On October 14, 2011, Accurate filed an eight count complaint against BTI, and Brackett, individually, alleging: (1) fraud (Count I); (2) consumer fraud and deceptive business practices (815 ILCS 505/1 *et seq.* (West 2012)) (Count II); (3) fraudulent inducement (Count III); (4) negligent misrepresentation (Count IV); (5) breach of the original contract (Count V); (6) breach of the settlement agreement (Count VI); and (7) equitable indemnity/contribution (Count VII).

¶ 27 In the complaint, Accurate alleged that BTI had failed to provide it the telephone system in

accordance with the original contract and when the system was finally delivered, refused to service the system.

¶ 28 Accurate further alleged that BTI promised to self-finance the contract in order to get Accurate to sign the agreement, and also promised that the contract would not be assigned. However, according to Accurate, some time prior to March 2007, BTI reached an agreement with a third-party, GAL, an Iowa corporation, to be the financing source for BTI's contracts. In addition, after BTI and Accurate executed their agreement, BTI assigned Accurate's lease to GAL. Accurate alleged that it first found out about the assignment after June 2008, when it threatened to withhold payments from BTI because of BTI's failure to deliver the outbound IVR as part of the telephone system. Accurate alleged that once it found out that it was liable to GAL on the lease agreement, rather than BTI, it chose to mitigate its losses by entering into the settlement agreement with BTI, under which it was to receive \$11,316.09 and a fully operational telephone system with outbound IVR by March 30, 2009, in exchange for continuing to make its lease payments to GAL. However, Accurate further alleged, BTI eventually failed to deliver both the \$11,316.09 and a fully operational system with outbound IVR by March 30, 2009. As a result, Accurate stopped making payments to GAL, and GAL filed a law suit against Accurate in Iowa, which Accurate alleged it was ultimately forced to settle.

¶ 29 In addition, Accurate alleged that BTI failed to subsequently service the telephone system as was agreed by the parties' under the warranty and service section of their original service agreement. Specifically, Accurate alleged that in June and August 2011, the telephone system stopped working twice following power outages in the area. BTI initially advised Accurate to just flip the power switch to restart the system. After problems recurred, a BTI service person was dispatched to Accurate's headquarters and was able to fix the telephone system but not the

IVR. The IVR was then disconnected and removed and BTI subsequently informed Accurate that the IVR was "fried." When Accurate asked BTI to fix the system, BTI sent Accurate a proposal indicating that the repair would cost \$32,960.30, and that it was not covered under the parties' original agreement because that agreement was voided by Accurate's settlement with GAL.

¶ 30 With respect to Count V, breach of the original agreement, Accurate alleged: (1) that BTI failed to deliver a fully operational telephone system, and (2) that it should be allowed to void and rescind both agreements under the money back guarantee section of the original scope of work agreement.

¶ 31 On May 29, 2012, BTI filed a combined section 2-619.1 motion to dismiss (735 ILCS 5/2-619.1 (West 2010)). In support, BTI attached an affidavit of BTI's principal, Brackett. According to that affidavit, Brackett was responsible for negotiating the March 2007 agreement with Accurate. Brackett averred, *inter alia*, that during those negotiations he never made representations to Accurate that Accurate was entering into the contract only with BTI, that Accurate would receive the full benefits of the telephone system and repair service even if it failed to make the payments required under the contract, and that BTI would not assign the lease portion of the agreement to a third party. Brackett further averred that in the spring and summer of 2008, Accurate became seriously delinquent on its lease payments to BTI and had defaulted on the contract. Brackett stated that in July 2008 it sent a formal notice to Accurate informing it that BTI had assigned the lease portion of the agreement to GAL.

¶ 32 On August 13, 2012, the circuit court dismissed all of Accurate's counts, except for Count VI, breach of the settlement agreement. In dismissing counts I (fraud), II (consumer fraud and deceptive business practices), III (fraudulent inducement) and IV (negligent misrepresentation)

the court noted that Accurate had failed to supply a counter affidavit to challenge Brackett's assertions. With respect to Count V, the court noted that Brackett's affidavit established that Accurate was significantly delinquent on its payments and had not performed under the contract and therefore could not recover under it. In addition, the court found that counts I through V were all barred by the settlement agreement executed by the parties on March 16, 2009, as all those claims arose prior to that date. The court specifically noted that by the language of the settlement agreement, on March 16, 2009, Accurate released all claims it had against BTI whether known or unknown. With respect to counts VII and VIII (for equitable indemnity/contribution), the court noted that they were barred by the settlement agreement as they were premised on the same operative facts as the fraud and breach of contract claims which predated the settlement agreement.

¶ 33 Accurate did not attempt to appeal the circuit court's dismissal of all but one of its claims. Instead it proceeded with count VI, breach of the settlement agreement.

¶ 34 On October 17, 2012, BTI filed a counter claim against Accurate, alleging breach of contract and quantum meruit. According to BTI's counter claim it was entitled to damages and attorneys' fees because Accurate had stopped making any payments on the lease to BTI from July 2009, while at the same time receiving and accepting substantial benefits from services rendered to it by BTI.

¶ 35 Accurate responded by filing a motion to dismiss the counter claim, but that motion was denied by the circuit court. After BTI was permitted to amend its counter claim to add the amount of damages (\$18,000 in lease payments allegedly not paid by Accurate), on March 1, 2013, Accurate petitioned the court to amend its complaint to provide additional facts supporting its breach of settlement agreement claim (Count VI). Specifically, Accurate wanted to allege: (1)

BTI's failure to honor the risk of loss provision in the lease agreement and the warranty and service provision of the service agreement by refusing to recover the telephone system after the July 2011 storm and the actual damages incurred by Accurate in restoring that telephone system in the amount of \$32,960.30; and (2) BTI's failure to deliver the entire telephone system (including the outbound IVR) contracted for. In addition, Accurate filed a motion to dismiss BTI's amended counter claim. The circuit denied both of Accurate's motions.

¶ 36 2. Bench Trial

¶ 37 After the close of discovery, on April 22, 2014, the parties proceeded with a bench trial at which seven witnesses testified and over 50 exhibits were introduced. The record is long and convoluted because at trial the witnesses were called and then recalled several times both as part of the parties' cases-in-chief and as part of each parties' rebuttal to the others' claims.

Accordingly, for purposes of brevity, we set forth only the relevant evidence adduced at trial.

¶ 38 Accurate's general manager, Nasser first testified that in late 2006, Accurate decided to replace its old telephone system (Toshiba) with a newer and more advanced version. Nasser reached out to BTI after having heard about the company from a former employee. After researching BTI on the internet, sometime in February 2007, Nasser made a telephone call to BTI to obtain a quote. Soon thereafter, a BTI representative came to Accurate's Bridgeview office where the two talked about what Nasser wanted in the new telephone system (namely, graphs, statistics, time-on-hold information about phone calls being made to Accurate's customers, and voicemail.).

¶ 39 Afterwards, BTI's project engineer David Smith (hereinafter Smith) invited Nasser and Nasser's brother, Michael, to visit BTI's Lemont headquarters, where they were shown a mock telephone system. The parties met again soon thereafter at Accurate's Bridgeview office. At this

meeting, BTI's president, Brackett (hereinafter Brackett) informed Nasser about the possibility of a telephone system taking payments and making outbound calls to request payments.

