2015 IL App (4th) 140936-U

NO. 4-14-0936

Order filed September 24, 2015

Modified upon denial of rehearing December 2, 2015

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

ILLINOIS STATE BAR ASSOCIATION MUTUAL INSURANCE COMPANY, Plaintiff-Appellee, v. THOMAS W. BURKART, ROBERT WILSON, and ELIZABETH WILSON, Defendants-Appellants.	))))))))	Appeal from Circuit Court of Sangamon County No. 12MR835 Honorable John P. Schmidt, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Justices Knecht and Appleton concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, concluding the circuit court did not err by (1) denying insured's motion to transfer venue to Madison County, (2) granting insurer's motion for summary judgment after finding it had no duty to defend, and (3) denying insured's motion to file an amended counterclaim.

¶ 2 In October 2012, plaintiff, Illinois State Bar Association Mutual Insurance Company (ISBA Mutual), filed a complaint for declaratory judgment against its insured, Thomas W. Burkart, seeking a declaration of its duty to defend Burkart in two underlying actions brought by his former clients, Robert and Elizabeth Wilson. In response, Burkart filed a three-count counterclaim alleging breach of settlement agreement (count I), declaratory judgment (count II), and bad faith (count III). The circuit court granted ISBA Mutual's motion for summary judgment on all counts, finding it had no duty to defend Burkart in either of the Wilsons' lawsuits, and dismissed Burkart's counterclaims.

¶ 3 Burkart appeals, asserting the circuit court erred by (1) denying his motion to transfer venue, (2) granting summary judgment in favor of ISBA Mutual, and (3) denying his motion for leave to file an amended counterclaim. The Wilsons appeal, alleging the court erred by ruling on ISBA Mutual's motion for summary judgment as to count I. For the following reasons, we affirm.

¶ 4 I. BACKGROUND

¶ 5 The procedural history of this protracted litigation is convoluted, and we set forth only as much information as is relevant for purposes of this appeal.

¶ 6 A. The Parties

¶ 7 ISBA Mutual is an Illinois insurance corporation with its principal place of business in Chicago, Illinois. Burkart is an attorney licensed to practice law in Illinois and at all times relevant herein was an insured on a certain policy of insurance issued by ISBA Mutual. Burkart Law Offices is located in Hamel, Illinois. The Wilsons are former clients of Burkart and were named as nominal defendants in this case because they are plaintiffs in an underlying suit against Burkart.

¶ 8 B. History of Litigation

¶ 9 Burkart represented the Wilsons in a real estate transaction and litigation arising from that transaction (Madison County case No. 98-L-534). The details of this litigation are largely irrelevant to the case now before the court, but the Fifth District Appellate Court summarized them in a previous appeal. See *Wilson v. Lauschke*, 2012 IL App (5th) 110059-U (unpublished order under Illinois Supreme Court Rule 23). The litigation ultimately resulted in a $30,000 jury verdict for the Wilsons.

¶ 10 In May 2005, Burkart filed a motion, under the same case number (Madison County case No. 98-L-534), "[T]o Enforce and Adjudicate Attorney's Lien." He sought $35,806.85 in attorney fees. The Wilsons responded to Burkart's lien motion by filing a counterclaim alleging Burkart committed negligence and legal malpractice and retained an excessive amount of attorney fees from the judgment proceeds.

¶ 11 Burkart tendered defense of the Wilsons' counterclaims to ISBA Mutual and requested representation. ISBA Mutual initially refused to defend Burkart against the malpractice claims and Burkart sought a declaratory judgment against ISBA Mutual in Madison County case No. 05-MR-558. ISBA Mutual and Burkart settled the declaratory action via a memorandum of understanding and settlement agreement whereby ISBA Mutual agreed to pay for Burkart's defense. Paragraph 4 of the memorandum of understanding and settlement agreement included the following provision:

> "4. Future Litigation
>
> If future litigation in the nature of a declaratory judgment action arises between Burkart and ISBA Mutual regarding the underlying litigation, i.e., Wilson v. Burkart, Civil No. 98-L-534, by agreement of the parties said litigation must be filed in Madison County, Illinois."

