2017 IL App (1st) 161092-U

THIRD DIVISION
September 27, 2017

No. 1-16-1092

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ETHEL FRAZIER, as Administrator of the Estate of Rosetta Frazier, Plaintiff/Appellant, v. ROBERT SAIN, Defendant/Appellee, SAFEWAY INSURANCE CO., Citation Respondent/Appellee.	)	Appeal from the Circuit Court of Cook County Nos. 05 L 8067 & 10 CH 1311 (cons.) The Honorable Alexander P. White, and The Honorable Nancy J. Arnold, Judges Presiding.
SAFEWAY INSURANCE CO., Plaintiff/Cross-Appellant, v. ROBERT SAIN, ETHEL FRAZIER as Administrator of the Estate of Rosetta Frazier, CASANDRA STEWART,	)	

CHRIS FRAZIER, and ROBERT SAIN III,)
)
Defendants/Cross-Appellees.)

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Presiding Justices Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 Held: In proceedings regarding a declaratory judgment action and garnishment, we find no error in the trial court's grant of partial summary judgment in favor of insurer and, after a bench trial, judgment in favor of insurer on remaining issues. Affirmed.

¶ 2 Safeway Insurance Company, the citation respondent/appellee and plaintiff/cross-appellant, is an Illinois insurance company. Defendant/appellee Robert Sain was the driver in a fatal vehicle accident. Plaintiff/Appellant Ethel Frazier (Frazier),[1] as Administrator of the Estate of Rosetta Frazier, is the sister of Rosetta Frazier, who died in the vehicle crash. Defendants/Cross-appellees Robert Sain, Ethel Frazier, Casandra Stewart, Chris Frazier, and Robert Sain III were all in the vehicle when it crashed.

¶ 3 This appeal consists of two underlying consolidated cases: a declaratory judgment action and a garnishment. The declaratory judgment was entered following a bench trial of the same insurance coverage question at issue in both cases. The trial court found the insurance policy afforded no coverage due to the material misrepresentation in the application of failure to disclose a driver with a suspended driver's license. Frazier appeals and Safeway Insurance cross-appeals.

¶ 4 I. BACKGROUND

[1] While this cause was pending on appeal, the parties notified this court that Ethel Frazier has passed away. Pursuant to motion granted by this court on September 12, 2017, Doris Frazier now sits in Ethel Frazier's stead as Administrator of the Estate of Rosetta Frazier.

¶ 5 i. A Brief History

¶ 6 Briefly, there are three underlying cases here, all stemming from the same vehicular accident. In Case number 05 L 8067, Ethel Frazier sued Robert Sain, alleging wrongful death and survival claims. Judgment was entered in favor of Frazier and against Sain in September 2007. During the pendency of the 2005 law case, in August 2005, defendant Safeway Insurance disclaimed coverage and claimed the insurance policy was rescinded. In June 2007, the Estate made a policy demand, seeking payment of the entire policy in regards to the 2005 law case. In December 2009, Frazier commenced a garnishment against Safeway Insurance. In April 2010, Frazier brought a citation to discover assets against both Safeway Insurance and Sain. Throughout, Safeway Insurance claimed its insurance policy, issued to Rosetta Frazier, is null and void due to a material misrepresentation on the application, namely, the failure to disclose Sain on the insurance application as a driver in the household and failure to disclose that Sain had a revoked driver's license.

¶ 7 In case number 10 CH 1311, Safeway Insurance filed a declaratory judgment action seeking a finding that the insurance policy it issued to Rosetta Frazier is null and void due to a material misrepresentation and that Safeway Insurance is not obligated to provide coverage for the vehicle accident. These two cases were consolidated.

¶ 8 Then, Ethel Frazier as Administrator of the Estate filed case number 13 CH 9938, by which she sought: (1) a declaratory judgment finding that the Safeway Insurance policy issued to Rosetta Frazier was not null and void and did cover Sain for the vehicle accident; (2) a declaratory judgment that Safeway Insurance breached a duty to settle Frazier's claim against Sain for the vehicle accident when it was aware of the likelihood of an excess verdict; (3) a declaratory judgment that Safeway Insurance waived or is estopped from asserting any coverage

defense as to Sain and the vehicle accident; and (4) a judgment award of attorneys fees, damages, and costs. This case was dismissed. In September 2012, the trial court granted partial summary judgment in the consolidated cases in favor of Safeway Insurance and against Casandra and her children, finding that Safeway Insurance does not owe insurance coverage for the August 7, 2003 accident. Specifically, the court ruled that Safeway Insurance policy number 0066393 is null and void due to material misrepresentation and that Safeway Insurance is not obligated to provide coverage for the vehicle accident. The case remained pending as to Frazier and Sain. A trial was held in 2015, after which the court granted partial summary judgment in favor of Safeway Insurance and against Sain, noting that the named insured made a material misrepresentation in the insurance application by failing to disclose a driver in the insured's household. Soon after, the court ruled that the insurance policy was null and void. This appeal follows.

¶ 9 ii. Background Facts

¶ 10 On August 7, 2003, a one car accident occurred on an interstate in Arkansas. At the time of the accident, Rosetta Frazier was a passenger in a vehicle driven by defendant/appellee Robert Sain.[2] Sain lost control of the vehicle and Rosetta was killed in the ensuing traffic accident. Other passengers in the vehicle were Rosetta Frazier, Casandra Stewart, Crystal Stewart, Stephon Stewart, Chris Frazier, and Robert Sain. The accident vehicle, a 2002 Dodge Caravan, was owned by Rosetta, and both Rosetta and her niece, Casandra Stewart, were the named insureds Safeway Insurance policy 0066393. The insurance policy included a $20,000/$40,000 limit for liability and uninsured motorist coverage.

¶ 11 Following the accident, plaintiff/appellant Ethel Frazier, as Administrator of the Estate of Rosetta Frazier (the Estate) filed a wrongful death lawsuit against defendant Sain. This case is

[2] Defendant Robert Sain is sometimes referred to in the underlying proceedings as Robert Sain and sometimes as Robert Sain Jr. His son, Robert Sain III, was a passenger in the vehicular accident at issue here. For clarity, we refer herein to defendant as Robert Sain.

number is 2005 L 8067 and was a two-count complaint for wrongful death and survival. By that case, plaintiff alleged defendant Sain failed to exercise ordinary care when driving, resulting in the death of Rosetta Frazier. Safeway Insurance retained counsel to defendant Sain under a reservation of rights.

¶ 12 A jury trial was held in September 2007, and the jury rendered a verdict in favor of plaintiff and against defendant Sain in the amount of $250,000, representing $240,000 for the wrongful death count and $10,000 for the survival count.

¶ 13 Plaintiff filed a garnishment (non-wage) against Safeway Insurance in November 2009, to turn over its policy of $20,000. Safeway Insurance filed a "no funds" answer to the garnishment.

¶ 14 In January 2010, Safeway Insurance filed a complaint for declaratory judgment (case number 2010 CH 1311), alleging it was not obligated to defend, indemnify, or provide any coverage to Sain or anyone else in regards to the accident at issue due to material misrepresentation on the insurance application, and asking for an "order of declaratory judgment concerning its rights and duties under automobile insurance policy 0066393." Specifically, Safeway Insurance alleged that Sain had been a resident of Rosetta's household at the time of the insurance application, that he did not have a valid driver's license when Rosetta applied for insurance with Safeway Insurance, and that Rosetta "failed to disclose Defendant Sain as a resident driver of her household despite being asked to disclose all resident drivers." This failure to disclose, alleged Safeway Insurance, was a "material misrepresentation because it materially affected the acceptance orating of the risk by Safeway of issuing policy 0066393." It further explained:

"10. Specifically, had Safeway known, that Defendant Robert Sain was a resident of Rosetta Frazier's household, Safeway would have investigated whether or not it would have insured Mr. Sain. Even if Safeway would have insured Mr. Sain, it would have charged a materially higher premium. However, Safeway would not have issued policy 0066393 as is because Robert Sain did not have a valid Illinois driver's license at the time of the application. Safeway would have accordingly insisted upon a named driver exclusion as to Defendant Robert Sain.

11. Upon learning that Defendant Robert Sain was a resident of Rosetta Frazier's household, Safeway rescinded policy 0066393 due to material representation."

¶ 15 By its motion, Safeway Insurance sought a declaratory judgment that it was "not obligated by Rosetta's insurance policy to defend, indemnify, or provide coverage to Defendant Robert Sain, or any other individual, for the August 7, 2003 accident because of the above described material representation." Accordingly, argued Safeway Insurance, it was not obligated to defend, indemnify, or provide coverage to Sain or anybody else in regards to the accident at issue.

¶ 16 In December 2010, Judge Arnold entered an order dismissing only Ethel Frazier from Case No. 10 CH 1311. The court stated:

"It is HEREBY ordered that:

(1) Frazier's Motion to Dismiss is hereby granted as to Ethel Frazier only under 103(b) Motion and because another action is currently pending, namely Garnishment action before Judge White in Room 2503 for Frazier's Motion to Turn Over Policy who will hear coverage issues."

None of the other defendants to that cause were dismissed, and the court did not enter a Supreme Court Rule 304(a) finding. The court also continued Case No. 10 CH 1311 to January 11, 2011, for status, "at which time the court will suggest transfer of this case to be consolidated with the garnishment before Judge White for a single hearing on the coverage issue."