¶ 40 According to Nasser, BTI eventually made a written proposal to Accurate, and the parties entered into the original written contract, consisting of the service agreement, the scope of work agreement, the lease agreement and lease agreement addendum. That agreement was entered into evidence at trial.

¶ 41 Nasser next testified about the installation process. He stated that before the lease agreement was signed, BTI shipped the entire telephone system to Accurate's headquarters before beginning installation. Two weeks after delivery the telephones and the voicemails were set up. Soon thereafter the tracer (which records telephone calls) began working. In October 2008, the inbound IVR (which takes payments that are due from customers when they call in) became operational.² Each time, Nasser was informed by BTI's project engineer, Smith, that the component had become functional.

¶ 42 Nasser testified, however, that after October 2008, no other parts of the originally promised system were installed. Specifically, Nasser averred that Accurate never received an operational outbound IVR (for use in automatically reaching out to customers to renew their insurance policies or to pay past-due payments on current insurance policies).

¶ 43 Nasser explained that when the parties signed the settlement agreement, they agreed that Accurate was to have an operational outbound IVR by March 30, 2009, but that BTI never delivered on this promise. Specifically, Nasser testified that it was not until April 2009 that Smith asked him for help in testing the outbound IVR functionality. Smith asked Nasser to listen

² Nasser explained that the inbound IVR allowed a calling customer to enter a zip code and telephone number permitting the system to look up the customer's file and the amount due, and permitting the customer to make a payment using the telephone.

to several audio tape recordings of the outbound IVR and then send them back to Smith and Brad Foster (hereinafter Foster) of Watch4Net (the subcontractor, provided by BTI, and responsible for the software end of the IVR system). Nasser testified that he did so, and noted several problems with the outbound IVR, namely: that it was hanging up on customers, that it was not disconnecting as it was supposed to if it hit an answering machine, that it was not directing the insured to a live operator, and that it was not accepting payments through credit cards for renewals of insurance policies. This was the first time Nasser learned of any problems with the outbound IVR.

¶ 44 Nasser acknowledged that when BTI subsequently sent him an acceptance form on April 1, 2009, accepting the BTI system as complete and operational, he refused to sign it. Instead, after listening to the audio recordings, Nasser emailed Foster on April 29, 2009, attaching the audio tape recordings that showed the problems. In this email, which was admitted into evidence, Nasser detailed the problems he observed with the system, including that 99% of the time the outbound IVR was not hanging up on answering machines, thereby tying the telephone lines up for minutes.

¶ 45 Two of the tape recordings that Nasser listened to as part of the testing were introduced at trial. Nasser testified that the first was an audio recording of the outbound IVR system telephoning an insured customer, the customer picking up the call, the outbound IVR identifying itself as being a call from Accurate, followed by a ringing sound, and then the outbound IVR trying to redial before hanging up. On cross-examination, Nasser acknowledged that it could have been the customer redialing and hanging up. Nevertheless, according to Nasser, this recording establishes that the outbound IVR was not performing properly because it did not: connect the customer to an operator, nor give the customer an opportunity to enter a credit card,

both of which were contemplated under the parties' original agreement as to the functionality of the outbound IVR.

¶ 46 The second audio recording is of the outbound IVR system calling an insured customer and the customer's answering machine picking up. At that point, the outbound IVR repeatedly asks the customer to identify his name, instead of just hanging up. Nasser testified that Smith had promised him that the outbound IVR would disconnect when it picked up an answering machine. He acknowledged that this ability to hang up after picking up an answering machine came only from Smith and was not documented anywhere in the parties' agreements.

¶ 47 Nasser further testified that after he expressed his concerns to Smith, Smith suspended testing and turned off the outbound IVR. When Nasser attempted to approach BTI's representatives about the outbound IVR, BTI sent him an invoice dated June 3, 2009, which was admitted into evidence, asking for \$6,075 to make the outbound IVR operational. The invoice was followed by a telephone call from Smith informing Nasser that BTI would not continue testing until this amount was paid. Nasser acknowledged that Accurate refused, and in fact, never paid this amount.

¶ 48 Nasser next testified regarding Accurate's financial losses resulting from the failure of the outbound IVR to perform as promised. According to Nasser, without the automated outbound system campaigning for renewals, Accurate was forced to use three to four of its employees to telephone insureds to renew their insurance policies. He stated that the salary of those three employees was between \$12,000 and \$15,000 a month, or about \$144,000 per year. In addition Nasser testified to the total amount paid by Accurate on the lease agreement with BTI (later assigned to GAL). According to Nasser, Accurate was responsible for and paid a monthly sum of \$3,647.01 (\$3532.69 plus \$96.34 plus \$17.98) for the period of 60 months, totaling

\$218,550.90. Nasser testified that Brackett had told Accurate the value of the outbound IVR was 49% of the lease agreement amount.

¶ 49 Nasser next testified that in August 2011 he had another telephone conversation with Smith after a power outage had cut the telephone system's operation, including the continually tested outbound IVR. At that time, Smith told Nasser that the restoration of the system would not give Accurate the outbound IVR that it had been requesting all along. This conversation was tape recorded as part of Accurate's regular course of business and was admitted into evidence.

¶ 50 On cross-examination, Nasser stated that the equipment installed is owned by Accurate and became Accurate's after Accurate made all of its payments to GAL. Although he could not recall when Accurate started making payments directly to GAL, namely before or after the settlement agreement, he stated that they initially sent checks to BTI but were then told to make them to GAL. Nasser understood GAL to be a leasing company, which leased the phone system to Accurate, while BTI serviced the telephone system.

¶ 51 On cross-examination, Nasser acknowledged that when asked during his deposition what kind of problems he observed with the outbound IVR, he only indicated that there were problems with hang ups, and never mentioned the slew of other problems he had testified to on direct.

¶ 52 Accurate's president and owner, Michael next testified consistently with Nasser about their decision to obtain a new telephone system for the business, reiterating that it was BTI's founder and owner, Brackett, who introduced them to the idea of an IVR, suggesting that it could replace the work of some of Accurate's employees. Michael testified consistently with Nasser regarding the functionality expected from the inbound and the outbound IVR, adding that the advantage was that both systems were capable of working during and after business hours. He also acknowledged that the installation process was done in phases and overseen by Nasser.

¶ 53 Michael testified that in March 2009, the parties entered into a settlement agreement because Accurate had not yet received an outbound IVR. Michael explained that the IVR was the most significant part of the system, and he wanted certain funds from the lease payments that Accurate had already paid to be refunded, if the outbound IVR was not going to be installed.

According to the settlement agreement a deadline was put into place by which Accurate would receive an outbound IVR, and Accurate was compensated for the payments it had made on the lease agreement toward the outbound IVR.

¶ 54 Michael acknowledged that prior to the settlement agreement, BTI had paid several of the lease payments from Accurate to GAL. He explained that although Accurate initially made payments on the lease agreement to BTI, after receiving a notice of the lease assignment to GAL, Accurate began making payments directly to GAL.