We note this paragraph differed from the venue provision in the insurance contract between ISBA Mutual and Burkart, which states as follows:

> "**W. Venue**. With respect to all disputes regarding this Policy, **YOU** and **WE** consent to the personal jurisdiction and venue of any state or federal court located in either Cook County

or Sangamon County, Illinois, and agree that legal proceedings pertaining to any such dispute will be brought only in such state or federal court."

¶ 12 Thereafter, in March 2008, the Madison County circuit court entered summary judgment in Burkart's favor as to the Wilsons' counterclaims for negligence and malpractice. The court also awarded Burkart 50% of the judgment proceeds (*i.e.*, $20,806.85). In March 2010, the Fifth District Appellate Court affirmed the Madison County circuit court's judgment. *Wilson v. Burkart*, No. 5-08-0180 (2010) (unpublished order under Supreme Court Rule 23).

¶ 13 In October 2010, Burkart filed a motion to release the judgment proceeds that had been deposited with the Bank of Edwardsville. The Wilsons objected, arguing the circuit court lacked subject-matter jurisdiction to enter an order awarding Burkart an equitable lien. In November 2010, the Madison County circuit court granted Burkart's motion and entered an order directing the Bank of Edwardsville to distribute the funds held in escrow, giving $20,806.85 to Burkart and the remaining funds to the Wilsons.

¶ 14 In February 2012, the Fifth District reversed, finding the Madison County circuit court lacked jurisdiction to hear Burkart's request for an equitable lien on the judgment proceeds. Thus, the order entering the equitable lien in Burkart's favor was void and the subsequent orders relying on the void order were likewise void. *Wilson*, 2012 IL App (5th) 110059-U (unpublished order under Supreme Court Rule 23). Before the Fifth District issued its mandate, the Bank of Edwardsville distributed the judgment proceeds, giving $20,806.85 to Burkart and the remaining funds to the Wilsons.

¶ 15 C. The Underlying Litigation

¶ 16 In July 2012, the Wilsons filed two lawsuits against Burkart. In Madison County case No. 12-L-1152, the Wilsons, *pro se*, filed a petition for relief from vacated orders as prevailing plaintiffs/appellants after appeal seeking the return of the distributed portion of the escrow fund, and interest thereon. In Madison County case No. 12-CH-950 the Wilsons sought to enjoin Burkart from referencing *Wilson v. Burkart* on his Burkart-for-judge website in connection with his political campaign for judicial office.

¶ 17 Burkart tendered defense of both cases to ISBA Mutual. ISBA Mutual accepted defense of the attorney-fee litigation under reservation of rights and refused to defend Burkart in the case seeking injunctive relief.

¶ 18 During the course of litigation, ISBA Mutual contacted the Wilsons about the possibility of settling their claims against Burkart. Following negotiations, the Wilsons agreed to settle all claims against Burkart for $62,500. ISBA Mutual asked Burkart to consent to the settlement and warned Burkart it would invoke the "hammer clause" in its policy with Burkart and cease defending Burkart if Burkart refused to settle. The hammer clause provided in relevant part:

> "**WE** will not settle a **CLAIM** without **YOUR** consent. If **YOU** refuse consent and **YOU** elect to contest the **CLAIM** or continue legal proceedings, then **OUR** liability for the **CLAIM** will not exceed the amount for which the **CLAIM** could have been settled, plus **CLAIM EXPENSES** incurred up to the date of **YOUR** refusal."

Burkart refused to consent to the settlement.

¶ 19 D. Complaint for Declaratory Relief

¶ 20 In October 2012, ISBA Mutual filed a two-count complaint for declaratory judgment in Sangamon County, seeking a declaration it did not owe any duty to defend Burkart against either of the Wilsons' lawsuits.

