2017 IL App (1st) 152933-U

FIFTH DIVISION
March 24, 2017

No. 1-15-2933

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

CHRISTINE DEMARCO, on behalf of herself and others similarly situated, Plaintiff-Appellant, v. CC SERVICES INC. a/k/a COUNTRY FINANCIAL, COUNTRY INSURANCE AND FINANCIAL SERVICES, COUNTRY PREFERRED INSURANCE COMPANY, and COUNTRY MUTUAL INSURANCE COMPANY, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 14 CH 10416 Honorable Mary L. Mikva, Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Gordon and Justice Lampkin concurred in the judgment.

ORDER

¶ 1 *Held*: Affirming the judgment of the circuit court of Cook County where the court properly dismissed with prejudice a plaintiff's claims against an alleged tortfeasor's insurer based on its purported misrepresentation and concealment of the tortfeasor's umbrella insurance policy.

¶ 2 Following an automobile collision, Christine Demarco (Demarco) filed an action against Austin Sahr (Sahr) in DuPage County. In a putative class action subsequently filed in the circuit

court of Cook County, Demarco alleged that Sahr's insurer, referred to herein as Country,[1] misrepresented and concealed Sahr's excess or umbrella insurance policies. Demarco sought class certification for individuals damaged by Country's purported practices. In this appeal, Demarco contends that the circuit court erred in denying class certification, granting Country's motion to dismiss her amended complaint with prejudice, and denying her motion to reconsider. For the reasons stated below, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 After Demarco and Sahr were involved in a two-vehicle collision in Lisle, Illinois, on September 21, 2011, Sahr pled guilty to a moving violation and paid a fine. Demarco retained an attorney to handle her personal injury claim against Sahr. In letters to Country dated September 29, 2011, and October 5, 2011, Demarco's attorney requested: "[P]ursuant to 215 ILCS 5/143.24(b), please disclose your insured's policy limits." On October 11, 2011, a Country claims specialist responded: "I am in receipt of your correspondence dated October 5, 2011. Please be advised our insured's policy limits are $250,000.00 per person, $500,000.00 per incident."

¶ 5 Demarco filed an action against Sahr in DuPage County in 2013. On June 5, 2013, she served Sahr with discovery pursuant to Illinois Supreme Court Rule 213 (Ill. S. Ct. R. 213 (eff. Jan. 1, 2007)), including the following model interrogatory (Interrogatory #6). In Interrogatory #6, Demarco asked for information about Sahr's liability insurance, including any

[1] The appellee brief was filed by "Country Preferred Insurance Company® and Country Mutual Insurance Company®, improperly named as 'Country Insurance and Financial Services, Country Preferred Insurance Company and Country Mutual Insurance Company' and CC Services, Inc., improperly named as 'CC Services Inc. a/k/a Country Financial.' " Although certain documents, communications, and pleadings described herein involve some, but not all, of the foregoing entities, we refer generically to "Country" for purposes of clarity and simplicity, unless otherwise provided.

umbrella or excess insurance coverage. On the same date, she propounded a document request (Production Request #9), in which she asked for copies of all of Sahr's insurance policies covering Sahr or his vehicle. On September 3, 2013, Demarco's attorney prepared a demand letter for the then-disclosed policy limits of $250,000 per person.

¶ 6 On October 7, 2013, Sahr, through counsel, submitted answers to Demarco's interrogatories. In response to Interrogatory #6, Sahr listed his automobile policy with limits of $250,000 per person and $500,000 per accident. He indicated that he had no excess coverage. Sahr certified that his answers to the interrogatories were true and correct pursuant to section 1-109 of the Code of Civil Procedure (735 ILCS 5/1-109 (West 2012)). On October 29, 2013, Sahr answered Production Request #9 by attaching a declaration sheet and stating that his investigation was continuing. The declaration sheet indicated that, at the time of the collision, Country was providing a $1 million personal umbrella liability policy.

¶ 7 In a deposition taken on January 31, 2014, Sahr testified that he was a college student who lived with his parents at the time of the collision. Sahr was questioned, in part, regarding his interrogatory answer in which he denied having umbrella or excess coverage. He testified not knowing what excess coverage is and did not recall asking anyone about it. Sahr had spoken with his parents, but not his lawyers, before answering the interrogatory. He further testified that no one had informed him that his answer was inaccurate, and he believed it was, in fact, correct.

¶ 8 Demarco ultimately filed a putative class action complaint against Country and a motion for class certification pursuant to section 2-801 of the Code of Civil Procedure (735 ILCS 5/2-801 (West 2014)) in the circuit court of Cook County in June 2014. Demarco sought certification of a class comprised of all Illinois residents who made a personal injury motor vehicle accident claim for an Illinois accident occurring after August 12, 1988, with an Illinois

tortfeasor who had an excess or umbrella insurance policy with Country which was undisclosed to the claimant or her attorney.

¶ 9 Demarco subsequently filed an amended putative class action complaint against Country. She alleged that it was Country's accepted practice to have its employees misrepresent and conceal policy limits. According to Demarco, no mechanism existed for a plaintiff to discover the misrepresentation and concealment of the tortfeasor's actual policy limits after the plaintiff settled her claim. Demarco asserted that she was a proper plaintiff to expose this fraud.