¶ 55 Michael next testified that BTI never performed on the settlement agreement, and failed both to pay Accurate the settlement amount as well as to install the outbound IVR by the agreed upon date. Michael testified consistent with Nasser about the outbound IVR never working properly, *i.e.*: (1) hanging up on customers; (2) not allowing a customer who was following a prompt to actually do anything it was instructed to do; (3) failing to automatically disconnect after receiving an answering machine.

¶ 56 Michael telephoned Brackett in June 2009 attempting to discuss BTI's failure to perform under the settlement agreement, but Brackett refused. Michael continued to email Brackett attempting to get the outbound IVR running, but received no replies. As a result, Michael decided to have Accurate stop making its lease payments to GAL. At the beginning, Accurate merely stopped making partial payments to GAL (namely the 49% of the lease payment that Brackett indicated to him was the value of the outbound IVR).

¶ 57 Soon thereafter, GAL sued Accurate in Iowa. On May 27, 2010, Accurate entered into a settlement agreement with GAL and paid them the full amount owed on the lease. Although Michael acknowledged that under that settlement agreement, Accurate paid a smaller monthly amount to GAL than it had been paying to them under the lease agreement, he explained that this smaller amount was merely a reflection of an agreement to extend the lease over an extra year, but that the total amount paid remained the same.

¶ 58 Michael next identified a voicemail left by Brackett on Michael's answering machine around September 2009, wherein Brackett acknowledges that BTI still owes Accurate \$7,941.33 from their settlement agreement.

¶ 59 Michael next averred that in August 2011, electrical problems affected the BTI telephone system, and it stopped working for a while. When Accurate approached BTI, BTI demanded around \$30,000, to restore the system. Michael acknowledged that this demand enraged him and that as a result he made intemperate remarks about Brackett to Smith, which led to Brackett filing a complaint with the police. Michael explained, however, that in response, on September 9, 2011, he did receive an email from Brackett, wherein Brackett agreed that the outbound IVR "did not turn out as planned," but that there was no reason to go over the various reasons on either side unless they wanted to go to court.

¶ 60 Michael next testified consistently with Nasser regarding the damages that Accurate had suffered as a result of BTI's failure to install a functioning outbound IVR. These damages included the money Accurate had paid for the outbound IVR and the money it had paid to its employees to perform the services that had been anticipated would be performed by the outbound IVR.

¶ 61 On cross-examination, Michael acknowledged that under its settlement agreement with GAL,

after Accurate paid all of its lease payments to GAL, it would own the telephone system equipment, outright. Michael also acknowledged that GAL was not responsible for servicing the telephone system, and that after Accurate settled with GAL, BTI continued to service the system for Accurate.

¶ 62 Kenneth Gebherd (hereinafter Gebherd) next testified that he is a network engineer at QuotePro, the company that owns the software that was used by the IVR system. Gebherd acknowledged that this software had two databases, one to be used in obtaining payments from customers, and the other for renewals of insurance policies. He indicated that he had no personal knowledge of any problems with the IVR, but acknowledged that he was privy to several emails indicating that the IVR was hanging up on customers.

¶ 63 In addition, Gebherd acknowledged that during the installation, representatives from Accurate had emailed him about understanding how to use an asterisk in the database content to prevent the IVR from making a courtesy call to a customer who had indicated he did not want to be receiving such calls. Gebherd explained that the program works in such a manner that placing an asterisk in front of a customer's address stops the IVR from making a telephone call to that customer. Gebherd explained, however, that the software program did not hit both databases at the same time so that that an asterisk needed to be placed in front of the addresses of the customer both in the payment and the renewal databases to prevent each call being made. He acknowledged that Accurate's employees were responsible for placing the asterisks in front of the customer's names in both databases.

¶ 64 Gebherd also testified that in August 2011, Smith telephoned him to ask whether QuotePro had backed up the IVR system because the hard drive of the system had crashed in a power outage. Gebherd told Smith that he did not.

¶ 65 BTI's network and operations engineer and manager, David Smith (hereinafter Smith) next testified about BTI's role in the development of the IVR. According to Smith, BTI first discussed the script for the automated machines with Accurate, and went through eight iterations of the script before choosing one. BTI also informed Accurate's database team at QuotePro what kind of information it needed so as to make the IVR work. BTI then contracted with Watch4Net which programmed the script into the IVR. BTI helped integrate that script into the IVR, tested the system and made it live. On cross-examination, Smith was impeached by his deposition testimony and admitted that when asked to explain the role BTI played in the development of the IVR at that time he had testified "none."

¶ 66 Smith averred that both the inbound and the outbound IVR became functional in early 2008. On cross-examination, however, he acknowledged that in his deposition he had testified that he could not recall when they became functional. Smith was also shown a work order dated October 2008, which states "IVR still not complete. This will be tracked on separate ticket." When asked where the separate ticket was, Smith indicated that he did not know.

¶ 67 Smith also acknowledged that under the language of the original agreement entered into by the parties the "automated dialing campaigns to increase renewals" were to be included in the IVR, permitting the customer to either make a payment or be transferred to an agent. Smith asserted, however, that this language meant that if the customer was being called on a past due payment it would be given the option to pay by credit card, but that if the purpose of the call was to get a renewal of an insurance policy, then the system would transfer the customer to a live agent. In fact, Smith identified a May 24, 2007, scope of work agreement relating to the IVR that was negotiated between Accurate and BTI and testified that this document governed the IVR scripts. According to Smith, that document contains two sections, the "IVR outgoing renewal

campaign" and the "IVR collection campaign," and only the second section, the "IVR collection campaign" contains language stating the IVR will be taking credit card payments.

¶ 68 Smith testified that sometime in late 2008, during inbound IVR testing, he received about 55 emails from Accurate requesting changes to the inbound and outbound IVR. Smith asserted that as a result in February 5, 2009, he sent an email to Michael quoting a price for changes proposed to the IVR to allow for renewal of payments by phone. At that point, Accurate threatened BTI with litigation. According to Smith, although Accurate never paid the additional cost, BTI continued "in good faith" to work on installing the remaining functions of the outbound IVR, while attempting to negotiate a settlement agreement.

¶ 69 Smith acknowledged that under the settlement agreement that was subsequently entered into, BTI was obligated to install the outbound IVR by March 30, 2009. He testified affirmatively that by that date, the outbound IVR was working 100%. According to Smith, the outbound IVR was taking information from a database, qualifying it, taking the phone number, making outbound calls, waiting for an answer, acting upon that answer, giving the information it needed to the person that answered, determining if it was the person by making the person provide it certain information, acting upon the status of the client, and either giving the customer a reminder if he or she was past due on a payment or reminding them of a cancelation or any other things that the customer needed to do, *i.e.*, be transferred to customer service. The system also successfully transferred customers to live agents, and would accept credit card payments on the phone.

¶ 70 Smith explained that under the December 14, 2008, email which was incorporated by the parties' into the settlement agreement, and which defined the final scope of work agreed to by the parties, there was no requirement that the IVR for renewals permit customers to make automatic

payments using the telephone. In that email he identified an unnumbered IVR recording script as script Number 87, which was referred to in the settlement agreement as the one the parties agreed would not be included in the "outgoing script." That script read: "C[redit] C[ard] renewal PaymentNotice: Thank you for your renewal payment, all phone and online renewal payments are processed the next business day."