¶ 21 In count I of the complaint, ISBA Mutual alleged it has no duty or obligation to defend Burkart in Madison County case No. 12-L-1152 because the lawsuit does not involve a "wrongful act" as that term is defined in the policy. The Wilsons' claim does not allege a negligent act, error, or omission in the rendering of or failure to render professional services. Rather, the Wilsons seek recovery from Burkart for only nonnegligent conduct—*i.e.*, improperly withholding judgment proceeds. Additionally, the recovery sought by the Wilsons does not involve "damages" as defined by the policy.

¶ 22 In count II of its complaint, ISBA Mutual alleged it "has no duty or obligation to defend Burkart in connection with the action filed against him by the Wilsons" since "there is no claim for 'damages' as defined by the policy." Rather, the action only requests injunctive relief. Alternatively, ISBA Mutual contends it has no duty or obligation to defend Burkart because "there is no 'claim' as defined, there is no 'wrongful act' alleged, that is, a negligent act, error or omission in the rendering of or failure to render professional services."

¶ 23 In count III, ISBA Mutual sought to enforce the so-called "hammer clause" in the insurance contract. Pursuant to the hammer clause, ISBA Mutual's liability would not exceed the amount for which the claim could have been settled had Burkart consented, plus expenses incurred up to the date of Burkart's refusal to consent.

¶ 24 E. Venue

¶ 25 In December 20, 2012, Burkart filed a "special and limited appearance" objecting to venue. He argued, pursuant to paragraph 4 of the memorandum of understanding and

settlement agreement, ISBA Mutual agreed that any future litigation regarding the underlying litigation (Madison County case No. 98-L-534), must be brought in Madison County, Illinois. ISBA Mutual responded by arguing the settlement agreement does not apply to the instant case, which involves two new lawsuits (Madison County case Nos. 12-L-1152 and 12-CH-950). In July 2013, the Sangamon County circuit court denied Burkart's motion to transfer venue, finding the forum-selection clause in the policy governs. The court ordered Burkart to answer or otherwise plead within 30 days.

¶ 26 Burkart answered the third amended complaint and filed a three-count counterclaim, alleging breach of settlement agreement (count I), declaratory judgment (count II), and bad faith (count III).

¶ 27 F. Summary Judgment Proceedings

¶ 28 In February 2014, ISBA Mutual filed a motion for summary judgment as to count III, seeking a declaration that, pursuant to the hammer clause, it has no duty to continue defending Burkart and its liability is capped at $62,500, since Burkart has refused to consent to the settlement.

¶ 29 In May 2014, the circuit court entered an order granting ISBA Mutual's motion for summary judgment. The court determined, under the hammer clause, if Burkart refuses to consent to the settlement and elects to continue litigation, then ISBA Mutual's liability for the claim will not exceed the amount for which the claim could have been settled. The court found it undisputed that ISBA Mutual and the Wilsons agreed to settle the case for $62,500 and Burkart has refused to consent.

¶ 30 Thereafter, in August 2014, ISBA Mutual filed a motion for summary judgment on counts I and II, asserting certain provisions within the policy excluded coverage for the

allegations raised by the Wilsons. A hearing was held on September 25, 2014. Later that same day, the court entered a docket entry granting ISBA Mutual's motion for summary judgment as to counts I and II, finding it had no duty to defend Burkart in either of the actions filed by the Wilsons. The court dismissed Burkart's counterclaims and denied his request for leave to file an amended counterclaim.

¶ 31 This appeal followed.

¶ 32 II. ANALYSIS

¶ 33 On appeal, Burkart argues the circuit court erred by (1) denying his motion to transfer venue to Madison County; (2) granting summary judgment in favor of ISBA Mutual, finding it had no duty to defend Burkart against claims raised by the Wilsons; and (3) denying Burkart's motion to file an amended counterclaim. We address these assertions in turn.