¶ 17 Case No. 10 CH 1311 and Case No. 05 L 8067 were consolidated in January 2011. In September 2012, the court entered partial summary judgment in favor of Safeway and against five of the defendants, ruling that the Safeway insurance policy was void and afforded no coverage, and that the case remained pending as to Ethel Frazier and Robert Sain. Specifically, the court ordered:

> "IT IS HEREBY ORDERED:
>
> (1) Safeway's motion for partial summary judgment is granted, and summary judgment is entered against Cassandra Stewart, Crystal Stewart, Stephen Stewart, Chris Frazier, and Robert Sain III, finding and declaring that policy number 0066393 issued by Safeway Insurance Co. to Rosetta Frazier is null and void due to material misrepresentation and is of no benefit from its inception, and Safeway is not obligated to provide coverage as a result of the August 7, 2003 accident[.]"

The Court did not make a Supreme Court Rule 304(a) finding, and the consolidated cases continued as to Robert Sain, Ethel Frazier, and Safeway.

¶ 18 In April 2013, plaintiff Rosetta Frazier, deceased, by Ethel Frazier as Administrator of the Estate, filed a "chancery declaratory action" (2013 CH 9938)[3] by which plaintiff alleged there would be an excess verdict; that Safeway Insurance retained attorneys to defend defendant Sain, but failed to notify him of the Estate's June 2007 policy demand, failed to advise him of the

[3] This case was consolidated with 10 CH 1311 and 05 L 8067.

alleged conflict of interest between Safeway Insurance and himself, and failed to advise Sain of his right to hire an independent attorney at Safeway Insurance's expense; and that the rescind letter was factually inaccurate because Sain was not a household member at the time of the application. Specifically, plaintiff alleged, in part:

> "9. That in the 2005 law case, there was no reasonable dispute about the potential of excess to the policy based on the subsequent death of Rosette Frazier; that further, compared to the $20,000/$40,000 limits, an excess verdict was a virtual certainty.
>
> 10. That during the pendency of the 2005 law case, on or about 8/1/2005, defedant Safeway disclaimed coverage and claimed the policy was rescinded.
>
> 11. That during the pendency of the 2005 law case, upon information & belief, Safeway 'retain[ed] attorneys to defend' Sain and indicated to defendant Sain that 'you have the right to retain additional counsel' 'at your own expense'.
>
> 12. That upon information & belief, at least according to the production of documents from Safeway, they did not notify Sain of the 'policy demand' sent on 6/11/07, or the demand for excess, or the substantial and virtually certain risk of an excess verdict, or of the consequences of a money judgment substantially above the limits of the Safeway policy.
>
> 13. That further, upon information & belief, defendant Safeway did not advise defendant Sain of the 'conflict of interest' between Safeway and Sain either before the 'policy demand' and more particularly after the 'policy demand'.
>
> 14. That further, upon information & belief, defendant Safeway did not advise defendant Sain that he had a right to retain an independent attorney *at Safeway's* full expense.

15. That further, the rescind letter is factually inaccurate in that Sain was not (at the exact time *of the Application*) a Member of the Household of Frazier."

¶ 19 By this declaratory action, plaintiff argued that the rescind was improper and Sain was entitled to full coverage; that Safeway Insurance "breached its good faith and duty to settle and tender" because, although it "was aware that its limits were substantially below a potential verdict in this matter," Safeway Insurance "failed and refused to settle the policy limits upon plaintiff and an excess verdict of over ten times the policy was entered by the trier of fact in the law case." Plaintiff also alleged that Safeway Insurance waived any coverage and related defenses, and that Safeway Insurance was estopped from asserting said defenses because it failed in its obligation to "advise its insured of the conflict of interest, of the policy demand, of the potential excess, of the potential money judgment and its consequences, and that defendant had a right to retain counsel of his own choosing at the expense of Safeway."

¶ 20 This case, No. 13 CH 9938, was dismissed with prejudice pursuant to section 2-619 of the Code of Civil Procedure (the Code) (735 ILCS 5/2-619) (West 2012)) in December 2013. Specifically, Judge Kennedy entered the following order captioned "13 CH 9938, 10 CH 1311, 05 L 8067 consolidated":

"This cause coming before the court for hearing on Safeway's motion to dismiss, due notice given, the court having heard arguments of counsel, and read the briefs,

IT IS HEREBY ORDERED,

1) Safeway's motion to dismiss is granted;

2) Case No. 13 CH 9938 is severed and dismissed with prejudice pursuant to 2-619;

3) Cases 10 CH 1311 and 05 L 8067 shall remain pending and consolidated with each other and shall be transferred to the presiding judge to be returned to Judge Alexander White, to whom the cases were previously assigned."

¶ 21 In March 2015, prior to the start of trial, Safeway Insurance filed a motion for partial summary judgment against Sain, but not against Frazier pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2014)). By this motion, Safeway asked the court to find that Safeway Insurance policy 0066393 was "voidable due to Rosetta Frazier's material misrepresentation;" that Safeway properly rescinded the policy and that the policy is now null and void; and that Safeway is under no obligation to provide coverage to anyone for the August 7, 2003 accident.

¶ 22 In July 2015, Judge White held a single bench trial in the consolidated cases (the garnishment case (number 05L8067), and the declaratory judgment action (number 10 CH 1311)). A certified copy of the Illinois Secretary of State's driver's license record for Sain, reflecting Sain's suspended license, was entered into evidence, as well as the insurance policy and application, the Safeway Insurance letter declaring the policy null and void, and the letter notifying Sain that Safeway Insurance would provide a defense attorney under a reservation of rights. Three Safeway Insurance employees testified at trial: field adjuster Michael Legenza, underwriting supervisor Mirjana Condos, and assistant claims manager Laura Devine. Over Safeway Insurance's objections, Frazier called Sain as a witness.

¶ 23 Sain also testified at trial that he lived in Rosetta's house with Rosetta and Casandra until he moved out "two months before the accident." The insurance application was submitted to Safeway Insurance on May 9, 2003, three months before the August 7, 2003 accident.

¶ 24 Safeway Insurance field adjuster Michael Legenza interviewed Sain in October 2003. A transcript of this interview is included in the record on appeal, and a recording of the interview was played for the jury at trial. In the interview, Sain described the accident and resulting injuries, as well as his living situation with Rosetta and Casandra, estimating they moved into the house together in 2001. He admitted that his driver's license was suspended because he failed to pay a fine after a "little traffic violation." Prior to the accident, Rosetta, Casandra Stewart, and Robert Sain leased and lived in a house together in Chicago. Casandra was Rosetta's niece, and Sain was Casandra's fiancé. Casandra's children lived with them. Sain regularly drove Casandra's children to school in Rosetta's vehicle, stating that he used Rosetta's vehicle "everyday."

¶ 25 Assistant claims manager Laura Devine testified that she was the Safeway employee who "okayed" the decision to rescind the policy. Following the vehicle accident, Safeway Insurance learned that Sain was a driver in Rosetta's household and that Sain's driver's license was suspended. Devine testified that Safeway first learned of the lawsuit in July 2005 when it received a letter from Frazier's attorneys which included a copy of the summons and the complaint. Frazier's attorney addressed mail and the summons to Sain at 7222 South Marshfield, Chicago, which was the house he had previously shared with Rosetta and Casandra. Safeway Insurance mailed letters declaring the policy null and void and retaining an attorney to defend Sain under a reservation of rights in Case number 05L8067. Soon after mailing the letter to Sain, Devine received a phonecall from Sain, to whom Devine explained the letter and Safeway's "no coverage" position.

¶ 26 Safeway Insurance underwriting supervisor Mirjana Condos testified at trial that she reviewed the insurance policy in question and Sain was not an insured driver on the policy. Condos testified that neither Rosetta nor anyone else informed Safeway Insurance prior to the

accident that Sain was a member of Rosetta's household or a driver of her car or that his driver's license was suspended. The policy application includes the following provision:

> "Applicant warrants that there are no drivers in the household, other than those listed below and that no driver's license of any person in the household is under suspension or revocation at the time the application is executed."

¶ 27 According to Condos, Safeway Insurance discovered after the traffic accident that, at the time of the insurance application, Sain was a driver in Rosetta's household and Sain had a suspended driver's license. Safeway Insurance then rescinded the policy due to material misrepresentations made on the application, and refunded the premiums paid. Condos testified that only Rosetta and Casandra were listed on the insurance application as drivers. Condos testified that, had Safeway known that Sain was a driver in Rosetta Frazier's household, Safeway would only have issued an insurance policy to Rosetta if it were issued with an endorsement excluding all coverage for all claims arising from Sain's use or operation of any vehicle. According to Condos, upon learning that Sain was a resident of Rosetta Frazier's household, Safeway rescinded policy 0066393 due to material misrepresentation and refunded the premium in full in care of Rosetta's insurance broker.

¶ 28 The insurance policy and application, which were entered into evidence at trial and are included in the record on appeal. Rosetta applied to Safeway Insurance for vehicle insurance in May 2003. On the insurance application, Rosetta was the named insured and Casandra was the only other driver listed. Safeway issued policy 0066393 with scheduled effective dates of May 10, 2003 to November 10, 2003. The resulting insurance policy includes the following language:

> "APPLICANT WARRANTS THAT THERE ARE NO DRIVERS IN THE HOUSEHOLD OTHER THAN THOSE LISTED BELOW AND THAT NO DRIVER'S

LICENSE OF ANY PERSON IN THE HOUSEHOLD IS UNDER SUSPENSION OR REVOCATION AT THE TIME THE APPLICATION IS EXECUTED."