¶ 10 Demarco further alleged, in part, that it was "not believable" that Sahr's attorney – who was "hired and compensated" by Country – did "not know the full amount" of available insurance coverage when the interrogatories were answered. Demarco also noted that Sahr's attorney signed the interrogatory answers pursuant to Rule 137 of the Illinois Supreme Court Rules, which requires "reasonable inquiry."[2] According to Demarco, Sahr's attorney "had an inherent conflict of interest between" loyalty to Country and loyalty to Sahr, *i.e.*, it was in Sahr's but not Country's interest to disclose the umbrella policy. Demarco alleged that Country and Sahr's counsel "colluded to deceive [Demarco] and her attorney as to the actual policy limits."

¶ 11 In Count I of the amended complaint, Demarco alleged fraudulent concealment and misrepresentation of the policy limits. In Count II, she asserted an implied right of action under section 143.24b of the Illinois Insurance Code (Insurance Code). The exhibits to the amended complaint included verified search results from the Illinois Department of Insurance (IDI) and

[2] Rule 137(a) provides, in part, that "the signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, 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." Ill. S. Ct. R. 137(a) (eff. July 1, 2013).

the affidavits of three IDI employees in support of Demarco's assertion that "[a]s it stands now, there is no remedy recognized whatsoever for a violation of 215 ILCS 5/143.24b." In Count III, Demarco alleged violation of the Illinois Consumer Fraud and Deceptive Business Practices Act (Consumer Fraud Act). In Count IV, she sought recovery pursuant to section 155 of the Insurance Code (215 ILCS 5/155 (West 2010)) for "unreasonable and vexatious acts constituting improper claims practice." In Count V, Demarco alleged negligent misrepresentation of the policy limits.

¶ 12 Country filed a motion to strike or dismiss the class action allegations in the amended complaint. According to Country, the amended complaint on its fact demonstrated that the case was unsuited for class action treatment because individual questions would predominate and because Demarco could never be an adequate class representative. Country also filed a motion to dismiss the amended complaint pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2014)). In the motion to dismiss, Country asserted, among other things, that no private cause of action exists under section 143.24b of the Insurance Code and, in any event, Country did not violate the statute. Country further argued that Demarco's "consumer fraud, statutory fraud, and negligent misrepresentation claims should be dismissed because [Demarco] fails to allege" actual damages or that "she did or did not do anything based on a misrepresentation or omission by" Country, *e.g.*, her personal injury action against Sahr was pending when she learned of the umbrella policy.

¶ 13 During a hearing on May 12, 2015, the circuit court concluded that Country made the proper disclosure pursuant to section 143.24b of the Insurance Code. The circuit court also rejected Demarco's claim pursuant to section 155 of the Insurance Code, stating, "I don't think there is a 155 claim available to somebody other than the insured." As to both the section

143.24b and section 155 claims, however, the circuit court encouraged Demarco to seek legislative reform. The circuit court rejected her Consumer Fraud Act claim, indicating that there was no "consumer nexus," and also stated that there was no duty that would give rise to a negligent misrepresentation claim.

¶ 14 The circuit court indicated that the sole issue was whether Demarco should be permitted to replead her fraud claim, *i.e.*, whether Demarco would be able to allege facts to demonstrate reliance and actual damages. The circuit court observed that there was only a three-week period between the incorrect interrogatory answer and the correct production response regarding Sahr's umbrella policy. When asked whether Demarco could make any specific damage allegations relating to the three-week period, her attorney referenced *his* work during the period. Demarco's attorney argued that his efforts during the three weeks – *e.g.*, placing telephone calls, sending letters, issuing interrogatories, or contacting an expert – constituted damages. Her attorney acknowledged that he did not maintain time sheets and thus would need to review his file to determine whether he could specifically describe his work during the period. The circuit court observed that this purported damage did not constitute damage to *Demarco* – as opposed to her attorney – as the attorney was representing Demarco on a contingency fee basis.

¶ 15 At the conclusion of the hearing, the circuit court granted the motion to dismiss. A written order entered on May 12, 2015, provides "that the amended complaint at law is dismissed in its entirety with prejudice and without leave to amend and that this is a final and appealable order for the reasons stated on the record."

¶ 16 Demarco filed a motion to reconsider the dismissal order and to file an attached second amended complaint. Country responded, in part, that the proposed complaint "alleges no new facts showing causation or damages as to [Demarco's] individual causes of action. Instead,

[Demarco] alleges other unknown class members may have claims and attaches materials from other cases." After a hearing, the circuit court entered an order on September 15, 2015, denying the motion to reconsider. Demarco appeals from the orders of May 12 and September 15, 2015.

¶ 17 II. ANALYSIS

¶ 18 Demarco advances three primary arguments on appeal. First, she contends that "public policy requires certification of the class at issue as the only mechanism to reveal endemic fraud within the insurance industry regarding the disclosure of excess and umbrella policies." Second, she asserts that the circuit court erred in granting Country's motion to dismiss the amended complaint with prejudice and without leave to amend. Third, Demarco argues that the "trial court erred in denying [her] motion for reconsideration and denying [her] leave to file her second amended complaint after encouraging [her] to file an amended complaint at the hearing on the motion to dismiss." We address each argument in turn.