¶ 34 A. Venue

¶ 35 Burkart contends the circuit court erred by denying his motion to transfer venue to Madison County because the venue provision in the parties' memorandum of understanding and settlement agreement governs venue. Alternatively, Burkart asserts the forum-selection clause in the insurance policy should not be enforced because it is unreasonable and against public policy.

¶ 36 1. *The Settlement Agreement*

¶ 37 Burkart maintains Madison County is the appropriate forum pursuant to the 2005 memorandum of understanding and settlement agreement in which ISBA Mutual agreed to bring future declaratory judgment litigation in Madison County, Illinois. ISBA Mutual responds by arguing the settlement agreement only applied to future declaratory relief actions regarding Madison County case No. 98-L-534. We agree with ISBA Mutual.

¶ 38 The interpretation of a settlement agreement, which is governed by contract principles, is a matter of law that we review *de novo*. *Blum v. Koster*, 235 Ill. 2d 21, 33, 919 N.E.2d 333, 340 (2009). "The cardinal rule of contract interpretation is to discern the parties' intent from the contract language." *Buenz v. Frontline Transportation Co.*, 227 Ill. 2d 302, 308, 882 N.E.2d 525, 528-29 (2008). "Where the contract language is unambiguous, it should be given its plain and ordinary meaning." *Id.* at 308, 882 N.E.2d at 529.

¶ 39 In this case, section 4 of the Memorandum of Understanding and Settlement Agreement states as follows:

> "If future litigation in the nature of a declaratory judgment action arises between Burkart and ISBA Mutual regarding the underlying litigation, i.e., Wilson v. Burkart, Civil No. 98-L-534, by agreement of the parties said litigation must be filed in Madison County, Illinois."

¶ 40 In our view, the words in the settlement agreement are clear, and the language is not susceptible to more than one reasonable interpretation. Section 4 of the memorandum of understanding and settlement agreement plainly states future litigation regarding Madison County case No. 98-L-534 must be filed in Madison County. In this case, ISBA Mutual brings a declaratory relief action regarding Madison County case Nos. 12-L-1152 and 12-CH-950. Thus, section 4 of the settlement agreement does not apply. We conclude the parties intended the settlement to apply only to case No. 98-L-534. As to future litigation in Madison County case No. 98-L-534, the settlement served as an exception to the forum-selection clause contained in the insurance policy.

¶ 41 Burkart asks this court to adopt a broad interpretation and find the phrase "regarding the underlying case" to mean any litigation "that touched upon *** Burkart's representation of the Wilsons." We decline to do so. When reading the memorandum of understanding and settlement agreement as a whole, the only reasonable interpretation is the parties intended the agreement to apply only to case No. 98-L-534.

¶ 42 Accordingly, since the underlying litigation in this case relates to case Nos. 12-L-1152 and 12-CH-950, we find section 4 of the memorandum of understanding and settlement agreement does not apply in this case.

¶ 43 2. *Forum-Selection Clause*

¶ 44 Alternatively, Burkart contends even if the settlement agreement does not apply in this case, the forum-selection clause in the insurance policy is unenforceable because it is unreasonable.

¶ 45 A forum-selection clause in a contract is *prima facie* valid and should be enforced unless the opposing party shows enforcement would be unreasonable under the circumstances. *Calanca v. D & S Manufacturing Co.*, 157 Ill. App. 3d 85, 87, 510 N.E.2d 21, 23 (1987). The party opposing the enforcement of the clause must show that " 'trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court.' " *Id.* at 87-88, 510 N.E.2d at 23. To determine the reasonableness of a forum-selection clause, the court should consider (1) the law that governs the formation and construction of the contract, (2) the residency of the parties, (3) the place of execution and/or performance of the contract, (4) the location of the parties and their witnesses, (5) the convenience to the parties of any particular location, and (6) whether the clause was

equally bargained for. *Id.* at 88, 510 N.E.2d at 23-24; *Yamada Corp. v. Yasuda Fire & Marine Insurance Co.*, 305 Ill. App. 3d 362, 368, 712 N.E.2d 926, 931 (1999).