¶ 29 It also states:

"ALL QUESTIONS MUST BE TRUTHFULLY ANSWERED. ANY FALSE OR FRAUDULENT ANSWER MAY RESULT IN DENIAL OF COVERAGE."

¶ 30 And:

"APPLICANT'S STATEMENT: The applicant states that the application was read and attests that all answers are truthful and that said answers were made as an inducement to the insurance company to issue a policy, and it is a special condition of this policy that the policy shall be NULL and VOID and of no benefit or effect whatsoever as to any claims arising thereunder in the event that the attestations or statements in the application shall prove to be false or fraudulent in nature. It is understood that a copy of this application shall be attached to and form a part of the policy of insurance when issued and that it is intended that the company shall rely on the contents of this application in issuing any policy of insurance or renewal thereof."

¶ 31 The declarations page contained the following provision:

"Named Insured warrants that there are no other drivers listed in the household other than those listed in the application or endorsement."

¶ 32 The policy jacket contained the following language:

"NOTICE—This policy has been issued in reliance on the statements in the application which is attached hereto and is a part hereof. Read it Carefully and immediately notify the Company of any misinformation.

SAFEWAY INSURANCE COMPANY * * * agrees with the insured, named in the Declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements on the Application and subject to the Declarations and all of the terms of this policy:

* * *

CONDITIONS

* * *

4. Fraud and Misrepresentation. The statements contained in the application are deemed to be representations. In the event that any representation contained in the application is false, misleading or materially affects the acceptance or rating of this risk by the Company, by either direct misrepresentation, omission, concealment of facts or incorrect statements, this policy shall be null and void and of no benefit whatsoever from its inception * * *

* * *

19. Declarations. By acceptance of this policy, the insured named in Item 1 of the Declarations agrees that the statements contained in the Application, a copy of which is attached to and forms a part of this policy, have been made by him or on his behalf and that said statements and the statements of the Declar [sic] Declarations and in any subsequent Application accepted by the Company are offered as an inducement to the Company to issue or continue this policy and the same are his agreements and representations, and that this policy is issued and continued in reliance upon the truth of such statements and representations and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance * * *."

¶ 33 All trial evidence and testimony was presented on July 29, 2015, and the case was continued to October 26, 2015, for closing arguments and rulings on Safeway's motion to strike dismissed claims, Safeway's motion to strike depositions, and Safeway's motion for partial summary judgment as to Sain, and then taken under advisement.

¶ 34 On December 30, 2015, the court entered a memorandum decision and judgment. In it, the court granted partial summary judgment in favor of Safeway Insurance and against Sain, noting that the named insured made a material misrepresentation in the insurance application by failing to disclose a driver in the insured's household. The court stated:

> "Sain was an undisclosed driver. As admitted by Sain and by all other parties having personal knowledge of the facts, Sain lived with Rosetta at 7222 S. Marshfield, Chicago, IL on May 9, 2003, when Rosetta applied for a Safeway insurance policy. Ethel admittedly did not live with Rosetta at that time and was never present at Rosetta's house when people were sleeping. Neither does Ethel know who drove Rosetta's vehicle while Ethel was at her own home or at her full time job.
>
> The fact Sain lived somewhere else more than two (2) years later, two (2) years after Rosetta died, when Ethel sued him and Safeway mailed a letter to Sain retaining a defense attorney for Sain and reserving rights to deny coverage, has no bearing on where Sain lived on May 9, 2003, the date of the insurance application. Frazier's own attorney mailed a letter to Sain at 7222 S. Marshfield, Chicago, IL shortly after the accident.
>
> Safeway is not estopped from denying coverage. Safeway retained attorneys who defended Sain, under a reservation of rights throughout the entire course of Frazier's lawsuit against Sain until the entry of final judgment. Safeway promptly notified Sain less than two (2) weeks after the lawsuit was filed, that Safeway retained attorneys to

> defend him under a reservation of rights. Safeway thereby preserved its rights to deny coverage. An insurer need only 1) defend under a reservation of rights or 2) file a declaratory judgment action to determine coverage. An insurer need not do both in order to preserve the right ot deny coverage. *State Farm Fire and Cas. Co. v. Martin*, 186 Ill. 2d 367, 371 (1999). An insurer who does both, defend under a reservation of rights and file a declaratory judgment action, as Safeway did, certainly preserves its right to deny coverage."

¶ 35 The court also held that Frazier "has no standing to bring excess, bad faith, or Section 155 Claims" where "there can be no excess or bad faith claim here, for Sain's tape recorded statement and answer to the request to admit establishes facts that defeat coverage." Additionally, the court noted there was no conflict of interest here, saying:

> "Frazier falsely argues Safeway had a conflict of interest with Sain. Frazier fails to allege any facts to support that argument, because there was no conflict of interest. Moreover, as no one filed any pleading in this case alleging a conflict of interest no one may assert an unpled conflict of interest claim to defeat entry of summary judgment at this late stage of the litigation."

¶ 36 The court held:

> "Safeway prays for entry of summary judgment only against Sain with respect to policy 0066393 finding and declaring as follows: said policy was voidable due to Rosetta's material misrepresentation; Safeway properly rescinded said policy, and the policy is null and void, and is of no benefit whatsoever, from its inception, and; Safeway is not obligated to provide coverage as a result of the August 7, 2003 accident in any other litigation or claim which has arisen or may arise from the accident.

* * *

[T]here is no factual dispute on whether Sain lived with Rosetta Frazier at the time the contract was executed. According to the admission, Sain lived with Rosetta.

When Rosetta applied for insurance, she did not disclose Sain as another driver in her application, and Safeway issued policy 0066393 in reliance on that information failure. The non-disclosure was a material misrepresentation because it materially affected the acceptance or rating of the risk by Safeway of issuing the policy. Had Rosetta disclosed Sain in the application, then Safeway would not have issued the policy as is. * * * As a result of the material misrepresentation, policy 0066393 is null and void, and Safeway is not obligated to provide any coverage under said policy. Therefore, Safeway's Motion for Partial Summary Judgment against Sain is granted.

The Court orders:

1) Safeway's Objections to the Evidence Deposition Transcripts of Ethel is DENIED;

2) Safeway's Motion to Strike the Deposition Transcripts of Ethel is GRANTED; and

3) Safeway's Motion for Partial Summary Judgment against Sain is GRANTED."

¶ 37 In January 2016, Frazier filed a postjudgment motion which was heard on April 11, 2016. After the hearing, Judge White entered an order "finding 'no coverage' is owed, stating:

"that the 12/30/2015 order is final & appealable & the Court declares it has ruled on Safeway's motion for partial summary judgment and further declares the order disposes of the said trial, finding 'no coverage' is owed, finding on [*illegible*] evidence at trial that Safeway policy is null & void due to material misrepresentation."

¶ 38 Frazier appeals, and Safeway cross-appeals.

¶ 39 II. ANALYSIS

¶ 40 i. Insufficient Record on Appeal

¶ 41 At the outset, we note that the record on appeal is incomplete. Specifically, the trial transcript is incomplete, as it is missing closing arguments as well as a hearing on various evidentiary and procedural motions. In addition, there is no transcript of the April 11, 2016 post-trial hearing included in the record on appeal. There were court reporters present on both days, and the trial court expressly ordered Frazier to include both of those transcripts in the record, having entered an order on July 27, 2016 stating:

> "Transcripts from July 29, 2015, April 11, 2016 and October 26, 2015 will be certified to include in the record for appeal[.]"

¶ 42 Frazier, the appellant, failed to do so. Instead, we are presented, on appeal from a bench trial, with a record that is missing portions of that bench trial—closing arguments and hearings—as well as the hearing and arguments that occurred after the bench trial and partial summary judgment were entered. That hearing, on April 11, 2016, resulted in the court's determination that the remaining issues had been decided and the trial was complete, with the court entering an order following the hearing finding 'no coverage' is owed, and stating:

> "that the 12/30/2015 order is final & appealable & the Court declares it has ruled on Safeway's motion for partial summary judgment and further declares the order disposes of the said trial, finding 'no coverage' is owed, finding on [*illegible*] evidence at trial that Safeway policy is null & void due to material misrepresentation."

This court is left to guess what happened during those missing portions of the record, although the trial court itself ordered Frazier to include those transcripts in the record.

¶ 43 In addition, Frazier failed to include some of the evidence entered at trial in the record on appeal. Safeway points out that, although it admitted "numerous" exhibits into evidence at trial, none of them are included in the record on appeal.

¶ 44 Our supreme court has repeatedly held that the burden is on the appellant to present a sufficiently complete record of the trial proceedings to support a claim of error on appeal. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). "From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Foutch*, 99 Ill. 2d at 391. An appellant has the burden of presenting this court with a record which is sufficient to support his claims of error. *Foutch*, 99 Ill. 2d at 391. Any doubts or deficiencies arising from an incomplete record will be construed against the appellant. *Foutch*, 99 Ill. 2d at 391. When presented with an insufficient record, we will indulge every reasonable presumption in favor of the judgment appealed from. *Smolinski v. Vojta*, 363 Ill. App. 3d 752, 757-58 (2006). Accordingly, in the absence of a complete record supporting the plaintiff's claim of error, we will resolve "[a]ny doubts which may arise from the incompleteness of the record * * * against the appellant." *Foutch*, 99 Ill. 2d at 392.

¶ 45 With these limitations in mind, we address the issues raised in this cause on appeal.