¶ 19 A. Class Certification

¶ 20 Although Demarco argues that "the trial court's failure to certify the class involved the application of impermissible legal criteria and must be reversed," she acknowledges that "[t]he issue of class certification was not briefed before the trial court nor did the parties have any opportunity to conduct discovery or present evidence on the issue, which is typically permitted." Demarco asserts, however, that the circuit court "reached several conclusions during oral argument suggesting it was denying class certification." Her appellate briefs thus address class certification issues in order to "avoid any question of waiver."

¶ 21 Country argues that the circuit court never ruled upon Demarco's motion for class certification or its motion to strike or dismiss the class action allegations. Country notes that the circuit court stated, "There is no reason to even fight about whether it would or wouldn't be a

proper Class Action because absent a claim for an individual plaintiff [there] can't be a Class Action." Based on our review of the record, we conclude that there was no ruling on class certification for this court to now consider. As courts of review in Illinois generally do not render advisory opinions (*Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 10), we need not specifically address Demarco's arguments regarding class certification. We note, however, that Demarco expressly "incorporated by reference" public policy arguments relating to class actions into her other arguments, which are addressed below. We thus deny Country's request that we strike or disregard any portion of her opening brief.

¶ 22 B. Granting Country's Motion to Dismiss

¶ 23 Demarco contends that the circuit court erred in granting Country's motion to dismiss the amended complaint with prejudice pursuant to section 2-615 of the Code of Civil Procedure. See 735 ILCS 2-615(a) (West 2014). A section 2-615 motion "tests the legal sufficiency of the amended complaint." *Henderson Square Condominium Ass'n v. LAB Townhomes, LLC*, 2015 IL 118139, ¶ 61. The question presented on review is whether the allegations of the amended complaint, construed in the light most favorable to Demarco, are sufficient to state a cause of action for which relief can be granted. *Id*. "In making this determination, all well-pleaded facts must be taken as true." *Id.* We "should not dismiss a complaint pursuant to section 2-615 unless it clearly appears that no set of facts can be proved that would entitle the plaintiff to recovery." *Id.* Our standard of review is *de novo*. *Id.*

¶ 24 Demarco argues on appeal that she suffered damage under theories of fraud, violations of the Consumer Fraud Act and negligent misrepresentation. She further contends that the circuit court erred in dismissing her Consumer Fraud Act claim and that she alleged sufficient facts to state a claim for negligent misrepresentation. Demarco further asserts that the circuit court erred

in holding that claims pursuant to section 155 of the Insurance Code cannot be brought by third parties who are not insureds. Finally, she argues that the circuit court erred in dismissing her claim pursuant to section 143.24b of the Insurance Code. We address Demarco's contentions and related issues below.

¶ 25 1. Common Law Fraud, Negligent Misrepresentation, and Consumer Fraud Act

¶ 26 Count I of the amended complaint alleges "fraudulent concealment and misrepresentation of the policy limits." To state a claim for fraudulent concealment, a plaintiff must allege the following elements: " '(1) the defendant concealed a material fact under circumstances that created a duty to speak; (2) the defendant intended to induce a false belief; (3) the plaintiff could not have discovered the truth through reasonable inquiry or inspection, or was prevented from making a reasonable inquiry or inspection, and justifiably relied upon the defendant's silence as a representation that the fact did not exist; (4) the concealed information was such that the plaintiff would have acted differently had he or she been aware of it; and (5) the plaintiff's reliance resulted in damages.' " *Abazari v. Rosalind Franklin University of Medicine and Science*, 2015 IL App (2d) 140952, ¶ 27, citing *Bauer v. Giannis*, 359 Ill. App. 3d 897, 902-03 (2005). The elements of a fraudulent misrepresentation claim are: "(1) a false statement of material fact; (2) knowledge or belief of the falsity by the person making it; (3) intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statements; and (5) damage to the other party resulting from such reliance." *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶ 28. Accord *Doe v. Dilling*, 228 Ill. 2d 324, 360 (2008). Fraudulent misrepresentation is also referred to as common law fraud. *Weidner v. Karlin*, 402 Ill. App. 3d 1084, 1087 (2010). "Fraud claims must be pleaded with sufficient specificity, particularity, and certainty to apprise the opposing party of

what he is called upon to answer." *Avon Hardware Co. v. Ace Hardware Corp.*, 2013 IL App (1st) 130750, ¶ 15.

¶ 27 Count V of the amended complaint alleges negligent misrepresentation. A negligent misrepresentation claim "has essentially all of the same elements as fraudulent misrepresentation, except that the defendant's mental state is different." *Jane Doe-3*, 2012 IL 112479, ¶ 28. "A plaintiff need only allege that the defendant was careless or negligent in ascertaining the truth of the statement, and that the defendant had a duty to convey accurate information to the plaintiff." *Id*.