¶ 46 A review of the appropriate factors demonstrates Burkart's failure to meet his burden. As to the first factor, the contract was formed between an attorney practicing in Illinois and an Illinois mutual insurance company. The parties agreed to language requiring any dispute to be litigated in one of two specific counties in Illinois. Regarding the second factor, since neither party resides in Sangamon County— ISBA Mutual resides in Cook County and Burkart in Madison County, it would not follow that this factor shows that a trial in Sangamon County would be so gravely difficult and inconvenient that for all practical purposes Burkart was deprived of his day in court. We take judicial notice that Hamel, Illinois (Burkart's residence), is 67 miles from the Sangamon County courthouse and 8.5 miles from the Madison County courthouse. Although Madison County is closer, the distance to Sangamon County is not so great as to meet Burkart's heavy burden on this issue. The third factor, the place where the agreement was executed and performed, weighs slightly in Burkart's favor because ISBA Mutual agreed to defend Burkart in Madison County under a reservation of rights. As to the fourth factor, Burkart identifies the Wilsons as potential witnesses. However, Burkart, who had the burden in his forum-selection challenge, did not demonstrate the need for or unavailability of alternatives to physical travel of witnesses, such as evidence depositions and videotaped testimony. See *Brandt v. Miller Coors, LLC*, 2013 IL App (1st) 120431, ¶ 17, 993 N.E.2d 116. As such, the fourth factor is not persuasive in Burkart's favor. Moreover, under the fifth factor, Burkart has not established that traveling 67 miles to litigate this case in Sangamon County, Illinois, would be so serious a hardship he would have to abandon his defense. See *Yamada Corp.*, 305 Ill. App. 3d at 368, 712 N.E.2d at 931 (upholding a forum-selection clause providing that disputes are subject to

Japanese law and forum). The record shows Burkart and the Wilsons appeared in court, argued motions, and actively participated in the litigation in Sangamon County.

¶ 47 Burkart argues the sixth factor weighs strongly against enforcing the forum-selection clause because the clause was boilerplate language evidencing unequal bargaining power. He also claims he was not allowed to negotiate and had no leverage to refuse or revise the terms of the insurance contract since he did not receive a copy of the contract until after he submitted an application. We are not persuaded by Burkart's arguments.

¶ 48 The mere fact Burkart did not object to or attempt to negotiate the forum-selection clause is no reason to invalidate the provision. See *GPS USA, Inc. v. Performance Powdercoating*, 2015 IL App (2d) 131190, ¶ 39, 26 N.E.3d 574 (a failure to negotiate does not equate to an inability to do so). Burkart is an attorney with his own law practice and he gave no indication he lacked the necessary sophistication to negotiate a more favorable forum. The parties in this case are knowledgeable and experienced, as opposed to most ordinary consumers, and this court is not persuaded they are in need of protection when contracting for business services. See *IFC Credit Corp. v. Rieker Shoe Corp.*, 378 Ill. App. 3d 77, 87, 881 N.E.2d 382, 389 (2007). Illinois courts have consistently enforced forum-selection agreements between experienced businesspeople. *Id.* at 91, 881 N.E.2d at 393 (citing cases). We have no basis to find Burkart's level of bargaining power was disproportionate as compared to ISBA Mutual's. Thus, enforcement of the forum-selection clause was reasonable.

¶ 49 Similarly, Burkart offers no convincing argument the forum-selection clause was buried or hidden in fine print in the insurance contract as evidence of unequal bargaining. Rather, he simply argues the insurance policy is a contract of adhesion. However, even if we accept Burkart's argument his insurance agreement is a contract of adhesion, such a finding does

not render the agreement unenforceable. Our supreme court has held adhesive contracts "are a fact of modern life. Consumers routinely sign such agreements to obtain credit cards, rental cars, land and cellular telephone service, home furnishings and appliances, loans, and other products and services. It cannot reasonably be said that all such contracts are so procedurally unconscionable as to be unenforceable." *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 26, 857 N.E.2d 250, 266 (2006). Thus, the forum-selection clause is not unreasonable based on its adhesive nature.