¶ 46 ii. Case Number 13 CH 9938

¶ 47 Initially, Frazier seeks to reverse the December 11, 2013 order dismissing Case No. 13 CH 9938, arguing that it "was not (and is not)" clear to Frazier that [this] order was final and appealable then." Frazier acknowledges that the dismissal order stated that the cause was dismissed with prejudice, but argues that that was in error because the cause was actually just

dismissed pursuant to section 2-619(3) due to duplicative pending actions. Frazier argues that this was not a final order or, if it was a final order, that its finality was unclear. Safeway Insurance responds that the dismissal of Case No. 13 CH 9938 was a final order and is not now appealable. Specifically, Safeway argues that Frazier failed to challenge the December 11, 2013 order dismissing 13 CH 9938, and it is now too late to do so. Additionally, Safeway points out that Frazier's April 18, 2016 notice of appeal in the case at bar only refers to case number 05 L 8067, and specifies only "04/11/16" as the "judgment/order being appealed." Safeway asks us to determine that we lack jurisdiction to review the dismissal of 13 CH 9938, and that the doctrine of *res judicata* bars relitigation of all issues resolved by the dismissal of 13 CH 9938.[4]

¶ 48 Here, in April 2013, plaintiff Rosetta Frazier, deceased, by Ethel Frazier as Administrator of the Estate, filed a "chancery declaratory action" (2013 CH 9938) by which plaintiff alleged there would be an excess verdict; that Safeway Insurance retained attorneys to defend defendant Sain, but failed to notify him of the Estate's June 2007 policy demand, failed to advise him of the alleged conflict of interest between Safeway Insurance and himself, and failed to advise Sain of his right to hire an independent attorney at Safeway Insurance's expense; and that the rescind letter was factually inaccurate because Sain was not a household member at the time of the application. She sought: (1) a declaratory judgment finding that the Safeway Insurance policy issued to Rosetta Frazier was not null and void and did cover Sain for the vehicle accident; (2) a declaratory judgment that Safeway Insurance breached a duty to settle Frazier's claim against Sain for the vehicle accident when it was aware of the likelihood of an excess verdict; (3) a declaratory judgment that Safeway Insurance waived or is stopped from asserting any coverage

[4] Safeway Insurance also contends on appeal that Frazier lacks standing to assert those claim alleged and dismissed in Case Number 13 CH 9938. Because of our resolution of the 13 CH 9938 issues herein, we do not need to address the argument regarding standing.

defense as to Sain and the vehicle accident; and (4) a judgment award of attorneys fees, damages, and costs.

¶ 49 By this declaratory action, plaintiff argued that the rescind was improper and Sain was entitled to full coverage; that Safeway Insurance "breached its good faith and duty to settle and tender" because, although it "was aware that its limits were substantially below a potential verdict in this matter," Safeway Insurance "failed and refused to settle the policy limits upon plaintiff and an excess verdict of over ten times the policy was entered by the trier of fact in the law case." Plaintiff also alleged that Safeway Insurance waived any coverage and related defenses, and that Safeway Insurance was estopped from asserting said defenses because it failed in its obligation to "advise its insured of the conflict of interest, of the policy demand, of the potential excess, of the potential money judgment and its consequences, and that defendant had a right to retain counsel of his own choosing at the expense of Safeway."

¶ 50 This case, No. 13 CH 9938, was dismissed with prejudice pursuant to section 2-619 of the Code of Civil Procedure in December 2013. Specifically, Judge Kennedy entered the following order captioned "13 CH 9938, 10 CH 1311, 05 L 8067 consolidated":

> "This cause coming before the court for hearing on Safeway's motion to dismiss, due notice given, the court having heard arguments of counsel, and read the briefs,
>
> IT IS HEREBY ORDERED,
>
> 4) Safeway's motion to dismiss is granted;
>
> 5) Case No. 13 CH 9938 is severed and dismissed with prejudice pursuant to 2-619;
>
> 6) Cases 10 CH 1311 and 05 L 8067 shall remain pending and consolidated with each other and shall be transferred to the presiding judge to be returned to Judge Alexander White, to whom the cases were previously assigned."

¶ 51 First, we agree that we are without jurisdiction to review the final order dismissing case number 13 CH 9938. The filing of a notice of appeal is the jurisdictional step that initiates appellate review. *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011). "Unless there is a properly filed notice of appeal, the appellate court lacks jurisdiction over the matter and is obliged to dismiss the appeal." *General Motors Corp*., 242 Ill. 2d at 176. Illinois Supreme Court Rule 303(b)(2) provides that a notice of appeal "shall specify the judgment or part thereof or other orders appealed from and the relief sought from the reviewing court." Ill. S. Ct. R. 303(b)(2) (eff. June 4, 2008). A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal. *General Motors Corp*., 242 Ill. 2d at 176.

¶ 52 The notice of appeal in the case at bar, filed by Frazier, relates to case number 05 L 8067 only, and it specifies that the only judgment/order being appealed was issued "04/11/16." Because Frazier did not file a notice of appeal from the December 11, 2013 dismissal with prejudice of case number 13 CH 9938, we have no jurisdiction to consider the merits of 13 CH 9938.

¶ 53 In addition, Frazier failed to challenge the dismissal of 13 CH 9938 during the allotted time for appeal. She did not file a motion to reconsider, vacate, or modify the order dismissing case number 13 CH 9938. Nor did she file a notice of appeal of that cause. The dismissal order, as quoted above, "severed and dismissed with prejudice" case number 13 CH 9938. As such, it was a final and appealable order. A "notice of appeal must be filed with the clerk of the circuit court within 30 days after the entry of the final judgment appealed from * * *." Ill. S.Ct.R. 303(a)(1). Three years—not thirty days—have passed since the entry of the dismissal with prejudice in this case, and Frazier cannot now appeal 13 CH 9938.

¶ 54 Moreover, we disagree with Frazier's assessment that the dismissal was specifically pursuant to section 2-619(3) in that it was dismissed because "the same parties [were] litigating the same issues in another case." Frazier argues that, because the dismissal was pursuant to section 2-619(3) rather than pursuant to a different subsection of section 2-619, the dismissal is not a final order and is not a decision on the merits.

¶ 55 Frazier is correct that Safeway Insurance's motion to dismiss included an argument that 13 CH 9938 should be dismissed pursuant to section 2-619(3) because there were other similar causes pending. However, the motion also argued that the cause should be dismissed pursuant to section 2-619(2) based on lack of standing; pursuant to section 2-606 of the Code for failure to attach certain exhibits to the pleading; pursuant to section 2-619(9) because the claim was barred by another affirmative matter; and pursuant to section 2-619(5) of the Code based on the statute of limitations.

¶ 56 A section 2-619 motion to dismiss admits the sufficiency of the complaint, but asserts an affirmative matter that acts to defeat the claim. *Patrick Engineering, Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31; *King v. First Capital Financial Services Corp.*, 215 Ill. 2d 1, 11-12 (2005); *Wallace v. Smyth*, 203 Ill. 2d 441, 447 (2002); see 735 ILCS 5/2-619 (West 2014) (allowing dismissal when "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim"). Section 2-619(a)(3) allows for dismissal of the action if "there is another action pending between the same parties for the same cause." 735 ILCS 5/2-619(a)(3) (West 2014); *Whittmanhart, Inc. v. CA, Inc.*, 402 Ill. App. 3d 848, 852 (2010) (Section 2-619(a)(3) "is a procedural device designed to avoid duplicative litigation."). Section 2-619(a)(2) allows for dismissal of the action if the "plaintiff does not have legal capacity to sue or that the defendant does not have legal capacity to be sued;" section 2-

619(a)(5) allows for dismissal if "the action was not commenced within the time limited by law; and section 2-619(a)(9) allows for dismissal of the cause if "the claim asserted against defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(2); 735 ILCS 5/2-619(a)(5); 735 ILCS 5/2-619(a)(9) (West 2014). "Under section 2-619, the defendant admits to all well-pled facts in the complaint, as well as any reasonable inferences which may be drawn from those facts [Citation.], but asks the court to conclude that there is no set of facts which would entitle the plaintiff to recover. As long as there is no genuine issue of material fact and the defendant is entitled to judgment as a matter of law, the complaint may be properly dismissed." *Advocate Health and Hospital Corp*. v. Bank One, N.A., 348 Ill. App. 3d 755, 759 (2004).

¶ 57 Contrary to Frazier's argument, the December 11, 2013 order dismissing Frazier's entire complaint in case number 13 CH 9938 "with prejudice pursuant to 2-619" does not specify that the cause was dismissed under section 2-619(3), and nothing in the dismissal order states that Frazier may reassert the dismissed claims again.

¶ 58 Safeway Insurance contends that the doctrine of *res judicata* bars the relitigation of all matters resolved by the dismissal of case number 13 CH 9938. It argues that all of Frazier's arguments "which depend upon reversal or modification of the December 11, 2013 order dismissing Case No. 13 CH 9938 must be disregarded, because that order has not been, and never can be, modified, vacated, or reversed." We agree.

¶ 59 *Res judicata* is an equitable doctrine designed to encourage judicial economy by preventing a multiplicity of lawsuits between the same parties where the facts and issues are the same. *Arvia v. Madigan*, 209 Ill. 2d 520, 533 (2004). The doctrine also "protects the parties

from being forced to bear the unjust burden of relitigating essentially the same case." *Arvia*, 209 Ill. 2d at 533.