¶ 28 The claims asserted in Counts I and V of the amended complaint require, among other items, reliance by Demarco. Although Demarco stated that she "relied upon" Country's misrepresentations, the amended complaint failed to adequately allege what she did or did not *do* in reliance on any misrepresentations. See *id.*, ¶ 28 (requiring "*action* by the other party in reliance on the truth of the statements" for a fraudulent misrepresentation claim (emphasis added)). See also *Weidner*, 402 Ill. App. 3d at 1087 (stating that the plaintiff in a legal malpractice and fraud action "alleged no facts that she relied upon [her attorney's] allegedly fraudulent omission," *i.e.*, the "plaintiff did not settle her worker's compensation claims"). "Illinois is a fact-pleading state, and conclusions of law and conclusory factual allegations unsupported by specific facts are not deemed admitted." *Alpha School Bus Co. v. Wagner*, 391 Ill. App. 3d 722, 735 (2009). Regarding the reliance element, Demarco has not satisfied the fact-pleading standard for her negligent misrepresentation claim, and certainly has not met the heightened pleading standard applicable to fraud claims.

¶ 29 To state a cause of action for negligent misrepresentation, a complaint must also "allege facts establishing a duty owed by the defendant to communicate accurate information." *Brogan*

v. Mitchell International, Inc., 181 Ill. 2d 178, 183 (1998). See also *Jane Doe-3*, 2012 IL 112479, ¶ 28. Our supreme court has recognized a duty to communicate accurate information only in two circumstances: (1) "to avoid negligently conveying false information that results in physical injury to a person or harm to property"; and (2) "where one is in the business of supplying information for the guidance of others in their business transactions." *Brogan*, 181 Ill. 2d at 184. See also *Hoover v. Country Mutual Insurance Co.*, 2012 IL App (1st) 110939, ¶ 45.

¶ 30 The amended complaint alleged, in part, that Country "was in the business of supplying information (e.g. accurate policy limits), for the guidance of Christine Demarco (i.e. third party claimants), in her business transactions, (i.e. the settlement of her personal injury claim with Austin Sahr)." Although she contends on appeal that "Illinois public policy creates a duty," there is no support under Illinois law for her conclusory allegation. See, *e.g.*, *Martin v. State Farm Mutual Automobile Insurance Co.*, 348 Ill. App. 3d 846, 850 (2004) (providing that the "duty in the handling of claims is owed only to the insurance company's insured"). As discussed below, Country complied with the disclosure requirements imposed by section 143.24b of the Insurance Code. We further note that Demarco does not cite any support for transforming a potential discovery violation – the incorrect response to Interrogatory #6 – into the basis for a negligent misrepresentation claim. In sum, the amended complaint does not adequately allege facts establishing a duty owed by Country to communicate accurate information to Demarco.

¶ 31 In Count III of the amended complaint, Demarco alleges violation of the Consumer Fraud Act. See 815 ILCS 505/1, *et seq.* (West 2010). "To prove a private cause of action under section 10a(a) of the [Consumer Fraud Act], a plaintiff must establish: (1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual

damage to the plaintiff (5) proximately caused by the deception." *Avery v. State Farm Mutual Auto Insurance Co.*, 216 Ill. 2d 100, 180 (2005). An action under the Consumer Fraud Act must be pled with the same specificity as is required in an action for common law fraud. *Sklodowski v. Countrywide Home Loans, Inc.*, 358 Ill. App. 3d 696, 703 (2005).

¶ 32 Country challenges, among other things, whether Demarco is a "consumer" or meets the "consumer nexus" test for purposes of the Consumer Fraud Act. A plaintiff must ordinarily allege that she is a "consumer" to state a claim under the act. See, *e.g.*, *McCarter v. State Farm Mutual Automobile Insurance Co.*, 130 Ill. App. 3d 97, 101 (1985) (stating that the act applies only to consumers); 815 ILCS 505/1(e) (West 2014) (defining "consumer" as "any person who purchases or contracts for the purchase of merchandise not for resale in the ordinary course of his trade or business but for his use or that of a member of his household"). Demarco contends on appeal that she was "actually a 'consumer' of the subject insurance because Country provided automobile coverage to Sahr pursuant to 625 ILCS 5/7-601, which required Sahr to carry liability insurance." According to Demarco, "as the Illinois public policy *** states, where automobile liability insurance policies are concerned, plaintiff was indeed a 'consumer' of Sahr's umbrella policy."

¶ 33 Nowhere in the amended complaint, however, did Demarco state that she is a consumer. She instead alleged that "[u]nder the law [she] does not need to be a consumer in order to receive the protections of" the Consumer Fraud Act. Generally, arguments not raised before the circuit court are forfeited and cannot be raised for the first time on appeal. *Allstate Property & Casualty Insurance Co. v. Trujillo*, 2014 IL App (1st) 123419, ¶ 17. "Allowing a party to change its theory of the case on appeal would weaken the adversarial process and likely prejudice the opposing party." *Id.* Demarco's argument that she is a "consumer" has been forfeited.

