2014 IL App (1st) 13-1666-U

FOURTH DIVISION
June 26, 2014

No. 1-13-1666

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BRADLEY SCHMITT and HEATHER SCHMITT,	)	Appeal from the Circuit Court
	)	of Cook County, Illinois,
Plaintiffs-Appellants,	)	County Department, Law
	)	Division.
v.	)	
	)	No. 12 L 8004
AMERICAN FAMILY MUTUAL INSURANCE	)	
COMPANY and AMERICAN FAMILY	)	The Honorable
INSURANCE GROUP,	)	Raymond Mitchell,
	)	Judge Presiding.
Defendants-Appellees.	)	

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

ORDER

¶ 1 *Held*: The circuit court properly denied the plaintiffs' motion for substitution of judge. The court also properly dismissed the plaintiffs' complaint on the basis that it was time-barred. The plaintiffs' motion for leave to amend their complaint was properly denied.

¶ 2 This cause arises from a ten year old insurance claim filed by the *pro se* plaintiffs, Bradley

Schmitt and Heather Schmitt with their home insurer, the defendants, American Family Mutual Insurance Co., and American Family Insurance Group (hereinafter, collectively, the insurance company). In 2002, the plaintiffs made a claim to the insurance company alleging damage to their home as a result of a hail storm. The insurance company notified the plaintiffs that it would pay for the damage to the plaintiffs' home, but not to the roof, and the plaintiffs accepted the payment. Ten years later, the plaintiffs filed a breach of contract claim against the insurance company. The insurance company moved to dismiss on the basis of a one-year contractual limitations period contained in the plaintiffs' insurance policy. After the plaintiffs' motions for additional discovery and to stay ruling on the motion to dismiss was denied, the plaintiffs motioned for a substitution of judge as of right. The circuit court denied the motion, finding that it improper, since the court had already ruled on a substantial issue in the case. The circuit court then dismiss the plaintiffs' action as time-barred. The plaintiffs' filed a motion to reconsider and sought leave to amend their complaint. The circuit court denied both requests. The plaintiffs now appeal contending that the circuit court erred when it denied: (1) their motion for substitution of judge as of right; (2) their motion for reconsideration; and (3) their request for leave to file their amended complaint. For the reasons that follow, we affirm.

¶ 3 III. BACKGROUND

¶ 4 The record before us is sparse and contains only the following facts and procedural history. In 1996, the plaintiffs obtained a homeowners' insurance policy for their house, located at 878 Walnut Dr. Sleepy Hollow, IL 60118, from "American Family Mutual Insurance Co., a member of the American Family Insurance Group." The initial effective date of the policy was August 19, 1996, but the policy was regularly renewed, and provided the same extent of coverage to the plaintiffs' home at time of the relevant hail storm in 2002. The homeowners' insurance policy

provided dwelling coverage in the amount of $244,800 and personal property on premises coverage up to $186,600. The policy also covered $300,000 in personal liability damage and $1,000 in medical expenses. The policy required that the plaintiffs pay a $250 deductible. The policy also explicitly provided that any suit against the insurance company had to be brought "within one year after the loss or damage occur[ed.]"[1] In addition, one of the amendatory endorsements to the homeowners' policy provided that the policy could be changed, or a provision of it waived, only if "put in writing."[2]

¶ 5 In October 2011, a hail storm damaged the plaintiffs' property. On June 30, 2002, the plaintiffs submitted a claim to the insurance company for that damage. On July 1, 2002, Curt Costello, the insurance company's property damage adjuster contacted the plaintiffs and set up an appointment for an inspection of the home. On July 10, 2002, Costello conducted the inspection, noting storm damage only to the roof vent, the attic vents, a downspout and window screen. Costello found no additional storm damage. Costello also noted that the "siding on the west elevation is rotting away, not storm damage." Based on Costello's inspection report, the

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[1] Subsection 18 of the section titled "Conditions" provides in full:

> "18. **Suit Against Us**. We may not be sued unless there is full compliance with all the terms of this policy. Suit must be brought within one year after the loss or damage occurs."