¶ 60 "The doctrine of *res judicata* provides that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand, or cause of action." *Nowak v. St. Rita High School*, 197 Ill. 2d 381, 389 (2001). The essential elements of *res judicata* are: (1) a final judgment on the merits; (2) an identity of parties or their privies; and (3) an identity of causes of action. *Hudson v. City of Chicago*, 228 Ill. 2d 462, 467 (2008); *Northeast Illinois Regional Commuter R.R. Corp. v. Chicago Union Station Co.*, 358 Ill. App. 3d 985, 1000 (2005). "Moreover, the doctrine of *res judicata* applies not only to claims that have been fully litigated in an earlier proceeding, but also those that could have been raised or decided, but were not, thus barring such claims from relitigation at a later date." *Northeast Illinois Regional Commuter R.R. Corp.*, 358 Ill. App. 3d at 1000; *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334-35 (1996) (*Res judicata* "extends not only to what was actually decided in the original action, but also to matters which could have been decided in that suit."). In addition, the issue of whether a claim is barred by *res judicata* is an issue of law which mandates *de novo* review by this court. *Northeast Illinois Regional Commuter R.R. Corp.*, 358 Ill. App. 3d at 1000.

¶ 61 Pursuant to Supreme Court Rule 273, unless the order of dismissal or a pertinent statute states otherwise, an involuntary dismissal such as the one in the case at bar operates as an adjudication on the merits. S. Ct. R. 273 ("Unless the order of dismissal or a statute of this State otherwise specifies, an involuntary dismissal of an action, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join an indispensable party, operates as an

adjudication upon the merits."); also see *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 303-04 (1998). Here, because the order dismissing case number 13 CH 9938 was an involuntary dismissal of the case, and neither the dismissal order nor statute specify otherwise, the dismissal order operates as an adjudication of the merits as provided in Supreme Court Rule 273 and for purposes of *res judicata*. S. Ct. R. 273; also see *River Park, Inc.*, 184 Ill. 2d at 303-04 (in context of an involuntary dismissal of a complaint for failure to state a claim, dismissal was an adjudication on the merits for purposes of applying the doctrine of *res judicata*).

¶ 62 We find, therefore, that the December 11, 2013 dismissal order constitutes *res judicata* as to all claims and matters alleged in the complaint in case number 13 CH 9938, and all matters that could have been alleged by that complaint. *Northeast Illinois Regional Commuter R.R. Corp.*, 358 Ill. App. 3d at 1000 ("[T]he doctrine of *res judicata* applies not only to claims that have been fully litigated in an earlier proceeding, but also those that could have been raised or decided, but were not, thus barring such claims from relitigation at a later date."); *Rein*, 172 Ill. 2d at 334-35 (*Res judicata* "extends not only to what was actually decided in the original action, but also to matters which could have been decided in that suit."). This court cannot rule upon defenses, claims and causes of action which were dismissed in Frazier's case number 13 CH 9938 and never asserted in the cases on appeal, that is, number 05 L 8067 consolidated with number 10 CH 1311.

¶ 63 The 13 CH 9938 complaint alleged: Count I: declaration of coverage—"Plaintiff prays for Judgment against Defendant in a Declaration that the policy was not rescinded, that there is and was full coverage for Sain;" Count II: breach of the duty to settle—where Safeway Insurance knew of the likelihood of an excess verdict, it breached its good faith duty to settle and tender; Count III: declaration of waiver and estoppel as to coverage defenses: Safeway Insurance was

"obligated to advise its insured of the conflict of interest, of the policy demand, of the potential excess, of the potential money judgment and its consequences, and that defendant had a right to retain counsel of his own choosing at the expense of Safeway (not Sain)", that Safeway failed to "ever notice Sain (or the Plaintiffs) of the conflict of interest, of the policy demand, of the potential excess, of the potential money judgment and its consequences, and that defendant had a right to retain counsel of his own choosing at the expense of Safeway (not Sain)" is "grounds that Safeway is estopped form claiming any policy defense and/or a rescind as a defense to payment of the Judgment" and that Safeway "has waived by operation of law from claiming any policy defense and/or a rescind as a defense to payment of the Judgment" and "Plaintiff prays for Judgment against Defendant in a Declaration that the policy was not rescinded, that any coverage and related defenses are waived and Safeway stopped from asserting them, and that there is an was full coverage for Sain; and Count IV: Safeway Insurance acted in bad faith; and Count V: as to Sain only, Plaintiff asked for judgment against Sain that there is coverage owed by Safeway because "Sain is named as a potentially necessary party of interest, in that the money Judgment is against him personally, and in that he was the putative Safeway insured."

¶ 64 Pursuant to the doctrine of *res judicata*, by which this court cannot consider matters that have been previously alleged or that could have been alleged, this court cannot here consider arguments that coverage exists based upon Frazier's previously dismissed claims of waiver and estoppel, bad faith, duty to settle, and excess judgment. See, *e.g.*, *Northeast Illinois Regional Commuter R.R. Corp.*, 358 Ill. App. 3d at 1000; *Rein*, 172 Ill. 2d at 334-35.

¶ 65 iii. The Trial Court's Decision

Next, Frazier contends that the trial court's determination that there is no coverage because the insurance policy was rescinded is error. Because the trial court's decision was bifurcated as partial summary judgment followed by a determination on the merits after a further hearing, we will consider the partial summary judgment and the final determination separately.

¶ 66 The trial court here reached its conclusions after a multi-day trial, in which the trial judge, as the trier of fact, assessed all of the evidence adduced by the parties. " 'Although a trial court's holding is always subject to review, * * * [a court of review] will not disturb a trial court's finding and substitute its own opinion unless the holding of the trial court is manifestly against the weight of the evidence.' *Schulenburg v. Signatrol, Inc.*, 37 Ill. 2d 352, 356 (1967). 'Underlying this rule is the recognition that, especially where the testimony is contradictory, the trial judge as the trier of fact is in a position superior to a court of review to observe the conduct of the witnesses while testifying, to determine their credibility, and to weigh the evidence and determine the preponderance thereof.' *Id.* The evidence considered by the trier of fact includes not only the testimony of the witnesses and the exhibits introduced into evidence, but reasonable inferences supported by the evidence that the trier of fact was free to draw. *People v. Fountain*, 2011 IL App (1st) 083459-B. In our review of the conclusions reached following a bench trial, we do not reweigh the evidence; nor does the conflicting nature of the evidence render the verdict unreasonable. We will not reverse a judgment after a trial if reasonable persons might draw different conclusions from the evidence and a fair question is raised by the proof." *Chicago Title Land Trust Company v. JS II. LLC.*, 2012 IL App (1st) 063420, ¶ 31 (2012); *Staes and Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35 (Following a bench trial, the reviewing court will defer to the trial court's findings of fact unless they are contrary to the manifest weight of the evidence).

¶ 67 Keeping *Foutch* principles in mind, we find that the trial court's determination of no coverage was reasonable. See *Chicago Title Land Trust Company*, 2012 IL App (1st) 063420, ¶ 31 ("We will not reverse a judgment after a trial if reasonable persons might draw different conclusions from the evidence and a fair question is raised by the proof); *Foutch*, 99 Ill. 2d at 392 (In the absence of a complete record supporting the plaintiff's claim of error, we will resolve "[a]ny doubts which may arise from the incompleteness of the record * * * against the appellant."). Here, the court, as the trier of fact, was in the best position to observe the conduct of the witnesses while testifying, to determine their credibility and to weigh the evidence. " 'The evidence considered by the trier of fact includes not only the testimony of the witnesses and the exhibits introduced into evidence, but reasonable inferences supported by the evidence that the trier of fact was free to draw." *Chicago Title Land Trust Company*, 2012 IL App (1st) 063420, ¶ 31, quoting *Fountain*, 2011 IL App (1st) 083459-B. Accordingly, we affirm the judgment of the trial court which found there was no coverage under the Safeway policy.

¶ 68 As noted previously, Sain's prior recorded statement was entered into evidence and played during the trial, where the court had opportunity to hear the tone of the statement. In addition, Sain testified in person at the trial. Sain admitted he lived with Rosetta and Cassandra at 7222 S. Marshfield, admitted he drove Rosetta's vehicle regularly, and admitted that his driver's license was suspended. Sain testified at trial that he lived in Rosetta's house until he moved out "two months before the accident." The insurance application was submitted three months before the accident. Because Sain lived in Rosetta's house at the time Rosetta filled out the insurance application, Rosetta was required to list him as an operator in her household in response to questions on the insurance application. The policy application includes the following provision:

"Applicant warrants that there are no drivers in the household, other than those listed below and that no driver's license of any person in the household is under suspension or revocation at the time the application is executed."

As noted previously, the resulting insurance policy includes the following language:

"APPLICANT WARRANTS THAT THERE ARE NO DRIVERS IN THE HOUSEHOLD OTHER THAN THOSE LISTED BELOW AND THAT NO DRIVER'S LICENSE OF ANY PERSON IN THE HOUSEHOLD IS UNDER SUSPENSION OR REVOCATION AT THE TIME THE APPLICATION IS EXECUTED."

It also states:

"ALL QUESTIONS MUST BE TRUTHFULLY ANSWERED. ANY FALSE OR FRAUDULENT ANSWER MAY RESULT IN DENIAL OF COVERAGE."

And:

"APPLICANT'S STATEMENT: The applicant states that the application was read and attests that all answers are truthful and that said answers were made as an inducement to the insurance company to issue a policy, and it is a special condition of this policy that the policy shall be NULL and VOID and of no benefit or effect whatsoever as to any claims arising thereunder in the event that the attestations or statements in the application shall prove to be false or fraudulent in nature. It is understood that a copy of this application shall be attached to and form a part of the policy of insurance when issued and that it is intended that the company shall rely on the contents of this application in issuing any policy of insurance or renewal thereof."