¶ 50 Burkart cites *Martin-Trigona v. Roderick*, 29 Ill. App. 3d 553, 331 N.E.2d 100 (1975), and *Williams v. Illinois State Scholarship Comm'n*, 139 Ill. 2d 24, 50, 563 N.E.2d 465, 477 (1990), in support of his argument the forum-selection clause contained in the insurance policy prepared by ISBA Mutual is void as against public policy. Neither *Williams* nor *Martin-Trigona* assists Burkart's argument that the forum-selection clause here violates Illinois public policy.

¶ 51 In *Martin-Trigona*, the First District found a waiver of venue provision contained in a lease was void as against public policy when the landlord filed a complaint in Cook County to recover rent payments owed by the defendant, who had rented an apartment in Champaign, Illinois. *Martin-Trigona*, 29 Ill. App. 3d at 554-56, 331 N.E.2d at 100-01. The residential lease agreement provided: " '*** Lessee further consents and waives venue or other objections to lessor instituting any action under this lease in any circuit court of Illinois ***.' " *Id.* at 554, 331 N.E.2d at 101. The First District reasoned the Illinois venue statute was intended to protect a defendant from being sued in an oppressive and costly action in a county arbitrarily selected by a plaintiff. *Id.* at 555, 331 N.E.2d at 101. The court therefore held the provision "void as against public policy." *Id.*

¶ 52 In *Williams*, our supreme court held that the forum-selection clause in guaranteed student loan agreements was void as contrary to public policy. *Williams*, 139 Ill. 2d at 28-29, 563 N.E.2d at 467. Our supreme court noted the "[guaranteed student loan] agreements amounted to adhesion contracts [because the students] were in a disparate bargaining position, and, if they wanted the loan, were forced to 'take it or leave it.' " *Id.* at 72, 563 N.E.2d at 487.

¶ 53 Burkart can hardly be compared to the indigent students forced to agree to an adhesion contract to obtain student loans for their education (*Williams*), or to renters forced to execute leases to acquire a place to live (*Martin-Trigona*). The facts in the matter before us do not represent the type of unequal bargaining power Illinois courts have found unconscionable. As discussed above, Burkart is a lawyer and has his own law firm, Burkart Law Offices, with four attorneys. We are unpersuaded that Burkart is an unsophisticated consumer who is need of protection and thus should not be held to the forum-selection clause to which he agreed.

¶ 54 Finally, we reject Burkart's argument ISBA Mutual should be equitably estopped from enforcing its rights under the forum-selection clause. Burkart fails to develop his argument or cite relevant authority. He devotes less than a full page of his 50-page brief and cites one case, *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313, 751 N.E.2d 1150, 1157 (2001), for the general definition of equitable estoppel. Burkart has forfeited his argument on appeal.

¶ 55 In sum, we find Burkart has failed to overcome the presumptive validity of the forum-selection clause contained in the record. Accordingly we find the provision reasonable and enforceable.

¶ 56 B. Duty To Defend

¶ 57 Burkart maintains the circuit court erred by granting summary judgment in favor of ISBA Mutual and finding it had no duty to defend Burkart against claims raised in the Wilsons' lawsuits.

¶ 58 "Summary judgment is appropriate when 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14, 27 N.E.3d 67 (quoting 735 ILCS 5/2-1005(c) (West 2010)). "The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists." *Id*. "A circuit court's entry of summary judgment is reviewed *de novo*." *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 15, 989 N.E.2d 591.