[2] The provision stated in full:

> "**Waiver or Change of Policy Provision**. You are authorized to request changes on behalf of all insureds, if we agree to those changes. A provision of this policy is waived or changed only if we put it in writing."

insurance company computed the amount of hail damage and itemized the cost. The amount that the insurance company offered to pay the plaintiffs' was $1,099.77.

¶ 6 On July 17, 2002, 16 days after the plaintiffs' claim was submitted, the insurance company sent the plaintiffs a letter enclosing "a draft payment" in the amount of $1,099.77 to cover the claimed loss. In that letter, Tiffany Cass, the insurance company's claims representative, explained that the amount reflected the $250 policy deductible, and that it did not include any damage to the siding, since the insurance company's inspection of the siding did not reveal any evidence of storm related damage, and the "the rotting on the west elevation of the siding" was not covered under the insurance policy. The letter instructed the plaintiffs to refer to certain pages of their insurance policy, which detailed exclusions and explained losses not covered. It also advised the plaintiffs that if they wished to take up the matter with the Illinois Department of Insurance, they could do so, providing the address for the department. The letter was accompanied by a bill itemizing the covered losses, and the pages of the insurance policy containing the language explaining the losses not covered.

¶ 7 The itemized bill provided that the insurance company would cover only $1137.88 for hail damage to roof vent, attic fan, and skylight, and $211.89 for hail damage to screen, attic vent, and downspout. This document explicitly advised the plaintiffs to "present this estimate to a contractor before" authorizing any repairs, because the insurance company would not "accept any supplements" without prior approval. The document also advised the plaintiffs that they had to: (1) inform the insurance company within 180 days from the date of the loss of their intent to replace or repair the items listed above; (2) repair or replace the item within one year from the date of the loss; and (3) submit a final repair bill or purchase receipt showing the item had been repaired or replaced. The document further provided that the plaintiffs were free to repair or

replace the damaged items with higher quality items, but that the insurance company would not pay those items that exceeded the amounts already authorized above. The document finally advised the plaintiffs to "refer to your policy for the exact wording of your building replacement cost coverage," and stated that "[t]his is found in CONDITONS/Section 1." This is the same section of the policy that specifies the contractual one-year suit limitation period.

¶ 8 Ten years after accepting the insurance company's payment of part of their claim, on July 17, 2012, the plaintiffs filed a *pro se* complaint in the circuit court alleging breach of contract by the insurance company. The plaintiffs acknowledged that the insurance company paid for some of the damage to their home but alleged breach of contract for the insurer's refusal to pay the remainder of the damages, which they alleged arose from the hail storm. The plaintiffs sought damages in excess of $50,000, in addition to a 5% pre-judgment interest against the insurance company for its unreasonable delay in the payment of the amounts due to them under the policy. See 815 ILCS 205/2 (West 2002).

¶ 9 In support of their complaint, the plaintiffs attached a copy of the July 17, 2002, letter from the insurance company, informing them of the amount of damages the insurance company had approved for their claim, as well as the documents that were attached to that letter.

¶ 10 On September 13, 2012, the insurance company filed a motion to dismiss pursuant to section 2-619 of the Illinois Code of Civil Procedure (hereinafter the Civil Code) (735 ILCS 5/2-619 (West 2002)), contending that the plaintiffs were barred from raising their claim ten years after the hail storm, since under the explicit language of the insurance policy any claim by an insured needed to be brought within one year after the claimed loss or damage. In support of this motion, the insurance company attached a copy of the entire insurance policy as it read at the

time of the alleged damage to the plaintiffs' home, including the relevant one-year limitation period, found in "CONDITIONS-Section 1".

¶ 11 The defendant, American Family Insurance Group (hereinafter AFIG) also sought dismissal on the grounds that it did not issue the plaintiffs' policy and that is not a legal entity which can be sued. An affidavit in support of this contention was submitted explaining that American Family Mutual Insurance Co., is a mutual insurance company, while AFIG does not issue insurance policies and is not owned by American Family Mutual Insurance Company.