¶ 34 We recognize, however, that Illinois courts have permitted non-consumers to pursue claims under the Consumer Fraud Act if the "consumer nexus" test is satisfied, *i.e.*, if the plaintiffs can demonstrate: (1) that their actions were akin to a consumer's actions to establish a link between them and consumers; (2) how defendant's representations concerned consumers other than themselves; (3) how defendant's particular activity involved consumer protection concerns; and (4) how the requested relief would serve the interests of consumers. *Brody v. Finch University of Health Sciences/The Chicago Medical School*, 298 Ill. App. 3d 146, 160 (1998).

¶ 35 The allegations in the amended complaint, however, do not state a claim via the consumer-nexus test. See *Roppo v. Travelers Companies,* 100 F. Supp. 3d 636, 651 (N.D. Ill. 2015). Demarco fails to articulate how Country's conduct harmed consumers like Sahr or otherwise implicated consumer protection concerns. For example, she does not allege that Country misrepresented the policy limits to Sahr, or that any misrepresentation resulted in higher premiums or other negative consequences for Sahr. Because she failed to adequately allege the required consumer nexus, Demarco's Consumer Fraud Act claim was properly dismissed.

¶ 36 Another essential element regarding claims of fraud, negligent misrepresentation, and violation of the Consumer Fraud Act is that the plaintiff suffered damage. In the amended complaint, Demarco alleged that her damages include: emotional distress; aggravation and inconvenience; delay in settlement; changes in the duration, scope, and course of the litigation; changes in the resources she and her attorney applied to the case; and the commitment of limited judicial resources. Country contends, and we agree, that none of these alleged damages are cognizable as a matter of law.

¶ 37 As an initial matter, Demarco may only recover for injuries she herself suffered; she is

not entitled to recovery based on purported damage sustained by her attorney. See, *e.g.*, *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 486 (1996) (requiring "*plaintiff's* damages" for a fraudulent misrepresentation claim (emphasis added)). As discussed below, the first amended complaint failed to adequately allege any injuries actually suffered by Demarco, as opposed to her attorney. For example, Demarco did not allege how the delayed disclosure of Sahr's umbrella policy affected the manner in which *she* applied any resources toward the case, particularly given the fact she was represented by counsel on a contingency fee basis in the underlying litigation. Although Demarco cites cases regarding the alignment of interests of a client and her attorney, none are directly relevant to our analysis herein. *E.g.*, *Segal v. Illinois Department of Insurance*, 404 Ill. App. 3d 998, 1002 (2010) (stating that "notice to an attorney constitutes notice to the client and knowledge of an attorney is knowledge of, or imputed to the client"). In any event, Demarco's claims are otherwise deficient, as discussed below.

¶ 38 Demarco's conclusory allegations of emotional distress and "aggravation and inconvenience" are insufficient to maintain her claims. Only a person who suffered "actual damages" as a result of a violation of the Consumer Fraud Act may bring a private action. *Morris v. Harvey Cycle & Camper, Inc.*, 392 Ill. App 3d 399, 402 (2009). The statute provides remedies for purely economic injuries. See *id.*; *Cooney v. Chicago Public Schools*, 407 Ill. App. 3d 358, 365 (2010). Demarco points to *Greisz v. Household Bank (Illinois)*, 8 F. Supp. 2d 1031, 1043 (N.D. Ill. 1998), a federal district court case, for the proposition that "it is well established in Illinois that actual damages include compensation for mental suffering" (internal quotation marks omitted). The Illinois cases cited by the *Greisz* court for such proposition, however, do not address the Consumer Fraud Act. *Id.*

¶ 39 As to Demarco's common law claims, this court has stated that "damages for solely

emotional harm are not recoverable in an action for fraud." *Weidner*, 402 Ill. App. 3d at 1088. Accord *Cangemi v. Advocate South Suburban Hosp.*, 364 Ill. App. 3d 446, 469-70 (2006). While Demarco contends that "[i]n Illinois, fraudulent misrepresentation can be based on non-pecuniary losses, and emotional distress may be compensated," the cases she cites do not solely involve claims of emotional distress. See, *e.g.*, *Doe v. Dilling*, 371 Ill. App. 3d 151, 168 (2006) (plaintiff also sought recovery for her physical injuries due to delay in treatment based on the alleged misrepresentations of her deceased boyfriend's parents regarding their son's HIV status).[3]

¶ 40 Although we recognize that the appellate court in *Roche v. Fireside Chrysler-Plymouth, Mazda, Inc.*, 235 Ill. App. 3d 70 (1992), affirmed an award of $750 for "aggravation and inconvenience" under the Consumer Fraud Act, the amended complaint in the instant case does not include *factual* allegations that Demarco herself actually suffered "aggravation and inconvenience" due to Country's conduct. We further note that at least one federal district court case applying Illinois law rejected a plaintiff's reliance on *Roche* for "aggravation and inconvenience" damages, observing that the *Roche* plaintiff "had demonstrated that she suffered other harm as a result of the defendant's wrongdoing and her aggravation was only part of the award." See *Xydakis v. Target, Inc.*, 333 F. Supp. 3d 686, 688 (N.D. Ill. 2004). See also *Morris*, 392 Ill. App. 3d at 403 (applying the *Xydakis* reasoning to distinguish *Roche*; concluding that "[t]here is no cause of action under the Consumer Fraud Act when a plaintiff alleges only aggravation and not actual damages").