The declarations page contained the following provision:

"Named Insured warrants that there are no other drivers listed in the household other than those listed in the application or endorsement."

The policy jacket contained the following language:

"NOTICE—This policy has been issued in reliance on the statements in the application which is attached hereto and is a part hereof. Read it Carefully and immediately notify the Company of any misinformation.

SAFEWAY INSURANCE COMPANY * * * agrees with the insured, named in the Declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements on the Application and subject to the Declarations and all of the terms of this policy:

* * *

CONDITIONS

* * *

4. Fraud and Misrepresentation. The statements contained in the application are deemed to be representations. In the event that any representation contained in the application is false, misleading or materially affects the acceptance or rating of this risk by the Company, by either direct misrepresentation, omission, concealment of facts or incorrect statements, this policy shall be null and void and of no benefit whatsoever from its inception * * *

* * *

19. Declarations. By acceptance of this policy, the insured named in Item 1 of the Declarations agrees that the statements contained in the Application, a copy of which is attached to and forms a part of this policy, have been made by him or on his behalf and

> that said statements and the statements of the Declar [sic] Declarations and in any subsequent Application accepted by the Company are offered as an inducement to the Company to issue or continue this policy and the same are his agreements and representations, and that this policy is issued and continued in reliance upon the truth of such statements and representations and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance * * *."

¶ 69 Although required to list all drivers in the household, Rosetta failed to do so. Safeway's underwriting supervisor, Condos, testified that the omission was a material misrepresentation, and that Safeway Insurance would not have issued the policy as-is had it known that Sain was a driver in the household. Specifically, Condos testified that, had Safeway known that Sain was a driver in Rosetta Frazier's household, Safeway would only have issued an insurance policy to Rosetta if it were issued with an endorsement excluding all coverage for all claims arising from Sain's use or operation of any vehicle. These facts support the finding that, pursuant to section 5/154 of the Illinois Insurance Code (215 ILCS 5/154 (West 2016)), material misrepresentations were made on the insurance application that allow Safeway to avoid coverage. Specifically, section 5/154 of the Insurance Code provides:

> § 154. Misrepresentations and false warranties.
>
> No misrepresentation or false warranty made by the insured on or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent

to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company * * *." 215 ILCS 5/154 (West 2016).

¶ 70 Under this section then, an insurer may rescind if it is shown that the applicant made a material misrepresentation which affected either the acceptance of the risk or the hazard to be assumed by the insurer. *Illinois State Bar Ass'n Mut. Ins. Co. v. Law Office of Tuzzolino and Terpinas*, 2015 IL 117096, ¶ 17. Even an innocent misrepresentation can be cause for a recission under section 154. *Illinois State Bar Ass'n Mut. Ins. Co.*, 2015 IL 117096, ¶ 17., citing *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 462 (2003).

¶ 71 "Materiality is determined by considering whether a reasonably careful and intelligent person would have regarded the facts omitted as substantially increasing the chances of the events insured against so as to cause a rejection of the application or different conditions such as higher premiums. A material misrepresentation may result where an insured fails to disclose material information or provide complete information in response to a question. 'An insurance applicant has the duty to act in good faith, and an insurer is entitled to truthful responses so it may determine whether the applicant meets its underwriting criteria. Thus, the applicant must disclose all information and let the insurer determine the materiality of * * * the information.' An insurance policy may be voided even if the insured's misrepresentation was a mistake or made in good faith." *American Service Ins. Co. v. United Auto. Ins. Co.*, 409 Ill. App. 3d 27, 32-33 (2011), quoting *Garde v. Country Life Insurance Co*., 147 Ill. App. 3d 1023, 1032 (1986).

¶ 72 An insurance applicant has a duty to act in good faith and must provide the insurer with truthful responses. *American Country Insurance Co. v. Mahoney*, 203 Ill. App. 3d 453, 463 (1990). "Incomplete answers or failure to disclose material information may constitute material misrepresentation." *American Country Ins. Co.*, 203 Ill. App. 3d at 463. "Accordingly, the

applicant must disclose all information and let the insurer determine its materiality. *American Country Ins. Co.*, 203 Ill. App. 3d at 463.

¶ 73 Here, Safeway Insurance presented sufficient evidence at trial such that the "no coverage" judgment rendered is not against the manifest weight of the evidence where Rosetta's failure to disclose Sain as a driver in her household on her insurance application and failure to disclose Sain's driver's license suspension constituted material misrepresentation such that, had the insurance company been apprised of the information, it would not have issued the same policy to Rosetta.

¶ 74 iv. The Partial Summary Judgment as to Sain

¶ 75 We now turn to the question of partial summary judgment in favor of Safeway Insurance and against Sain. In contending that the trial court improperly granted summary judgment in Safeway's favor, Frazier does not assert that a genuine issue of material fact existed so as to preclude summary judgment. Instead, Frazier seems to argue, with nearly no citation to the record or to case law, that the court's grant of partial summary judgment finding no coverage is void because: (1) Frazier was a necessary party, but had previously been dismissed pursuant to Rule 103(b); and (2) Safeway's claim is an "improper collateral attack on the dismissal of Safeway's claims under Rule 103(b). Cross-appellant Safeway Insurance persuasively argues that the court had jurisdiction pursuant to the revestment doctrine. Specifically, Safeway Insurance challenges the trial court's December 10, 2010 dismissal of Frazier pursuant to Supreme Court Rule 103(b), arguing that it is not determinative of the final outcome of the case because: (1) the dismissal was not with prejudice and Frazier remained a party to the garnishment; (2) where Frazier continued to participate in the lawsuit and present evidence, she waived any objection to the trial court's jurisdiction over her and cannot now argue the court was not revested with

jurisdiction over her; (3) her argument is against the doctrine of invited error, where Frazier is not allowed to interject evidence and arguments as to the coverage question at trial and then argue on appeal that the trial court erred in entering judgment on the coverage issues; (4) and the trial court erred in dismissing Frazier pursuant to Rule 103(b) where Frazier was actively participating in concurrent cases regarding the same coverage and insurance issues. For the following reasons, we agree with Safeway Insurance.

¶ 76 In December 2010, Ethel Frazier was dismissed from case number 10 CH 1311, in part because the same coverage issue was already pending in the case number 05 L 8067 garnishment. The dismissal order stated:

> "(1) Fazier's Motion to Dismiss is hereby granted as to Ethel Frazier only under 103(b) Motion and because another action is currently pending, namely Garnishment Action before Judge White in Room 2503 for Frazier's Motion to Turn Over Policy who will hear coverage issues
>
> (2) Status on this matter is continued * * * for expected motions to default the other defendants, at which time the court will suggest transfer of this case to be consolidated with the garnishment before Judge White for a single hearing on the coverage issues."

The case was then consolidated with 05 L 8067.

¶ 77 The purpose of Rule 103(b) is to further the expeditious handling of suits, protect defendants from unnecessary delay in service of process, and "* * * to prevent the plaintiff from circumventing the applicable statute of limitations by filing suit before the expiration of the limitations period but taking no action to have defendants served until the plaintiff is ready to

proceed with the litigation." *Christian v. Lincoln Automotive Co.*, 403 Ill. App. 3d 1038, 1042 (2010). Rule 103(b) provides:

> "b) Dismissal for Lack of Diligence. If the plaintiff fails to exercise reasonable diligence to obtain service on a defendant prior to the expiration of the applicable statute of limitations, the action as to that defendant may be dismissed without prejudice. If the failure to exercise reasonable diligence to obtain service on a defendant occurs after the expiration of the applicable statute of limitations, the dismissal shall be with prejudice as to that defendant only and shall not bar any claim against any other party based on vicarious liability for that dismissed defendant's conduct. The dismissal may be made on the application of any party or on the court's own motion. In considering the exercise of reasonable diligence, the court shall review the totality of the circumstances, including both lack of reasonable diligence in any previous voluntarily dismissed or dismissed for want of prosecution, and the exercise of reasonable diligence in obtaining service in any case refiled under section 13-217 of the Code of Civil Procedure." Illinois Supreme Court Rule 103(b) (eff. July 1, 2007).

¶ 78 We disagree with Frazier's assessment that the 103(b) dismissal was with prejudice. Initially, we note that the dismissal order does not specify that the dismissal was with prejudice, but instead states, as noted above, that Frazer was dismissed "under 103(b) Motion and because another action is currently pending, namely Garnishment Action. ***" Additionally, by its terms, Rule 103(b) only allows dismissal of a defendant with prejudice if the plaintiff failed to exercise reasonable diligence to obtain service after expiration of the applicable statute of limitations. S.Ct. R. 103(b) (eff. July 1, 2007). The statute of limitations for an action on a written contract is 10 years. 735 ILCS 5/13-206 (West 2012). The 10-year statute of limitations applies to a

declaratory judgment action regarding a written contract such as an insurance policy. *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 309 Ill. App. 3d 730, 749 (1999). The insurance policy at issue was issued in May 2003, and the statute of limitations for an action on a written contract did not expire until May 2013. Case number 10 CH 1311 was filed in January 2010, and Frazier was served with summons and complaint in August 2010, all within the statute of limitations. Here, because Frazier was dismissed before the expiration of the applicable statute of limitations, the dismissal was without prejudice.