¶ 12 On September 20, 2012, the circuit court entered a briefing schedule for the insurance company's motion to dismiss and set a case management conference for September 20, 2012. According to that briefing schedule, the plaintiffs' response to the motion to dismiss was due on October 18, 2012.

¶ 13 About three weeks before their response was due, on September 26, 2012, the plaintiffs filed a motion for "Approval to Issue Additional Discovery to Defendants to Respond to the Defendants' Motion to Dismiss and to Vacate the Briefing Schedule and Allow Supplemental Discovery to be Issued and Answered." The plaintiffs' motion was heard on October 9, 2012. We, however, are without a transcript of that proceeding. All that is before us, is the circuit court's handwritten case management order from that day, which provides that: (1) briefing on the insurance company's motion to dismiss is stayed until October 25, 2012; (2) the plaintiffs are to advise the court regarding the need for additional discovery on October 25, 2012; and (3) the plaintiffs' motion to stay briefing and issue additional discovery is continued to October 25, 2012. The order further states that the insurance company is to comply with the original discovery, which was issued on September 13, 2012.

¶ 14 After the insurance company complied with the court's order and answered the initial request

for discovery on October 16, 2012, the parties proceeded to a hearing on the need for additional discovery on October 25, 2012. We are again without a transcript of the proceedings from that hearing. The record that is before us reveals only the trial court's written briefing schedule for that day, ordering the plaintiffs to file a response to the insurance company's motion to dismiss by November 29, 2012, and setting the mater for status on December 21, 2012. The briefing schedule makes no ruling on the plaintiffs' request for the issuance of additional discovery. In that vein, the briefing schedule contains only the following handwritten but crossed-off language: "Plaintiffs' were denied the supplemental discovery which was served 10/5/12 and stayed on 10/9/12, which was issued in direct response to the Defendants' Motion to Dismiss."

¶ 15 On November 21, 2012, prior to filing their response to the insurance company's motion to dismiss, the plaintiffs filed a motion for substitution of judge as a matter of right. In that motion, the plaintiffs argued that substitution was proper since there had been no ruling on a "substantial issue" in the case, but rather only "written orders" relating to discovery and a briefing schedule. The insurance company opposed the motion, arguing that substitution was improper since the judge had already made substantial evidentiary rulings in the case during the hearing on the plaintiffs' request for supplemental discovery.

¶ 16 On November 28, 2012, the plaintiffs filed their response to the insurance company's motion to dismiss. In that response, the plaintiffs argued that the limitations period in the insurance policy was unenforceable. The plaintiffs contended that the insurance company had waived the limitations period by failing to comply with an Illinois Administrative Code provision requiring insurers to advise their insureds of the time they have to bring suit. In support, they attached the affidavit of the plaintiff, Bradley Schmitt, averring that after informing the insurance company about the hail damage to their home in July 2002, the plaintiffs never received anything in

writing from the insurance company advising them of: (1) the number of days that the limitations period would be tolled for during the pendency of their claim; or (2) the number of days they would have to bring a suit after the tolling period expired. According to the affidavit, the plaintiffs were unaware prior to the filing of the present lawsuit, that there was a provision in their homeowners' insurance policy limiting the time period within which they could bring suit. According to the affidavit, on July 17, 2002, the insurance company sent the plaintiffs a letter detailing the damages it had approved and attaching to that letter only certain portions of the insurance policy, which did not contain the limitations period. Schmitt further averred that the plaintiffs did not have the portions of the insurance policy containing the limitations period until after this lawsuit was filed. Schmitt also stated that had they known in July 2002 about the limitations period and the time within which they had to sue, they would have retained another expert in 2002 to examine the roof, and would have filed within the limitations period in the policy. Schmitt averred that the repair estimates to the hail damage to their home totaled $41,094.39, and that it was paid by the plaintiffs to various contractors in May 2007. In support, Schmitt attached to his affidavit copies of roofing and home renovation proposals and costs signed by the plaintiffs in March and April 2007.