¶ 41 Demarco also argues that "one of the elements of the damages" she suffered was "the

[3] The Illinois Supreme Court in *Doe v. Dilling*, 228 Ill. 2d 324, 361 (2008), affirmed the appellate court judgment which vacated a jury verdict finding defendants liable for fraudulent misrepresentation. Our supreme court concluded, however, that the appellate court had improperly expanded the tort "to this purely personal setting." *Id.* at 359.

time value of money." She posits that she would have received "settlement sums" or "verdict sums" at an earlier time had Country "properly and timely disclosed all applicable coverage and policy limits." For the reasons discussed below, Country was not required to disclose any excess or umbrella policy in response to Demarco's 2011 inquiries pursuant to section 143.24b of the Insurance Code. The sole period at issue is thus the twenty-two days from October 7, 2013 (when Sahr incorrectly answered Interrogatory #6) until October 29, 2013 (when the umbrella policy was revealed in response to Production Request #9). As Demarco was aware of the umbrella policy by October 29, 2013, we reject her contention that her damages continue to increase due to Sahr's purported failure to correct his interrogatory answer to date.

¶ 42 Demarco contends that the facts of *Merritt v. State Farm Mutual Automobile Insurance Co.*, 247 Ga. App. 442 (2000), an automobile collision case, are "nearly identical" to the instant case. In *Merritt*, the plaintiff asked the tortfeasor's insurer for a statement under oath pursuant to section 33-3-28 of the Georgia Insurance Code. Section 33-3-28 provides, in part: "Every insurer *** which is or may be liable to pay all or a part of any claim shall provide, within 60 days of receiving a written request from the claimant, a statement, under oath, *** stating with regard to each known policy of insurance issued by it, including excess or umbrella insurance, the name of the insurer, the name of each insured, and the limits of coverage." Ga. Code Ann. 33-3-28. The insurer's response disclosed only a $250,000 automobile liability policy. *Merritt*, 247 Ga. App. at 443. In response to a second letter specifically asking about umbrella coverage, the insurer stated that all applicable policies had been disclosed. *Id.*

¶ 43 After the *Merritt* plaintiff signed the insurer's release and draft for $250,000, her attorney called the tortfeasor directly, who disclosed that he carried a $1 million umbrella policy with the insurer. *Id.* The plaintiff then demanded the entire $1.25 million, and the parties could not reach

an agreement on a settlement amount. *Id.* The plaintiff sued the insured for damages resulting from the collision and sued the insurer for fraud, misrepresentation, false swearing, and RICO violations. *Id*. The trial court granted summary judgment to the insurer, concluding that the plaintiff suffered no damages because the parties had no enforceable settlement agreement, given that the settlement agreement was contingent upon the insurer having disclosed all applicable policies. *Id.* at 445.

¶ 44 The *Merritt* appellate court reversed, finding that a question of fact existed as to the plaintiff's damages due to the insurer's purported bad acts. *Id.* at 448. The appellate court noted that 22 months after the insurer's representative swore under oath that only a $250,000 policy covered the claim, the insurer's representatives reached a "regional office decision" that her claim was worth $500,000. *Id*. The appellate court thus reasoned that the plaintiff "presented some evidence from which a jury could conclude that she lost at least the use of $250,000 for some period of time." *Id.*

¶ 45 Even if we were inclined to follow the law of another state (*e.g.*, *Perik v. JPMorgan Chase Bank, N.A.*, 2015 IL App (1st) 132245, ¶ 25), the instant case is substantially dissimilar from *Merritt*. While the plaintiff in *Merritt* made a settlement demand *after* receipt of misinformation, Demarco's attorney prepared a demand letter for the then-disclosed policy limits of $250,000 per person on September 3, 2013 – prior to the inaccurate response to Interrogatory #6. Unlike section 33-3-28 of the Georgia Insurance Code, section 143.24b of the Illinois Insurance Code does not require the disclosure of umbrella policies in response to the 2011 correspondence from Demarco's attorney (as discussed below). Furthermore, unlike in *Merritt*, the amended complaint contains no allegation that Demarco increased her $250,000 settlement demand after learning about the umbrella policy. Although her amended complaint

stated that "there was a reasonable probability of recovery of more than the $250,000.00 disclosed policy limits," Demarco never alleged that her injuries exceeded the policy limits.