¶ 59 When a third party files a claim potentially covered by an insurance policy, the insurer must either defend the insured under a reservation of rights or seek a declaration that there is no duty for the insurance company to defend the insured. *Johnson v. State Farm Fire & Casualty Co.*, 346 Ill. App. 3d 790, 794, 806 N.E.2d 223, 226 (2004). In determining whether an insurer has a duty to defend its insured, a court must look to the allegations in the underlying complaint and the relevant portions of the insurance policy. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 107-08, 607 N.E.2d 1204, 1212 (1992). If the allegations of the underlying complaint fall within, or potentially within, the policy coverage, then the insurer has a duty to defend. *Id.* at 125, 607 N.E.2d at 1220. An insurer may refuse to defend only where "the allegations clearly show that the claim alleged is beyond coverage." *St. Paul Insurance Co. of Illinois v. Landau, Omahana & Kopka, Ltd.*, 246 Ill. App. 3d 852, 855-56, 619 N.E.2d 1266, 1269 (1993). The insurer bears the burden of proving a claim falls within a

provision that excludes coverage. *Pekin Insurance Co. v. L.J. Shaw & Co.*, 291 Ill. App. 3d 888, 892, 684 N.E.2d 853, 855. With this overview of an insurer's duty to defend in mind, we turn to the merits of Burkart's appeal.

¶ 60 The policy ISBA Mutual issued to Burkart includes the following relevant provisions regarding its professional-liability coverage:

> "C. **DAMAGES** means all sums which an **INSURED** is legally obligated to pay for any **CLAIM** to which this Policy applies, including judgments, settlements, final arbitration awards, and any taxes, fines or penalties incurred by a third party. The **INSURED** agrees with the **COMPANY** that **DAMAGES** do not include:
>
> * * *
>
> 4. legal fees, costs or expenses paid or incurred by the claimant, or retained or possessed by the **INSURED** whether claimed by way of restitution of specific funds, forfeiture, financial loss or otherwise, and injuries which are, in whole or part, a consequence of those fees;
>
> 5. legal costs, expenses or fees paid or incurred by the INSURED, whether claimed by way of restitution of specific funds, financial loss or otherwise."

Additionally, the policy defines "wrongful act" as "any actual or alleged negligent act, error, or omission in the rendering of or failure to render **PROFESSIONAL SERVICES**, including

PERSONAL INJURY committed by **YOU** in the course of rendering **PROFESSIONAL SERVICES**."

¶ 61 1. *Attorney Fee Dispute*

¶ 62 The Wilsons' complaint in Madison County case No. 12-L-1152 indisputably seeks restitution for legal fees which Burkart has improperly withheld and consequential damages for his impropriety, including statutory interest as well as punitive damages. The Wilsons do not complain of anything Burkart did or failed to do in representing them in the real estate litigation. All of the damages the Wilsons seek were either the return of, or reduction of, attorney fees, or were in some way a consequence of those fees. A common-sense reading of the complaint in case No. 12-L-1152 reveals it was entirely a fee dispute. The complaint alleges only noncovered, direct, and consequential injuries from Burkart's receipt of the distributed portion of the escrow fund, and interest thereon. There is no allegation of "damages" within the meaning of the policy. See *Continental Casualty Co. v. Donald T. Bertucci, Ltd.*, 399 Ill. App. 3d 775, 787, 926 N.E.2d 833, 844 (2010) (policy did not cover suit by client against insured for taking excessive fees in breach of fee agreement). We further note Burkart's intentional act of withholding the judgment proceeds does not fall within the definition of "wrongful conduct" because that term only applies to negligent conduct.

¶ 63 Thus, because the allegations in the Wilsons' complaint do not fall within the meaning of "damages" or "wrongful conduct," ISBA Mutual has no duty to defend Burkart in Madison County case No. 12-L-1125 and the circuit court did not err by granting its motion for summary judgment on count I.