¶ 17 On December 4, 2012, the circuit court acknowledged the parties' briefs with respect to the plaintiffs' motion to substitute the judge as of right and took the matter under advisement. On that same date, the court also permitted the plaintiffs' to file their reply to the insurance company's response to this motion. The case was then continued to December 21, 2012.

¶ 18 We are without a transcript of the proceedings from the December 21, 2012, hearing. The case management order from that day reveals only that the plaintiffs requested leave to file a surresponse to the insurance company's motion to the dismiss, and that the trial court took this

matter under advisement. According to the case management order, the court further indicated that "the plaintiffs' motion to substitute judge as matter of right will be ruled on prior to the motion to dismiss."

¶ 19 On January 17, 2013, the circuit court issued a written order first denying the plaintiffs' motion for substitution of judge as a matter of right. The court explained that substitution was improper because it had already ruled on substantial evidentiary matters, namely whether the plaintiffs' were entitled to additional discovery and whether the court should stay briefing on the motion to dismiss pending such discovery. As the court explained:

> "In this case, the Court was tasked with ruling on the [plaintiffs'] motion to take additional discovery prior to responding to a motion to dismiss. The motion also required the Court to determine whether briefing on the motion should be stayed. In order to rule on the [plaintiffs'] discovery motion, the Court reviewed [the insurance company's] motion to dismiss and the complaint. The Court then conducted a hearing on the merits of the [plaintiffs'] motion to determine if, under the relevant statues and Supreme Court Rules, they were entitled to a stay of a ruling on the motion to dismiss in order to take additional discovery. After the court made a finding that the [plaintiffs] were not so entitled, they moved for a substitution of judge.
>
> As opposed to the situations where a substitution of judge as of right is warranted, the [plaintiffs] failed to make the motion at the earliest practical moment and instead waited for the court to make a ruling on a contested motion. The appellate court has held that rulings on motions to accelerate and compel discovery, along with setting and continuing pretrial conferences constitute substantive rulings. [Citations.] Additionally, this case was filed and assigned to this courtroom four months before the motion was filed. The parties have had the

> opportunity to observe the Court's approach to the case at numerous pretrial conferences and have presented issues to the Court requiring it to state its position regarding the law as applied to certain matters at issue in the case. The rulings made to this point in the case have entailed more than mere administrative or ministerial decisions. After conducting an inquiry into the nature and extent of the proceedings to this point, it [i]s apparent that [the plaintiffs] are not entitled to substitution of judge as of right."

¶ 20 The court then granted the insurance company's motion to dismiss and declared the order final and appealable. The court found that the suit was time-barred under the one-year limitations provision in the insurance policy, and rejected the plaintiffs' argument that the insurance company had waived the contractual limitation period.

¶ 21 On February 19, 2013, the plaintiffs filed a motion to reconsider and requested leave to file their first amended complaint. In addition to the breach of contract claim raised in the original complaint, the amended complaint alleged 12 more counts against the insurance company, including, *inter alia*: (1) promissory estoppel; (2) negligent misrepresentation; (3) breach of fiduciary duty; (4) negligence; (5) fraudulent misrepresentation; (6) consumer fraud; and (7) fraudulent concealment.

¶ 22 On April 25, 2013, the circuit court denied the plaintiffs' motion for reconsideration and denied their request for leave to amend their complaint, finding it to be untimely. The record is unclear as to whether there was a hearing on this motion. Aside from the trial court's written order denying the motion, we are without a transcript from any such hearing. The plaintiffs now appeal.

¶ 23 II. ANALYSIS

¶ 24 On appeal, the plaintiffs contend that the circuit court erred when it: (1) denied their motion

for substitution of judge; (2) granted the insurance company's motion to dismiss; and (3) denied them leave to file an amended complaint. For the reasons that follow, we disagree.