¶ 71 Smith testified that there were no glitches with the IVR, nor times when it was not fully operational. He averred that the only reason that the system was down in April 2009 for testing was because Accurate had asked BTI to take the system down to deal with database anomalies. According to Smith, those anomalies arose solely from incorrect data being entered into the database. Smith explained that the data (including customer's phone numbers, status, what he or she owes etc.) is critical, and if inaccurate will affect the outcome of the fully operational outbound IVR. Smith averred that BTI had no control of the data and that it was solely in the control of and provided by QuotePro, whom Smith understood to be Accurate's inside information technology (hereinafter IT) aide. Smith acknowledged that testing revealed hang-ups, but reiterated that the problem was caused by inaccuracies in the database. He averred that once those inaccuracies were fixed the outbound IVR was operational again.

¶ 72 Smith further testified, contrary to Nasser, that testing on both the inbound and outbound IVR was never done with live customers because that would be "ludicrous" from a customer-service perspective and is therefore never done. Smith explained that Nasser's version of "testing" was to listen to live call recordings of an operational and running IVR and search for things he believed were "anomalies." According to Smith, the audio recordings that Nasser had testified to, were recordings of a fully functioning IVR doing its job.

¶ 73 Specifically, with respect to the first recording where the IVR appears to hang up on a

customer, Smith testified that this call also registers some ringing. He explained that the ringing could be one of two things: the customer accidentally redialing while the outbound IVR is in the process of transferring him to a live agent, or an Accurate agent, accidentally hanging up on the customer. He testified that the outbound IVR could not have hung up on the customer with the ringing sound in the background.

¶ 74 As to the second recording, where the outbound IVR does not automatically disconnect when upon reaching answering machine, Smith testified that he never told Michael that the outbound IVR would have this ability. Smith testified that based on the December 14, 2008, email he received from Michael, and which was incorporated by reference into the settlement agreement, he understood that Michael wanted the IVR to leave voicemails on answering machines, instead of disconnect. That email was admitted into evidence and states in pertinent part:

"One concern I have is calling too late. I feel we should not have calls go out later than 8:00 p.m. Your thoughts? Also, will the system leave messages on answering machines and voicemail? I think it is a good idea and a last attempt of the day and it is free name advertising?"

¶ 75 Smith next acknowledged that in 2011 there was an electrical storm that affected Accurate's telephone system. He explained that after that storm BTI was unable to backup the IVR system because the information in the system was contained on a hard drive in a box located at Accurate's headquarters and governed by Accurate's local network, which was controlled by QuotePro. Smith stated that there was a difference between the backing up of the Inter-Tel 500 system software database, which BTI always had the capability to do, and the backing up of the data on Accurate's local network. He explained that BTI routinely backed-up the Inter-Tel 500

system software database and identified printouts showing that such backups were made on July 22, 2011 and March 26, 2010.

¶ 76 Smith testified that Accurate never provided it with remote access to the QuotePro controlled local databases. In fact, according to Smith, Gebherd as the manager of Accurate's local server and Accurate's IT administrator was the only one with access to the network and the ability to back it up. Smith explained that this was the only reason he called Gebherd after the storm to see if he had made the backup.

¶ 77 On cross-examination, Smith was asked about the audio recording of his conversation with Nasser after the power outage where he acknowledges that BTI would not be able to provide Accurate with a fully running outbound IVR. Smith explained, however, that by this he simply meant that even if the IVR was fully rebuilt, the same issues, arising from the data inconsistencies (attributed to QuotePro) would cause the IVR to function subpar.

¶ 78 BTI's president and majority owner Brackett next acknowledged that he executed both the original and settlement agreement with Accurate. Brackett acknowledged that BTI only made a partial payment that it owed to Accurate under the settlement agreement. He explained that he did not pay the full amount on the settlement agreement because there was no deadline for such a payment specified in the agreement.

¶ 79 Brackett testified, however, that it was Accurate who failed to perform under the parties' original lease agreement. Specifically Brackett pointed out that under the original lease agreement, Accurate was responsible for the full amount of the lease even if BTI did not perform on the contract. Specifically, Brackett pointed out to the following provision in the lease agreement where Accurate agreed that it would be: "unconditionally obligated to pay all rent and other amounts due for the entire lease term no matter what happens, even if the equipment is

damaged or destroyed, if it is defective or if you no longer can use it." In addition, the lease agreement states that Accurate is "not entitled to reduce or set off against any rent or other amounts due" to BTI or "anyone to whom we transfer this lease, whether your claim arises out of the lease, any statement by the vendor, or any manufacturer or vendor liability, strict liability or negligence or otherwise."

¶ 80 Brackett next testified that the Accurate project should have been very simple. On a daily basis, QuotePro was supposed to send BTI one database file with correct information. The IVR was supposed to reference that database file and work flawlessly. However, according to Brackett, QuotePro tried for a year and could not get that single database file set up properly. QuotePro then complicated matters by adding a second database a year later. According to Brackett, Accurate took until February 2008 to make any recordings, and then requested a litany of changes, which were demanded at the constant threat of litigation and ultimately bodily harm.

¶ 81 Brackett also testified that GAL only ever acted as a financing company while BTI was responsible for the installation, service and warranty of the equipment. According to Brackett, the monthly lease payments made by Accurate included two separate portions: (1) the financing payment for the equipment; and (2) the service portion for BTI's support in repairing equipment and providing other maintenance services. When the lease was assigned to GAL only the portion financing the equipment was assigned. Accordingly, when Accurate started paying GAL directly, GAL would refund the service portion to BTI. Brackett testified that Accurate stopped making any payments for services in July 2009. Nevertheless, Brackett averred BTI continued to provide the services required under the service agreement, and in fact from July 2009 made about 55 service calls to Accurate.

¶ 82 On cross-examination, Brackett acknowledged that there is no language in the lease

agreement pointing out that there exists a division between the service and the financing portion of the lease payment. In addition, Brackett admitted that the total amount Accurate paid for the equipment was about \$214,000.

¶ 83 On cross-examination, Brackett also stated that he could not recall writing an email in response to Michael's threats of harm to his family in which he acknowledged that the "outbound IVR did not turn out as planned." He reiterated again that if the IVR did not "turn out as planned" it was because between the original scope of agreement, Accurate had requested "some 60 changes" under constant threats of litigation.

¶ 84 BTI's CEO, and minority owner, Scott Staver (hereinafter Staver) next acknowledged that on July 25, 2008, he wrote an email to Brackett in response to other communications he had received as a result of delays in the installation of Accurate's telephone system, wherein he estimated that BTI caused 30% of that delay. In addition, Staver admitted that according to that email, he stated that 49.6% of the monthly lease payment Accurate was making to BTI was for the value of the IVR.

¶ 85 In rebuttal, Accurate recalled Nasser, who testified that QuotePro only handles Accurate's servers and does not even host Accurate's email. Nasser also explained that QuotePro is "not Accurate's IT guy." In addition, Nasser stated that he does not know how to personally make entries into the QuotePro database.