¶ 46 Demarco contends that *Roppo v. Travelers Companies*, 100 F. Supp. 3d 636 (N.D. Ill. 2015) is "similarly instructive." In *Roppo*, the federal district court noted that it was possible – for purposes of the plaintiff's fraudulent and negligent misrepresentation claims – that the "six-month delay in disclosing the [umbrella policy] limits resulted in a concomitant six-month delay in settlement." *Id.* at 646. However, unlike in *Roppo*, the amended complaint herein does not allege that Demarco settled at an amount greater than the automobile policy limit or that she settled the underlying lawsuit at all. In any event, as was the case in *Roppo*, the operative complaint fails to adequately allege reliance, and thus the misrepresentation claims were properly dismissed. See *id.*

¶ 47 Finally, Demarco directs us to *California Dredging Co. v. Insurance Co. of North America*, 23 Cal. App. 4th 591 (1993), as support for various components of her damages claim. We question the propriety of reliance on the *dicta* and the dissenting opinion in a factually dissimilar, out-of-state case. In any event, the public policy concerns regarding the truthful and accurate disclosure of insurance coverage raised in *California Dredging* do not change our analysis or conclusions regarding the absence of cognizable damages under Illinois law in the instant case.

¶ 48 Based on the various deficiencies of the amended complaint described above, dismissal of Counts I, III, and V pursuant to section 2-615 was proper.

¶ 49 2. Third-Party Actions – Section 155 of Illinois Insurance Code

¶ 50 In Count IV of the amended complaint, Demarco also sought an award of damages pursuant to section 155 of the Insurance Code "based on the alleged unreasonable and vexatious

acts constituting improper claims handling committed by Country." Demarco contends that the circuit court erroneously held that claims under the statutory section "cannot be brought by third parties who are not insureds." Section 155 provides in part:

> "In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, plus an amount not to exceed any one of the following amounts: ***" 215 ILCS 5/155 (West 2010).

The Illinois Supreme Court has observed that "[t]he statute provides an extracontractual remedy to policyholders whose insurer's refusal to recognize liability and pay a claim under a policy is vexatious and unreasonable." *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 519 (1996). The statute permits recovery of "reasonable attorney fees and other costs, as well as an additional sum that constitutes a penalty." *Id.*

¶ 51 According to Demarco, "there is nothing in this statutory language which limits an action to only the 'insured' or 'assignee' on the policy." She contends that "[h]ad the legislature intended to limit the Section 155 penalties to 'the insured' the legislature could have so stated." Our supreme court has expressly stated, however, that "the remedy embodied in section 155 of the Insurance Code does not extend to third parties." *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill. 2d 458, 466 (1990). Accord *Premier Electrical Construction Co. v. American National Bank of Chicago*, 276 Ill. App. 3d 816, 833 (1995); *Stamps v. Caldwell*, 133 Ill. App. 2d 524, 528 (1971). The Illinois Appellate Court has further elucidated that "an assignee of the insured

succeeds to the same position of the insured and is not a true third party" for section 155 purposes. *Loyola University Medical Center v. Med Care HMO*, 180 Ill. App. 3d 471, 480 (1989). See also *Statewide Insurance Co. v. General Insurance Co.*, 397 Ill. App. 3d 410, 426 (2009) (noting that "the remedy under section 155 is intended for the protection of both the insured and the assignee who succeeds to the insured's position"). In the instant case, Demarco is neither the insured nor an assignee who succeeded to Sahr's position. We thus conclude that the circuit court did not err in dismissing Demarco's claim for damages pursuant to section 155 of the Insurance Code.

¶ 52 3. Section 143.24b of Illinois Insurance Code

¶ 53 In two separate letters to Country, Demarco's counsel stated: "[P]ursuant to 215 ILCS 5/143-24(b),[4] please disclose your insured's policy limits." Country responded, in pertinent part: "Please be advised our insured's policy limits are $250,000.00 per person, $500,000.00 per incident." In Count II of the amended complaint, Demarco asserted an "implied private right of action" pursuant to section 143.24b of the Insurance Code, claiming that Country's response "misrepresented and concealed the actual policy limits." The circuit court dismissed the claim, noting that "the statute as it's written requires disclosure of the personal automobile liability insurance policy, and that was disclosed here." The circuit court did not "reach the question of whether there is a private right of action" under section 143.24b.

¶ 54 On appeal, Demarco contends that Country was required to disclose excess or umbrella policies pursuant to this statutory section, and the circuit court thus erred in dismissing her claim. Section 143.24b, entitled "Disclosure of dollar amount of automobile liability coverage," provides in part:

[4] The correct statutory reference is "215 ILCS 5/143.24b," not "215 ILCS 5/143.24(b)."

> "Any insurer insuring any person or entity against damages arising out of a vehicular accident shall disclose the dollar amount of liability coverage under the insured's personal private passenger automobile liability insurance policy upon receipt of the following: (a) a certified letter from a claimant or any attorney purporting to represent any claimant which requests such disclosure and (b) a brief description of the nature and extent of the injuries, accompanied by a statement of the amount of medical bills incurred to date and copies of medical records." 215 ILCS 5/143.24b (West 2010).

As a threshold matter, we note that Demarco's correspondence to Country does not appear to have complied with the requirements of section 143.24b such that she would be entitled to disclosure. For example, the amended complaint does not allege that the letters to Country were certified or that Country was provided with a description of the nature and extent of Demarco's injuries. Despite the foregoing, we choose to address the merits of her argument on appeal.