¶ 25 A. Substitution of Judge

¶ 26 We begin with the plaintiffs' contention regarding the court's denial of their motion for substitution of judge. Under section 2-1001(a)(2) of the Code (735 ILCS 5/2-1001(a)(2) (West 2002)), a litigant is allowed one substitution of judge, without cause. This right is absolute when properly made, and a circuit court has no discretion to deny the motion. *Cincinnati Ins. Co. v. Chapman*, 2012 IL App (1st) 111792, ¶ 23 (citing *In re Marriage of Abma*, 308 Ill. App. 3d 605, 609-10 (1999)). However, in order to prohibit litigants from "judge shopping" by seeking a substitution after they have formed an opinion that the judge may be unfavorably disposed toward the merits of their case, a motion for substitution of judge as of right must be: (1) filed at the earliest practical moment before commencement of trial or hearing; and (2) before the trial judge considering the motion rules upon any "substantial issue" in the case. *Chapman*, 2012 IL App (1st) 111792, ¶ 23; see also *In re Estate of Hoellen*, 367 Ill. App. 3d 240, 245-46 (2006) (citing *In re Estate of Gay*, 353 Ill. App. 3d 341, 343 (2004)); see also 735 ILCS 5/2-1001(a)(2) (West 2002)). A ruling is substantial if "it pertains to evidentiary matters and reveals the court's interpretation of a supreme court rule or the court's opinion as to the admissibility of extrinsic evidence." *In re Estate of Hoellen*, 367 Ill. App. 3d at 246. In addition, a substitution of judge may be denied, even where the judge did not rule on a substantial issue, where "the litigant 'had an opportunity to *test the waters* and form an opinion as to the court's disposition' of an issue." (Emphasis added.) *Chapman*, 2012 IL App (1st) 111792, ¶ 23 (quoting *In re Estate of Hoellen*, 367 Ill. App. 3d at 246; *But see, Schnepf v. Schnepf*, 2013 IL App (4th) 121142, ¶¶29-30 (departing from the overwhelming "weight of appellate authority" and rejecting the "test the

waters" doctrine; holding that: (1) the plain language of the statute governing substitution as of right does not authorize denial of the substitution on the basis of any such doctrine, and (2) any consistent application of such a doctrine would be "nearly impossible.").

¶ 27 In the present case, the plaintiffs contend that substitution was proper because the trial court made no ruling on any "substantial issues" in the case. We disagree.

¶ 28 The trial court below denied the plaintiffs' motion for substitution of judge on the basis that: (1) it was untimely since it was brought four months after the start of litigation, and (2) improper because the court had already made decisions on "substantial issues," in the case, namely whether the plaintiffs were entitled to additional discovery and whether a stay of briefing on the insurance company's motion to dismiss was warranted pending such discovery. The court explicitly held that in making the aforementioned determinations it "stated its position regarding the law as applied to certain matters at issue in the case" thereby rendering substitution improper.

¶ 29 The plaintiffs admit that there was a hearing held on their motion for additional discovery and their request to stay the briefing of the motion to dismiss while that discovery was pending, but they contend that no "substantial issues" were discussed during that hearing. However, the plaintiffs have failed to provide us with a sufficient record on appeal to support this contention. The record does not contain any transcripts of those proceedings, but only the common-law record, including the parties' pleadings and the trial court's case management orders entered after those hearings.

¶ 30 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); see also *Dargis v. Paradise*

Park, Inc., 354 Ill. App.3d 171, 176 (2004). "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. Without an adequate record preserving the claimed error, the court of review must presume the circuit court's order had a sufficient factual basis and that it conforms to the law. *Corral*, 217 Ill. 2d at 157; *Webster*, 195 Ill. 2d at 432; *Foutch*, 99 Ill. 2d at 392. Accordingly, in the absence of a complete record supporting the plaintiffs' 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.