¶ 86 Nasser also testified contrary to Smith regarding the test recording wherein the IVR hung up on a customer. He explained that the ringing would not have happened during a transfer to a live agent because Accurate has an "inter-hold" professional voice during transfers telling customers that Accurate has been in business since 1992, and that never kicked in.

¶ 87 After hearing all of the evidence and closing arguments by counsels, the court took the case

under advisement. On May 30, 2014, the court issued a written order finding in favor of Accurate and against BTI on the amount owed under the settlement agreement, namely \$7,944.33 plus costs, but finding no liability as to all other claims and counterclaims. Specifically, the court found that BTI had breached the settlement agreement by failing to pay the total sum (\$11,316.09) due under that agreement. The court rejected Accurate's demand for liquidated damages, finding the liquidated damages provision of the settlement agreement was unenforceable. In doing so, the court found the provision was unreasonable in light of the actual damages sustained by Accurate as well as the value of the contract and bore no relationship to any potential loss contemplated at the time of contracting. In addition, and alternatively, the court found that the evidence established that the chief difficulty in achieving a telephone system operating to Accurate's satisfaction was related to Accurate's own business. The court held that "even assuming that there was a breach, it could not be fairly characterized as through no fault of Accurate or its agents."

¶ 88 The court also rejected Accurate's claim for actual damages on this basis, noting that Accurate or its agents were partially responsible in preventing the telephone system from operating the way it should have. In addition, the court found that any damages based on the salaries of Accurate employees forced to make renewal calls was too speculative, since Accurate never had an automated telephone system making such calls prior to contracting with BTI, so that there was no independent baseline for measuring those damages.

¶ 89 With respect to BTI's counterclaim, the court rejected BTI's assertion that it was owed \$18,000 in lease payments relating to the services it had continued to provide to the telephone equipment even after July 2009. The court found that the evidence at trial established that

Accurate ultimately paid those monies to GAL, which had been assigned by the lease, and that there was no competent proof presented to the contrary.

¶ 90 As to attorneys' fees, the court ordered each party to pay its own fees, finding that neither was a "prevailing party" under the language of the settlement agreement.

¶ 91 3. Posttrial

¶ 92 On June 26, 2014, Accurate filed a motion after judgment seeking reconsideration of the liquidated damages and attorneys' fees rulings. In addition, Accurate moved the court to amend its pleadings to conform to the proofs at trial pursuant to sections 2-616(c) and 2-617 of the Code (735 ILCS 5/2-1303 (West 2012)). Accurate argued that the evidence established that the outbound IVR, as defined by the parties' original agreement, was never delivered by BTI, and that therefore Accurate was owed an additional sum of \$53,544.97 in damages. In support, Accurate attached the amendment to the motion to conform with proofs, including the following relevant allegations: (1) that the original lease agreement and the service agreement were fully incorporated into the settlement agreement and include the requirement that BTI install an outbound IVR that accepts credits cards or ACH payments; (2) that such an outbound IVR was never installed by BTI; (3) that the entire bargained cost of the telephone system was \$218,550.90; and (4) that since Staver admitted that the IVR is 49% of the telephone system (\$107,098.94), a failure to deliver to Accurate half of the IVR (namely the outbound IVR) deprived Accurate of \$53,544.97. Additionally, in the attached amendment, Accurate reiterated the allegations it had wanted to include in its original amended complaint (denied by the trial court prior to trial), alleging: (1) that BTI had failed to honor the risk of loss provision of the lease agreement and the warranty and service provision of the service agreement by refusing to

recover the outbound IVR portion of the telephone system after the July 2011 storm, (2) by which Accurate incurred \$32,960.30 in damages.

¶ 93 The court denied Accurate's posttrial motion. In doing so, the court noted that the points raised in the motion were already considered and ultimately rejected by the court in giving judgment. In doing so, the court noted that it reviewed its trial notes and was convinced that the weight it gave to the evidence, including the credibility of witnesses, was correct. Accurate now appeals, and BTI cross-appeals.

¶ 94 II. ANALYSIS

¶ 95 On appeal, Accurate argues that the trial court erred when it refused to allow Accurate to amend its complaint prior to trial to permit Accurate to recover under the parties' original agreement, which had been directly incorporated into the settlement agreement. Accurate similarly argues that the trial court erred in refusing to permit Accurate to amend its pleadings post-trial, so as to conform to the proofs presented at trial, pursuant to sections 2-616(c) and 2-617 of the Code (735 ILCS 5/2-616, 2-617 (West 2012)). Accurate further claims that the trial court erred when it entered judgment in favor of Accurate on the settlement agreement issue, but failed to award Accurate any attorneys' fees or liquidated damages.

¶ 96 BTI cross-appeals contending that the trial court's judgment should be reversed because the evidence at trial established that Accurate breached the underlying lease agreement with BTI by admitting to never having paid BTI for any of the maintenance and service of the equipment rendered by BTI to the telephone system, after Accurate settled with GAL. We will address each contention in turn.

¶ 97 A. Amendments to Pleadings

¶ 98 We begin with the parties' arguments regarding whether Accurate's complaint should have

been amended prior to or after trial. In this vein, Accurate contends that the trial court erred in refusing to allow it to file an amended complaint prior to trial so as to address an ambiguity that was created when the trial court dismissed Accurate's complaint as to Count V, alleging a breach of contract action based directly on the parties' original agreement, but permitting Accurate to proceed with Count VI, alleging a breach of the settlement agreement, where the plain language of the settlement agreement incorporated the original agreement by reference, permitting Accurate to go forward with its claims on the original contract. Accurate contends that this ambiguity spilled over into trial, when the trial court considered and denied "actual damages" in favor of Accurate, even though those actual damages resulted from the original agreement and were never alleged as part of Accurate's unamended complaint.

¶ 99 BTI first responds by arguing that Accurate is procedurally barred from raising this issue because it never appealed the dismissal of Count V after the court dismissed that count with prejudice. We disagree.

¶ 100 In that respect, we rely on Illinois Supreme Court Rules 301 and 304 (155 Ill.2d Rs. 301, 304). Rule 301 permits appeals from final judgments as a matter of right. See also Ill. Const.1970, art. VI, § 6. A judgment or order is "final" if it disposes of the rights of the parties, either on the entire case or on some definite and separate part of the controversy. *Dubina v. Mesirow Realty Development, Inc.*, 178 Ill. 2d 496, 502 (1997). While a dismissal with prejudice is usually considered a final judgment, including the dismissal of claims in a complaint, it is nonetheless not always immediately appealable. *Dubina*, 178 Ill. 2d at 502. Supreme Court Rule 304(a) provides:

"If multiple *** claims for relief are involved in an action, an appeal may be taken from a final judgment as to one or more but fewer than all *** claims only if the trial court has made an express written finding that there is no just reason for delaying either enforcement or appeal or both. * * * In the absence of such a finding, any judgment that adjudicates fewer than all the claims *** is not enforceable or appealable and is subject to revision at any time before the entry of a judgment adjudicating all the claims, rights, and liabilities of all the parties." 155 Ill. 2d R. 304(a).