¶ 55 Demarco contends that the circuit court's interpretation "is based on a severely restrictive view of the statute and is inconsistent with its obvious purpose – the disclosure of all liability coverage." "Faced with a question of statutory construction," she argues, "courts should first look to the language of the statute to determine the intent of the drafters." We recognize that the "most reliable indicator of legislative intent is the language of the statute, given its plain, ordinary, and popularly understood meaning." *Klaine v. Southern Illinois Hospital Services*, 2016 IL 118217, ¶ 14. Contrary to Demarco's position, we read the plain language of section 143.24b as solely requiring the disclosure of Sahr's "personal private passenger automobile liability insurance policy."

¶ 56 Demarco suggests that an umbrella policy constitutes a "personal private passenger

automobile liability insurance policy" under section 143.24b. She does not cite, however, any case law in support of this contention. While no Illinois court has specifically addressed section 143.24b, we have stated that "an umbrella liability policy is entirely different from an automobile policy." *Hartbarger v. Country Mutual Ins. Co.*, 107 Ill. App. 3d 391, 396 (1982). See also *Mei Pang v. Farmers Insurance Group*, 2014 IL App (1st) 123204, ¶ 11 (noting that "[i]n Illinois, umbrella policies and primary auto policies are distinct policies"); 215 ILCS 5/143.13 (West 2010) (defining "[p]olicy of automobile insurance" separately from "[a]ll other policies of personal lines"). "An umbrella policy does not provide the same type of coverage as an automobile policy[.]" *Mei Pang*, 2014 IL App (1st) 123204, ¶ 11. There is no indication that, based on its "plain, ordinary, and popularly understood meaning" (*Klaine*, 2016 IL 118217, ¶ 14), an umbrella policy would be considered a "personal private passenger automobile liability insurance policy" under section 143.24b. If the language of a statute is clear and unambiguous – as is the case herein – the statute must be given effect as written. *Id*.

¶ 57 We additionally note that a federal court in *Roppo*, applying Illinois law, held that an insurer was *not* required to disclose the policy limits of the insured's umbrella policy under section 143.24b. *Roppo*, 100 F. Supp. 3d at 650. The *Roppo* court observed that the statute's "actual title reinforces the conclusion that the specific reference to 'automobile liability insurance' refers to just that" and "does not include umbrella policies." Although we are not bound by the rationale or holding of the *Roppo* court, its interpretation of section 143.24b provides useful guidance and additional support for our conclusion herein.

¶ 58 In sum, Country did not violate section 143.24b and thus Demarco's claim was properly dismissed. Because Demarco cannot state a claim under section 143.24b for the reasons discussed above, we need not consider her contentions regarding an "implied private right of

action" under the statute.

¶ 59 C. Denial of Motion for Reconsideration

¶ 60 Demarco also challenges the denial of her motion to (a) reconsider the order dismissing her claims and (b) file an attached second amended complaint. "The purpose of a motion to reconsider is to bring to the court's attention newly discovered evidence that was not available at the time of the original hearing, changes in existing law, or errors in the court's application of the law." *Evanston Insurance Co. v Riseborough*, 2014 IL 114271, ¶ 36. "The standard of review is an abuse of discretion for a trial court's denial of a motion to reconsider." *Jones v. Live Nation Entertainment, Inc.*, 2016 IL App (1st) 152923, ¶ 29. "A trial court's decision is considered an abuse of discretion only when it is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." *Id.*

¶ 61 Demarco's motion provided, in pertinent part, that the circuit court had encouraged her to file a motion to reconsider and to attach an amended complaint. Attached to the motion was a proposed second amended complaint, which purportedly cured the deficiencies in the prior complaint.

¶ 62 Although the circuit court's comments indicate it was receptive to the filing of a motion for reconsideration with a second amended complaint, we do not share Demarco's view that the court "encouraged" or "urged" her to so file. In any event, her bare-bones motion did not point to any newly-discovered evidence, changes in the law, or errors in the circuit court's application of the law. The circuit court thus did not abuse its discretion in denying the motion.

¶ 63 Demarco also asserts that the circuit court erred in denying her leave to file the second amended complaint. "A trial court has broad discretion when deciding whether to allow an amendment to a complaint, and we will defer to its decision unless we find an abuse of

discretion." *Pekin Insurance Co. v. St. Paul Lutheran Church*, 2016 Ill App (4th) 150966, ¶ 78. The proposed second amended complaint included, among other things, various generic allegations about policy principles in litigation and filings from other cases by unrelated plaintiffs against other insurers. Such allegations, however, cannot cure deficiencies in Demarco's individual claims. See, *e.g.*, *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 221 (2010) (noting that named plaintiffs must show that they personally have been injured, not that the injury has been sustained by other members of the class whom they purportedly represent). Furthermore, the additional factual allegations that are specific to Demarco do not correct the fundamental deficiencies in her individual claims, discussed above. "A court does not err in refusing to allow a plaintiff to amend a complaint if the proposed amendment will not cure the defects in the pleading." *Reuter v. MasterCard International, Inc.*, 397 Ill. App. 3d 915, 929 (2010). The circuit court did not abuse its discretion in denying Demarco leave to file the second amended complaint.

¶ 64 III. CONCLUSION

¶ 65 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County in its entirety.

¶ 66 Affirmed.