¶ 79 Regardless, the same insurance coverage issue raised in case number 10 CH 1311 was litigated in the garnishment proceedings under case number 05 L 8067. These two cases were consolidated and moved through the court as a consolidated case with the same parties, culminating in a combined trial. Dismissing Frazier and transferring and consolidating the declaratory judgment action with the garnishment only served to ensure a single trial with a single judgment on the coverage issue that was shared between all of the parties.

¶ 80 The declaratory action, case number 10 CH 1311, was filed by Safeway Insurance, seeking a declaratory judgment that it was "not obligated by Rosetta's insurance policy to defend, indemnify, or provide coverage to Defendant Robert Sain, or any other individual, for the August 7, 2003 accident because of [material representations]." The wrongful death action, case number 05 L 8067, was filed by Ethel Frazier against Robert Sain, alleging wrongful death and survival claims. After a jury verdict against Sain in the amount of $250,000, Frazier filed a garnishment against Safeway Insurance under case number 05 L 8067. Again keeping the *Foutch* principles in mind, so far as we can tell, this appeal, years after the 103(b) dismissal, is the first time the parties have challenged the 103(b) dismissal. See *Foutch*, 99 Ill. 2d at 392 (In the absence of a complete record supporting the plaintiff's claim of error, we will resolve "[a]ny doubts which

may arise from the incompleteness of the record * * * against the appellant."). It is now too late to do so.

¶ 81 Moreover, Frazier's continued active participation in the lawsuit constitutes waiver of any objection she may have had to the trial court's jurisdiction. Frazier presented evidence at trial on the disputed coverage issue, and her attorneys on her behalf took evidentiary depositions in attempt to show that Sain was not a member of Rosetta Frazier's household when Rosetta applied for insurance.

¶ 82 In addition, even if we assume, which we do not, that the trial court lost jurisdiction over Frazier when it dismissed her pursuant to Rule 103(b), Frazier revested the court with jurisdiction by actively participating in the trial regarding the coverage issue. The doctrine of revestment, which often applies to actions dismissed for want of prosecution, provides that jurisdiction is restored to the trial court when the litigants actively participate without objection in proceedings which are inconsistent with the merits of a prior judgment. *Harchut v. OCE/Brunning, Inc*., 289 Ill. App. 3d 790, 793 (1997) (Under the doctrine of revestment, "once the circuit court loses jurisdiction through the passage of 30 days after the entry of its judgment, it may nevertheless be subsequently revested with jurisdiction over the cause under the doctrine of revestment") In *Harchut*, this court applied the doctrine of revestment to an action that was dismissed for want of prosecution. "In order for this doctrine to apply, the litigants 'must actively participate without objection in proceedings which are inconsistent with the merits of the prior judgment." ' *Harchut*, 289 Ill. App. 3d at 794. By participating without objection, the parties revest the trial court with jurisdiction. *Harchut*¸ 289 Ill. App. 3d at 794, (citing *Gentile v. Hansen*, 131 Ill. App. 3d 250, 254 (1984); see also *People v. Kaeding*¸ 98 Ill. 2d 237, 240 (1991) ("In order for [the revestment rule] to apply, the parties must actively participate without

objection in proceedings which are inconsistent with the merits of the prior judgment"). Even if, as Frazier contends and Safeway denies, the court lost jurisdiction over Frazier, Frazier's active participation in the trial of the insurance coverage issue revested the trial court with jurisdiction to rule on the coverage issue.

¶ 83 Moving on to the question of whether the partial summary judgment was error, and again keeping in mind the *Foutch* principles, we find no error in the trial court's grant of partial summary judgment in favor of Safeway Insurance and against Sain. Summary judgment is proper when the pleadings, affidavits, depositions and admissions of record, construed strictly against the moving party, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Morris v. Margulis*, 197 Ill. 2d 28, 35 (201); 735 ILCS 5/2-1005 (West 2014). This relief is an appropriate tool to employ in the expeditious disposition of a lawsuit in which " 'the right of the moving party is clear and free from doubt.' " *Morris*, 197 Ill. 2d at 35 (quoting *Purtill v. Hess*, 111 Ill. 2d 229, 240 (1986)). In ruling on a motion for summary judgment, the circuit court is to determine whether a genuine issue of material fact exists, not try a question of fact. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). Although the burden is on the moving party to establish that summary judgment is appropriate, the nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law. *Caponi v. Larry's 66*, 236 Ill. App. 3d 660, 670 (1992). A party opposing a motion for summary judgment "must present a factual basis which would arguable entitle him to a judgment." *Allegro Services Ltd. v. Metropolitan Pier & Exposition Authority*, 172 Ill. 2d 243, 256 (1996). While he need not prove his case at this preliminary stage, the nonmoving party must, nevertheless, present some factual basis to support his claim and he is not simply entitled to rely on the allegations in his pleading in order to raise a genuine issue of material fact. See

Rucker v. Rucker, 2014 IL App (1st) 132834, ¶ 49, and *CitiMortgage, Inc. v. Bukowski*, 2015 IL App (1st) 140780, ¶ 19. This basis must recite facts and not mere conclusions or statements based on information and belief. See *In Interest of E.L.*, 152 Ill. App. 3d 25, 31 (1987); see also *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010) ("nonmoving party must present a *bona fide* factual issue and not merely general conclusions of law"). And, if his allegations of fact are lacking, any documents provided will be held insufficient to defeat the motion for summary judgment. See *E.L.*, 152 Ill. App. 3d at 31-32. Moreover, while a plaintiff need not prove his entire case during summary judgment, he must present some evidentiary facts to support the elements of his cause of action. See *Bellerive v. Hilton Hotels Corp*., 245 Ill. App. 3d 933, 936 (1993). If the plaintiff fails to establish even one element of the cause of action, summary judgment in favor of the defendant is wholly proper. See *Bagent v. Blessing Care Corp*., 224 Ill. 2d 154, 163 (2007).

¶ 84 When determining whether a genuine issue of material fact exists, courts construe the pleadings liberally in favor of the nonmoving party. *Williams,* 228 Ill. 2d at 417. "Summary judgment is to be encouraged in the interest of prompt disposition of lawsuits, but as a drastic measure it should be allowed only when a moving party's right to it is clear and free from doubt." *Pyne v. Witmer,* 129 Ill. 2d 351, 358 (1989). "If the plaintiff fails to establish any element of the cause of action [asserted,] summary judgment for the defendant is proper." *Governmental Interinsurance Exchange v. Judge,* 221 Ill. 2d 195, 215 (2006). We review summary judgment rulings *de novo* (*Espinoza v. Elgin, Joliet & Eastern Ry. Co.*, 165 Ill. 2d 107, 113 (1995)) and we will only disturb the decision of the trial court where we find that a genuine issue of material fact exists. *Addison v. Whittenberg,* 124 Ill. 2d 287, 294 (1988). A genuine issue of material fact exists where the facts are in dispute or where reasonable minds could draw different inferences

from the undisputed facts. *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724 (2010); see also *In re Estate of Ciesiolkiewicz*, 243 Ill. App. 3d 506, 510 (1993). In our review, we may affirm on any basis found in the record regardless of whether the trial court relied on those grounds or whether its reasoning was correct. *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregis Insurance Co*., 355 Ill. App. 3d 156, 163 (2004); see also *Pepper Construction Co. v. Transcontinental Insurance Co.*, 285 Ill. App. 3d 573, 576 (1996). Supreme Court Rule 304(a) expressly allows entry of judgment as to fewer than all parties.

¶ 85 For all of the reasons mentioned in our analysis above, including that Sain admitted he was a frequent driver of Rosetta's vehicle, that his driver's license was suspended, that he lived in the same house as Rosetta, and that Rosetta made a material misrepresentation in her insurance application, Safeway was entitled to summary judgment as to Sain.

¶ 86 v. The Judicial Admissions

¶ 87 Frazier next contends that Sain's "putative judicial admissions" cannot bind her in her claims against Safeway. Safeway argues these alleged admissions are admissible.

¶ 88 In October 2010, Safeway submitted a request for admissions to each defendant in 10 CH 1311. Specifically, this request went to Casandra Stewart, Crystal Stewart, Stephon Stewart, Robert Sain, Ethel Frazier, Chris Frazier, and Robert Sain, Jr. By that request to admit, Safeway asked the parties to admit that, at the time Rosetta applied for the Safeway insurance policy: Sain was a member of Rosetta's household, Sain lived with Rosetta at 7222 S. Marshfield in Chicago, that Sain drove Rosetta's vehicle at least twenty times in the two months before the insurance application, and that Sain drove Casandra's children to and from school in Rosetta's vehicle.

Only Robert Sain returned the request. In doing so, Sain only signed and returned the request to admit—he neither admitted nor denied any of the facts alleged.

¶ 89 Due to our resolution in this cause, we find these alleged admissions unnecessary. We have affirmed the trial court's determination of no coverage based on a material representation by the insured, and have relied on statements from Sain that essentially establish every fact requested in this challenged request to admit. Sain's prior recorded statement was entered into evidence and played during the trial. In addition, Sain himself testified in person at the trial. Sain admitted he lived with Rosetta and Cassandra at 7222 S. Marshfield, admitted he drove Rosetta's vehicle regularly, and admitted that his driver's license was suspended. Sain testified at trial that he lived in Rosetta's house until he moved out "two months before the accident." The insurance application was submitted three months before the accident. This evidence, as noted previously, is sufficient for this cause.