¶ 101 Accordingly, contrary to BTI's position, without a Rule 304(a) finding, a final order disposing of fewer than all of the claims in an action is not instantly appealable. 155 Ill. 2d R. 304(a). In fact, as our supreme court has noted "[s]uch an order does not become appealable until all of the claims in the multiclaim litigation have been resolved." *Dubina*, 178 Ill. 2d at 502. It is not until the entire action is terminated that all of the final orders become appealable under Supreme Court Rule 301. *Dubina*, 178 Ill. 2d at 502.

¶ 102 In the present case, the record reveals that in dismissing all but one of Accurate's claims, the trial court did not enter a Rule 304(a) finding. Accordingly, Accurate could not have appealed the dismissal of Count V, earlier.

¶ 103 What is more, we find no merit in BTI's assertion that permitting Accurate to argue that the trial court erred in failing to amend Accurate's complaint prior to trial to allege that the original contract was incorporated by reference into the settlement agreement will unfairly prejudice BTI. In making this argument, Accurate acknowledges that reversing the case to pre-trial status, for more discovery, pleading practice and a new trial would be inefficient and costly. To avoid such a waste of resources, Accurate seeks a "less disruptive" remedy, seeking instead that this court reverse the trial court's order denying Accurate's post-trial motion to amend its complaint to

conform to the proofs at trial pursuant to sections 2-616(c) and 2-617 of the Code (735 ILCS 5/2-1203 (West 2012)) and award it \$53,544.97 in damages for part of the outbound IVR system that was never delivered by BTI and \$32,960.30 in the damages arising from the July 2011 storm that BTI was obligated but refused to repair. Accordingly, we address Accurate's arguments in the context of a motion to amend its complaint to conform to the proofs.³

¶ 104 It is well established that whether to grant a plaintiff leave to amend a complaint is a decision that is left to the sound discretion of the trial court, and under normal circumstances leave to amend should be liberally granted. *Tomm's Redemption, Inc. v. Hamer*, 2014 IL App (1st) 131005, ¶ 13 (citing *Goldberg v. Brooks*, 409 Ill.App.3d 106, 113 (2011)). In determining whether leave should be granted, courts consider a number of factors, including: "(1) whether the amendment cures a defect in the pleadings; (2) whether the other party is prejudiced or surprised by the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether there were previous opportunities to amend the pleadings." *Goldberg*, 409 Ill. App. 3d at 113.

¶ 105 However, these factors apply only to amendments that have been proposed prior to final judgment. After final judgment, a plaintiff has no statutory right to amend a complaint and a court commits no error by denying a motion for leave to amend. See *Compton v. Country*

³In doing so, we note that in its brief Accurate also argued that this appellate court should grant its motion to amend the complaint to conform to the proofs at trial pursuant to the authority granted to us by Illinois Supreme Court Rule 362. In that vein, Accurate simultaneously filed a motion pursuant to Supreme Court Rule 362 with this court. Although Accurate correctly points out that we initially granted that motion on June 19, 2015, we subsequently vacated that order on the merits. Accordingly the issue is moot.

Mutual Insurance Co., 382 Ill. App. 3d 323, 332 (2008). The reason is that although section 2-616(a) of the Code of Civil Procedure (735 ILCS 5/2–616(a) (West 2010)) provides that "[a]t any time before final judgment amendments may be allowed on just and reasonable terms," there is no corresponding provision mandating similar latitude in amendments offered after final judgment has been entered. *Tomm's Redemption*, 2014 IL App (1st) 131005, ¶ 13. Rather, pursuant to section 2-616(c) of the Code, following judgment, a complaint may only be amended to "conform the pleadings to the proofs." See 735 ILCS 5/2–616(c) (West 2010); see also *Tomm's Redemption*, 2014 IL App (1st) 131005, ¶ 13.

¶ 106 To allow the amendment of a pleading to conform to proofs, the proofs already produced must support the amendment. *Harding v. Amsted Industries, Inc.*, 276 Ill. App. 3d 483, 494 (1995). In other words, a complaint cannot be amended after final judgment to add new claims and theories or to correct other deficiencies. See *Compton*, 382 Ill. App. 3d at 332; see also *Mandel v. Hernandez*, 404 Ill.App.3d 701, 707-10 (2010). The test for determining whether the trial court properly exercised its discretion in denying a motion to amend after judgment is "whether the court's decision furthers the ends of justice." *Deming v. Montgomery*, 180 Ill. App. 3d 527, 533 (1989).

¶ 107 In the present case, after a review of the record, for the reasons that follow, we find no abuse of discretion in the trial court's refusal to grant Accurate's motion to amend its pleadings both prior to and after trial.

¶ 108 Prior to trial Accurate sought to amend the pleading by alleging BTI's failure: (1) to deliver a fully operational telephone system (including an outbound IVR) by March 30, 2009, and (2) to honor the risk of loss provision in the lease agreement and the warranty and service provision of the service agreement, incorporated by reference in to the settlement agreement as a result of

which Accurate incurred damages in the amount of \$32,960.30. After trial, Accurate sought to amend the complaint to conform to the proofs by additionally alleging that the original lease agreement and service agreement were fully incorporated into the settlement agreement and that they required the installation of an outbound IVR that would accept credit cards for renewals, which was never delivered by BTI resulting in damages in the amount of \$53,544.97.

¶ 109 At the outset, we agree with Accurate that certain portions of the underlying contract were incorporated by reference into the settlement agreement, by way of the "Continuation of Agreements," provision of the settlement agreement. That provision explicitly states that the lease agreement and service agreement "shall remain in effect, notwithstanding the resolution reached under [the settlement agreement.]" The settlement agreement then specifies the scope of work agreement that the parties' agreed upon from the date of the settlement agreement forward. Specifically, the parties agreed that only those changes made through December 14, 2008, that had been made to the scope of work agreement would be included in the "outgoing script," except for IVR Recording #87. Any additional changes would be charged extra and would need to be made and approved by both parties in writing.

¶ 110 Nevertheless, because the evidence presented by the parties' as to BTI's obligations and performance under this final scope of work agreement was hotly contested, the proposed amendments could not have cured any defects existing in the pleadings. On one hand, at trial Nasser and Michael contended that under the December 14, 2008, email incorporated by reference into the settlement agreement, BTI was responsible for installing an outbound IVR that permitted customers to renew their insurance policies by making a telephonic credit card payment. On the other hand, BTI's Smith and Brackett testified that the parties had agreed to the exact opposite, noting that script #87, which was explicitly excluded from the scope of work

agreement by the language of the settlement agreement, included that renewal credit card option. Under this record, and the trial court's inherent authority to weigh the evidence and the credibility of the testifying witnesses, an amendment to the pleading alleging that the settlement agreement required that BTI install an outbound IVR, and that since no such IVR was installed BTI owed Accurate \$53,544.97 (the cost of half of the outbound IVR) would not have cured any defect in the original pleadings. The court was already privy to all of this information from the evidence presented to it at trial, and weighed that testimony accordingly, holding that the failure to install a full outbound IVR was at least in part attributable to Accurate's inability to resolve the database problems.