¶ 64 We are mindful of the Wilsons' argument maintaining it was improper for the trial court to rule on ISBA Mutual's motion for summary judgment as to count I. The Wilsons assert

that by first seeking and obtaining summary judgment on count III, any subsequent request for summary judgment on count I should have been precluded. The Wilsons maintain count I was made moot by the court's prior ruling on count III. As pointed out by ISBA Mutual, this argument is raised for the first time on appeal and is therefore forfeited. See *A. E. Staley Manufacturing Co. v. Swift & Co.*, 65 Ill. App. 3d 427, 433, 382 N.E.2d 667, 671 (1978) ("[T]he appellate court will not consider arguments or positions not raised below ***.") Given the forfeiture, we decline to address this issue.

¶ 65 2. *Injunctive Relief*

¶ 66 We similarly find ISBA Mutual has no duty to defend Burkart against the Wilsons' claim for injunctive relief in Madison County case No. 11-CH-950. We find the professional liability policy clearly does not cover the claims made by the Wilsons. The policy states, "**DAMAGES** means all sums which **YOU** are legally obligated to pay." Here, the Wilsons pray for equitable relief—*i.e.*, the removal of "*Wilson v. Burkart*, 237 Ill. 2d 593, 939 N.E.2d 532 (Table)" from the website, "Burkart for Judge." The relief requested does not fall within the policy's definition of damages. See *Ladd Construction Co. v. Insurance Co. of North America*, 73 Ill. App. 3d 43, 47-48, 391 N.E.2d 568, 572 (1979) (injunctive relief did not constitute damages under the insurance policy); *O'Brien & Associates, P.C. v. Tim Thompson, Inc.*, 274 Ill. App. 3d 472, 478, 653 N.E.2d 956, 960 (1995) (same). Accordingly, ISBA Mutual has no duty to defend Burkart in Madison County case No. 12-CH-950 and the circuit court appropriately granted ISBA Mutual's motion for summary judgment as to count II.

¶ 67 Since we find ISBA Mutual has no duty to defend, we need not reach Burkart's contention the circuit court erred by finding ISBA Mutual's liability is capped at $62,500 pursuant to the hammer clause.

¶ 68 C. Motion To File an Amended Counterclaim

¶ 69 Finally, Burkart claims the circuit court erred in denying him leave to file an amended counterclaim. We disagree.

¶ 70 Burkart's proposed amended counterclaim alleges civil conspiracy and seeks to join Johnson & Bell, Ltd., Peter R. Ryndak, and Pekin Insurance Company as third-party counterdefendants. Burkart alleges Ryndak and Johnson & Bell conspired with ISBA Mutual to unlawfully control "that part of the defense of the underlying suit which strategically determines whether or not to engage in settlement negotiations." Burkart's claim for civil conspiracy is predicated on his counterclaim for bad faith, which alleged ISBA Mutual "illegally assumed control of the defense" and "hired the law firm of Johnson & Bell as its agent and entered into settlement negotiations with the [Wilsons]." The circuit court dismissed the bad-faith claim, finding ISBA Mutual was authorized to negotiate a settlement with the Wilsons. Burkart does not challenge the dismissal on appeal. Accordingly, Burkart failed to state an independent cause of action and his claim of civil conspiracy must fail. See *Coghlan v. Beck,* 2013 IL App (1st) 120891, ¶ 59, 984 N.E.2d 132 ("conspiracy is not an independent tort: the conspiracy claim fails if the independent cause of action underlying the conspiracy allegation fails").

¶ 71 As such, the circuit court did not err in failing to rule on and grant plaintiff's motion to file an amended complaint. See *Brandon v. Bonell,* 368 Ill. App. 3d 492, 511, 858 N.E.2d 465, 485 (2006) ("the denial of a plaintiff's request to amend a complaint is appropriate if even after the amendment, no cause of action can be stated").

¶ 72 III. CONCLUSION

¶ 73 For the foregoing reasons, we affirm the circuit court's judgment.

¶ 74 Affirmed.