¶ 90 vi. The Declaratory Judgment Action: estoppel, conflict of interest, and reservation of rights

¶ 91 Next, Frazier contends that the declaratory judgment action, case number 10 CH 1311, in which Safeway Insurance sought a finding that the insurance policy it issued to Rosetta Frazier is null and void due to a material misrepresentation and that Safeway Insurance is not obligated to provide coverage for the vehicle accident, is "unreasonable and untimely." Fazier appears to argue that Safeway should be estopped from pursuing the Chancery case, arguing that a "carrier must file Declaratory before resolution of the Law tort case," and Safeway failed to do so here. Cross-Appellant Safeway Insurance responds that it is not estopped from denying coverage for Sain because an insurer cannot be estopped from denying coverage where, as here, an insurance policy is null and void due to material misrepresentation in the insurance application.

¶ 92 We have determined herein that the misrepresentation that occurred here, that is, that Rosetta failed to disclose Sain as a driver in her household on her insurance application and failed to disclose Sain's driver's license suspension, constituted material misrepresentation such that, had the insurance company been apprised of the information, it would not have issued the same policy to Rosetta, was a material misrepresentation. We have also determined here that this particular material misrepresentation caused the insurance policy to be null and void. Where an insurance policy is null and void due to a material misrepresentation in the insurance application, an insurer is not estopped from denying coverage. *State Farm Insurance Co. v. American Service Insurance Co.*, 332 Ill. App. 3d 31, 35-36 (2002).

¶ 93 Moreover, this claim is barred by the doctrine of *res judicata*. As determined in part (i) of this decision, "the December 11, 2013 dismissal order constitutes *res judicata* as to all claims and matters alleged in the complaint in case number 13 CH 9938, and all matters that could have been alleged by that complaint. *Northeast Illinois Regional Commuter R.R. Corp.*, 358 Ill. App. 3d at 1000 ('[T]he doctrine of *res judicata* applies not only to claims that have been fully litigated in an earlier proceeding, but also those that could have been raised or decided, but were not, thus barring such claims from relitigation at a later date.')[.]" As determined above, "this court cannot here consider arguments that coverage exists based upon Frazier's previously dismissed claims of waiver and estoppel, bad faith, duty to settle, and excess judgment." The estoppel argument raised by Frazier in 13 CH 9938 was the following: "Count I: declaration of coverage—'Plaintiff prays for Judgment against Defendant in a Declaration that the policy was not rescinded, that there is and was full coverage for Sain[.]' "

¶ 94 For the same reasons, Frazier's claims that the reservation of rights letters were "improper and insufficient to reserve coverage" and that there is an "obvious conflict of interest" in Sain's

representation by counsel provided by Safeway Insurance are barred by the doctrine of *res judicata*. As quoted above, Frazier's complaint in 13 CH 9938, which was dismissed with prejudice, alleged in part: "Count II: breach of the duty to settle—where Safeway Insurance knew of the likelihood of an excess verdict, it breached its good faith duty to settle and tender; Count III: declaration of waiver and estoppel as to coverage defenses: Safeway Insurance was "obligated to advise its insured of the conflict of interest, of the policy demand, of the potential excess, of the potential money judgment and its consequences, and that defendant had a right to retain counsel of his own choosing at the expense of Safeway (not Sain)", that Safeway failed to "ever notice Sain (or the Plaintiffs) of the conflict of interest, of the policy demand, of the potential excess, of the potential money judgment and its consequences, and that defendant had a right to retain counsel of his own choosing at the expense of Safeway (not Sain)" is "grounds that Safeway is estopped form claiming any policy defense and/or a rescind as a defense to payment of the Judgment[.]"

¶ 95 As determined above, "this court cannot here consider arguments that coverage exists based upon Frazier's previously dismissed claims of waiver and estoppel, bad faith, duty to settle, and excess judgment."

¶ 96 We are precluded by the doctrine of *res judicata* to consider arguments regarding claims of waiver and estoppel, bad faith, duty to settle, and excess judgment, and Frazier's claims on appeal regarding estoppel, reservation of rights, and conflict of interest regarding the declaratory judgment action fall squarely into these categories. Accordingly, we will not consider these two arguments as to the declaratory judgment action, case number 10 CH 1311, in this appeal.

¶ 97 vii. Clarification of the Memorandum Opinion

¶ 98 Next, with no citation to the record on appeal nor to statute or case law, Frazier argues she "sought to clarify the memorandum opinion, which is muddled and confusing." Then, arguing that the memorandum opinion is "void," she "move[s] to reverse and to declare it is void."

¶ 99 Initially, we have discussed, *supra*, the trial court's memorandum opinion in which it granted partial summary judgment as to Sain, and have found no error. We agree with the trial court's conclusion that Safeway was entitled to summary judgment as to Sain where Sain admitted he was a frequent drier of Rosett's van, that his driver's license was suspended, that he lived in the same house as Rosetta, and that Rosetta made material misrepresentation in her insurance application.

¶ 100 Although Frazier fails to cite to the record regarding where she "sought to clarify the memorandum opinion," we presume she is referring to her January 15, 2016 posttrial motion "to clarify, reconsider, and enter a final and appealable order." As we review that motion, however, it appears to this court that Frazier misapprehended the trial court's memorandum opinion. The memorandum opinion itself consists of 25-pages, including a thorough restatement of the parties' arguments, and it is possible Frazier understood the restatement of the parties' arguments to be the court's decision which, because the court restated the opposing arguments, would appear to be in conflict. However, as we read the memorandum opinion, the court's decision is clear. The court held:

> "Safeway prays for entry of summary judgment only against Sain with respect to policy 0066393 finding and declaring as follows: said policy was voidable due to Rosetta's material misrepresentation; Safeway properly rescinded said policy, and the policy is null and void, and is of no benefit whatsoever, from its inception, and; Safeway

is not obligated to provide coverage as a result of the August 7, 2003 accident in any other litigation or claim which has arisen or may arise from the accident.

* * *

[T]here is no factual dispute on whether Sain lived with Rosetta Frazier at the time the contract was executed. According to the admission, Sain lived with Rosetta.

When Rosetta applied for insurance, she did not disclose Sain as another driver in her application, and Safeway issued policy 0066393 in reliance on that information failure. The non-disclosure was a material misrepresentation because it materially affected the acceptance or rating of the risk by Safeway of issuing the policy. Had Rosetta disclosed Sain in the application, then Safeway would not have issued the policy as is. * * * As a result of the material misrepresentation, policy 0066393 is null and void, and Safeway is not obligated to provide any coverage under said policy. Therefore, Safeway's Motion for Partial Summary Judgment against Sain is granted.

The Court orders:

1) Safeway's Objections to the Evidence Deposition Transcripts of Ethel is DENIED;

2) Safeway's Motion to Strike the Deposition Transcripts of Ethel is GRANTED; and

3) Safeway's Motion for Partial Summary Judgment against Sain is GRANTED."

¶ 101 Then, after an April 11, 2016 hearing, the transcripts of which are not included in the record on appeal, the court entered an order "finding 'no coverage' is owed, and that the insurance was null and void due to material representation. This memorandum opinion was neither muddled nor confusing, and we find no error here.

¶ 102 viii. Frazier's Evidentiary Deposition

¶ 103 Next, while the parties disagree as to whether Ethel Frazier's evidence deposition should have been offered into evidence at trial, we decline to address this issue on appeal. Specifically, Safeway argues that, because Frazier failed to provide due notice of the deposition, the evidence deposition was not offered into evidence at trial and cannot now be considered by this court. Frazier argues that due notice was provided, but that the issue is of no merit because "Safeway's improper reservation of rights and declaratory without Frazier as defendant [due to dismissal pursuant to Rule 103(b)] make this issue moot." As we have determined that Frazier's arguments regarding the reservation of rights and the Rule 103(b) dismissal, and Frazier admits the issue is "moot," we decline to further address it.

¶ 104 ix. Sanctions

¶ 105 Finally, Safeway Insurance contends that Frazier's "attempted appeal" of the dismissal order in case number 13 CH 9938 plus arguments based on claims previously alleged by that case was frivolous and merits sanctions pursuant to Supreme Court Rule 375 (eff. Feb. 1, 1994).

¶ 106 Rule 375(b) allows this court to impose an appropriate sanction if the appeal is frivolous, not taken in good faith, or taken for an improper purpose, such as to harass or cause unnecessary delay or needless increase in litigation costs. Supreme Court Rule 375 (eff. Feb. 1, 1994). To determine whether an appeal is frivolous, we employ an objective standard, asking whether the appeal would have been brought in good faith by a reasonable, prudent attorney. *Penn v. Gerig*, 334 Ill. App. 3d 345, 356 (2002). The purpose of Rule 375(b) is to punish abusive conduct by litigants and their attorneys who appear before this court. *Henby v. White*, 2016 IL App (5th) 140407, ¶ 28. Rule 375 sanctions are penal and should be applied only to those cases falling

strictly within the terms of the rule. *Belfour v. Schaumburg Auto*, 306 Ill. App. 3d 234, 244 (1999). The imposition of sanctions under Rule 375 is left to the discretion of the reviewing court. *Parkway Bank & Trust Co. v. Korzen*, 2013 IL App (1st) 130380, ¶ 80. Although we have ruled in favor of Safeway Insurance in this cause, we cannot here conclude that no reasonable, attorney would have filed this appeal. We deny Safeway's request for sanctions pursuant to Rule 375.

¶ 107 III. CONCLUSION

¶ 108 For all of the foregoing reasons, the decision of the circuit court of Cook County is affirmed.

¶ 109 Affirmed.