¶ 111 We similarly reject Accurate's attempt to amend the pleadings to allege further facts regarding the damages it sustained after the July 2011 storm, since those amendments would again not have cured any defects in the pleadings nor would have conformed the pleadings to evidence that was already before the court. While Accurate is correct that both the warranty and service provision of the original service agreement and the risk of loss provision of the lease agreement were incorporated by reference into the settlement agreement, it again fails to acknowledge the language of those provisions in context of the evidence presented by the parties' at trial. Specifically, contrary to what Accurate posits, under the warranty and service provision of the original agreement, BTI only warranted against defective parts and workmanship. Similarly, even though the risk of loss provision of the lease agreement stated that BTI would "bear the risk of physical loss or damage to the equipment" it also specifically stated that BTI would not be responsible for, nor pay for, the replacement or repair of any loss or damages that "could have reasonably been prevented by [Accurate] or [that] resulted from [Accurate's] negligence in maintaining adequate protection for the equipment." Since BTI's agents testified at

trial that only Accurate's internal IT people had control and access over Accurate's local databases, which were necessary for the reinstallation of the telephone system after the storm, but had failed to back those databases up on their local network server, any amendment to the pleadings as to BTI's failure to perform under the risk of loss provision would not have cured any defects in the pleadings, and certainly would not have resulted in a different ruling by the trial judge.

¶ 112 Under the aforementioned record, we find that the trial court did not abuse its discretion in denying Accurate's motions to amend the pleadings either prior to or after trial. See *Tomm's Redemption*, 2014 IL App (1st) 131005, ¶ 13; see also *Compton*, 382 Ill. App. 3d at 332.

¶ 113 B. Liquidated Damages

¶ 114 On appeal, Accurate next contends that the trial court erred when it refused to grant it liquidated damages pursuant to the liquidated damages provision of the settlement agreement. Accurate asserts that the trial court erred when it found that Accurate was in part responsible for BTI's failure to deliver the services agreed to under the final scope of work agreement as contained in the settlement agreement. Accurate further asserts that the trial court erred when it concluded that the liquidated damages clause was an unreasonable penalty and therefore unenforceable. For the reasons that follow, we disagree.

¶ 115 The liquidated damages provision of the settlement agreement provides in pertinent part: "If, as of March 30, 2009, BTI fails through its own fault and no fault of Accurate and its agents, including its then database vendor to make features included in the scope of work agreement operation, BTI shall pay Accurate for each day the telephone system is not operational based on one-half (1/2) of Accurate's monthly lease payment at the time."

¶ 116 In the present case, the trial court rejected Accurate's demand for liquidated damages because

"the chief difficulty in achieving a telephone system operating to Accurate's satisfaction was related to Accurate's own database." The court explained that "Accurate itself or its agents (specifically problems with its own database) prevented the telephone system from operating properly." After a review of the record, we find nothing manifestly erroneous in this conclusion.

¶ 117 A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evidence or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented. *Best v. Best*, 223 Ill. 2d 342, 350 (2006). Under the manifest weight standard, a reviewing court must give deference to the trial court as the finder of fact because the trial court is in the best position to observe the conduct and demeanor of the parties and witnesses. *Best*, 223 Ill. 2d at 350. A reviewing court will not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn there from. *Best*, 223 Ill. 2d at 350.

¶ 118 In the present case, as already discussed above, the parties presented contradictory evidence as to what was contemplated under the final scope of work agreement and whether, in fact, it included an outbound IVR with the ability to take credit card payments for renewals. In addition, contrary to Accurate's contention and the testimony of its witnesses, BTI's Smith and Brackett consistently testified that the outbound IVR was fully functioning as per that final scope of work agreement on March 30, 2009, and that any problems that occurred with that outbound IVR resulted from errors made by Accurate's internal database vendor, QuotePro. Accordingly, under this record, giving proper deference to the trial court's determinations as to the weight of the conflicting evidence and the credibility of witnesses, we find nothing manifestly erroneous in the trial court's conclusion that Accurate was not entitled to recoup liquidated damages under the plain language of the liquidated damages clause of the settlement agreement. *Best*, 223 Ill. 2d at

350.

¶ 119 Since we find no fault in this basis for the trial court's denial of liquidated damages, we need not consider Accurate's additional arguments as to the court's error in finding that the liquidated damages provision was unenforceable as a penalty. See *North Shore Community Bank & Trust Co. v. Sheffield Wellington LLC*, 2014 IL App (1st) 123784, ¶ 62 ("[A reviewing court] may affirm on any basis appearing in the record, whether or not the trial court relied on that basis or its reasoning was correct.")

¶ 120 C. Cross-Appeal/Counter-Claim for Breach of Underlying Lease Agreement

¶ 121 Before turning to the last issue addressed by Accurate, namely the trial court's refusal to award it any attorneys' fees under the settlement agreement, we first turn to BTI's cross-appeal, since the resolution of that claim necessarily impacts our analysis of the attorneys' fees.

¶ 122 In its cross-appeal, BTI asserts that the trial court erred in dismissing its counter-claim by finding that Accurate did not breach the underlying lease agreement when it stopped paying any maintenance and service fees to BTI for service calls made after July 2009. BTI essentially contends that the original lease agreement contemplated two separate payments: (1) the financing of the telephone system equipment and (2) the maintenance and service fees. BTI argues that because Nasser admitted at trial that he was aware that GAL was only a financing company and that all maintenance and service for the equipment was done by BTI, the court should have found that Accurate's failure to pay any such service fees after it entered into a settlement agreement with GAL constituted a breach of the underlying lease agreement. We disagree

¶ 123 As already noted above, we review the trial court's findings under a manifest weight of the evidence standard. *Best*, 223 Ill. 2d at 350. The trial court below concluded that BTI was not owed any money under the original lease agreement because Accurate ultimately paid all the

money owed under that agreement to GAL, which had succeeded BTI pursuant to an assignment. The court further stated that BTI failed to present any "competent proof" to the contrary. After a review of the record, we find nothing manifestly erroneous in that conclusion. See *Best*, 223 Ill. 2d at 350. While BTI is correct that Smith and Brackett testified that the lease agreement contemplated two separate payments, one to cover the maintenance and service fees, the lease agreement itself, which was included in the trial exhibits, makes no such distinction, and merely shows a single amount owed on the lease. What is more, at trial both Nasser and Michael testified that Accurate made all of the 60 monthly payments on the original lease. Although BTI attempted to argue at trial that when Accurate settled with GAL, it did so in order to reduce its monthly payments, thereby avoiding its responsibility as to the maintenance and service fees owed to BTI, it ignores the fact that at trial Nasser testified that the only reason Accurate's lease payment was reduced after its settlement with GAL was because GAL was aware of Accurate's money problems and agreed to extend the lease for a year to permit Accurate to pay the existing sum owed over a longer period of time, but that the total amount of the payment remained the same. Since the trial court was in a better position to judge the credibility of the witnesses, and no witnesses were subpoenaed from GAL by either party to confirm or deny BTI's allegations regarding the amounts that may have been owed to BTI, as opposed to GAL, under the original lease agreement, under the record before us, we are unable to conclude that the trial court's judgment was against the manifest weight of the evidence. *Best*, 223 Ill. 2d at 350.

¶ 124

D. Attorney's Fees

¶ 125

Lastly, we turn to the issue of attorneys' fees. In that respect, Accurate asserts that the trial court erred in ordering that each party be responsible for its own attorneys' fees because under the fee-shifting provision of the settlement agreement, as the prevailing party in the litigation, it

was entitled to have BTI pay all of its "costs, expense and attorneys' fees." BTI, on the other hand, argues that BTI, rather than Accurate was the prevailing party on a substantial issue in the litigation, so that the trial court properly refused to award Accurate any attorneys' fees.

¶ 126 Because the parties disagree as to which standard of review applies, we address that issue first. Ordinarily, a trial court's decision to award or deny attorneys' fees will not be reversed on appeal absent an abuse of discretion. See *Peleton Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 226 (2007); see also *Guerrant v. Roth*, 334 Ill.App.3d 259, 262 (2002). "The rationale for this standard is that a party challenging a trial court's decision regarding attorney fees is actually challenging the trial court's discretion in determining what is reasonable." *Guerrant*, 334 Ill. App. 3d at 262-63.

¶ 127 However, where, as here, the parties on appeal do not contest the reasonableness of the trial court's decision concerning the amount of the attorneys' fees, but rather contest whether the parties' agreement authorized the court to grant or deny attorneys' fees, the standard of review is twofold. See *Peleton*, 375 Ill. App. 3d at 225.

¶ 128 First, to the extent that the trial court interpreted the terms of the settlement agreement, our review is *de novo*. See *Guerrant*, 334 Ill.App.3d at 263 (holding that "[w]here the trial court [has] determined the construction of the * * * agreement as a matter of law, we construe the contract unrestrained by the trial court's judgment, and our standard of review is *de novo*."); see also *Pietrzyk v. Oak Lawn Pavilion, Inc.*, 329 Ill.App.3d 1043, 1047 (2002) ("Because the plaintiff here is not disputing the trial court's calculations [of attorney fees], but is contending only that the trial court misapplied the law, *** the standard of review is *de novo* "). Second, to the extent that the trial court applied the terms of the contract to the facts of the case, *i.e.*, determining whether under the settlement agreement Accurate qualified as a "prevailing party,"

our review is for abuse of discretion. See *Peleton*, 375 Ill. App. 3d at 226; see also *Powers v. Rockford Stop-N-Go, Inc.*, 326 Ill. App. 3d 511, 516 (2001) ("Whether either party prevailed *** in the trial court below involves an application of the facts to this principle of law. Therefore, it remains a matter committed to the discretion of the trial court [citation], and the question before us is whether the trial court abused its discretion when it determined that plaintiff was the prevailing party.")

¶ 129 With these principles in mind we turn to the merits of the parties' contentions. BTI first contends that because the settlement agreement contains conflicting provisions regarding attorneys' fees, and the settlement agreement was written by Accurate, the agreement should be construed against Accurate and the trial court should not even have applied the fee-shifting provision. We disagree.

¶ 130 Although it is true, as BTI contends, that the settlement agreement contains two separate provisions that relate to attorneys' fees, a review of those provisions in context of the entire agreement reveals that the sections are neither contradictory, nor ambiguous. In fact, the provisions are distinct, and serve two very different purposes. Paragraph 5, titled "Parties to Bear Own Costs and Attorneys' Fees" states:

"Each party will bear its own costs, expenses, and claims to interest and attorneys' fees whether taxable or otherwise, incurred in or arising out of, or in any way connected with matters which are referenced or covered in th[e] mutual releases reference above or which were otherwise related to the subject of the agreement."

Paragraph 9 titled "Attorneys Fees," on the other hand, states:

"In the event it is necessary to enforce a provision or provisions of this agreement, all costs, expenses and attorneys' fees, whether taxable or not, shall be paid by the non-prevailing party or parties to the prevailing party or parties."

¶ 131 When read in context of the entire agreement, it is apparent from the plain language of the aforementioned provisions that paragraph 5 relates to each party accepting the responsibility of attorneys' fees and costs in negotiating and drafting the settlement agreement, and the release of claims contemplated under that agreement. On the other hand, paragraph 9, more specifically delineates who will be responsible for costs and attorneys' fees in the event either party has to enforce (by way of litigation) issues arising from the settlement agreement. Accordingly, contrary to BTI's contention, the trial court did not err in applying paragraph 9 to determine whether Accurate should be awarded any attorneys' fees.

¶ 132 Turning to the court's application of paragraph 9 to the facts of this case, we note that neither the term "non-prevailing party" or "prevailing party" are defined anywhere in the settlement agreement. However, our courts have previously held that a "prevailing party, for purposes of awarding attorneys' fees, is one that is successful on a significant issue and achieves some benefit in bringing suit." *Pelton, Inc. v. McGivern's, Inc.*, 375 Ill. App. 3d 222, 227 (2007). On one hand, a litigant does not have to succeed on all its claims to be considered a prevailing party. *Powers*, 326 Ill. App. 3d at 515. On the other hand, "when the dispute involves multiple claims and both parties have won and lost on different claims it may be inappropriate to find that either party is the prevailing party and an award of attorneys' fees to either is inappropriate." *Powers*, 326 Ill. App. 3d at 515.

¶ 133 In the present case, the record reveals that Accurate proceeded to trial on a single count,

breach of the settlement agreement. Accurate sought three remedies under this claim: (1) the partial payment of \$7944.33 owed by BTI under the express terms of the settlement agreement; (2) actual and (3) liquidated damages arising from BTI's failure to deliver a fully operational telephone system by March 30, 2009. On the other hand, BTI proceeded to trial on breach of contract and quantum meruit claims arising from Accurate's alleged breach of the underlying lease agreement incorporated into the settlement agreement. The trial court dismissed BTI's counter claim and ruled only in favor of Accurate, awarding it damages in the amount of \$7944.33.

¶ 134 While on the surface it would appear that Accurate is the prevailing party, BTI is correct in asserting that the sole award of damages to Accurate is rooted in a claim that was not contested by BTI at trial. The record is clear that all throughout trial BTI never contested the fact that it owed Accurate \$7944.33, the remainder of the \$11,316.09 it promised to pay to Accurate under the settlement agreement. Rather, the brunt of the evidence and arguments presented at trial concerned damages arising from BTI's alleged failure to deliver a fully operational telephone system to Accurate by March 30, 2010. The trial court explicitly ruled against Accurate on this issue, refusing to award either actual or liquidated damages on the basis that Accurate "prevented the system from operating properly" due to problems with its own database. As such, the trial court also concluded that Accurate was both a prevailing party and a non-prevailing party for purposes of the shifting-fee provision, and refused to permit Accurate to recover fees from BTI. Under this record, we are unable to find that no reasonable person in the trial court's shoes would have taken the view adopted by the trial court. See *Kim v. Mercedes-Benz, U.S.A., Inc.*, 353 Ill. App. 3d 444, 452 (2004) ("An abuse of discretion may be found only where no reasonable man would take the view adopted by the circuit court."); see also *Pelton*, 375 Ill. App. 3d at 228.

¶ 135

III. CONCLUSION

¶ 136 Accordingly, for all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 137 Affirmed.