¶ 31 The plaintiffs nevertheless attempt to cite to their proposed bystander's report, attached as a supplemental record on appeal to argue that no issue regarding the merits of this cause of action was discussed at that hearing. While we acknowledge that in the absence of a verbatim report of the proceedings before the trial court, Illinois Supreme Court Rule (323 Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) authorizes the use of a bystander's report or an agreed statement of facts, the plaintiffs have failed to provide us with either. According to Illinois Supreme Court Rule 323(c), a bystander's report must be either stipulated to by the parties, or certified by the trial court. Similarly, an agreed to statement of facts must be stipulated to in writing by both parties. See Illinois Supreme Court Rule 323(d) ("The parties by written stipulation may agree upon a statement of facts material to the controversy and file it without certification in lieu of and within the time for filing a report of proceedings").

¶ 32 In the present case, the record reveals that the circuit court below explicitly rejected the parties' request to certify any bystander's report, explaining that it could not recall what was said at the hearing on the plaintiffs' motion for additional discovery. Moreover, none of the three proposed bystander's reports, which are part of the supplemental record on appeal, are agreed to

by the parties. Accordingly, under these circumstances, we presume that the circuit court's ruling had a sufficient factual basis and was in conformity with the law. See *Corral*, 217 Ill. 2d at 156 (holding that absent an adequate record preserving the claimed error, a reviewing court will presume that the circuit court's ruling was in conformity with the law and had a sufficient factual basis, and any doubts arising from the incompleteness of the record will be resolved against the appellant, and the order of the circuit court will be affirmed); see also *Coleman v. Windy City Balloon Port, Ltd.*, 160 Ill. App. 3d 408, 419 (1987) (citing *Mileke v. Condell Memorial Hospital*, 124 Ill. App. 3d 42, 48-49 (1984)); *In re marriage of Hofstetter*, 102 Ill. App. 3d 392, 396 (1981) ("[i]t is not the obligation of the appellate court to search the record for evidence supporting reversal of the circuit court. *** When portions of the record are lacking, it will be presumed that the circuit court acted properly in entry of the challenged order and that the order is supported by the part of the record not before the reviewing court"); see also *Foutch*, 99 Ill. 2d at 392.

¶ 33 B. Motion to Dismiss

¶ 34 The plaintiffs next contend that the circuit court erred when it granted the insurance company's motion to dismiss on the basis of timeliness. A motion to dismiss pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2–619 (West 2002)) admits the legal sufficiency of the complaint (*i.e.*, all facts well pleaded), but asserts certain defects, defenses or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim. *Solaia Technology, LLC v. Specialty Publishing Co.*, 221 Ill. 2d 558, 579 (2006); see also *Wallace v. Smyth*, 203 Ill.2d 441, 447 (2002). Subsection (a)(5) of section 2-619, explicitly allows dismissal when "the action was not commenced within the time limited by law." 735 ILCS 5/2-619(a)(5) (West 2002). In ruling on a section 2-619

motion, all pleadings and supporting documents must be construed in a light most favorable to the nonmoving party, and the motion should be granted only where no material facts are in dispute and the defendant is entitled to dismissal as a matter of law. *Mayfield v. ACME Barrel Co.*, 258 Ill. App. 3d 32, 34 (1994). The relevant inquiry on appeal is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993). Where a defendant satisfies its initial burden of going forward on a section 2-619 motion to dismiss, the burden then shifts to the plaintiff to establish that the defense is unfounded or requires the resolution of an essential element of material fact before it is proven. *Van Meter v. Darien Park Dist*., 207 Ill. 2d 359, 377 (2003). Our review the circuit court's grant of a motion to dismiss pursuant to section 2-619 is *de novo*. *Peregrine Financial Group, Inc. v. Futronix Trading, Ltd*., 401 Ill. App. 3d 659, 660 (2010).

¶ 35 In the present case, it is undisputed that the plaintiffs' homeowners' insurance policy contained a provision requiring that any "[s]uit [against the insurance company] must be brought within one year after the loss or damage occurs." It is further undisputed that the plaintiffs waited ten years before filing their instant complaint. The plaintiffs acknowledge, as they must, that in Illinois as insureds, they are charged with notice of the contents of their insurance policy, including this limitation period, and that as such they are barred from raising the claim outside of that contractual limitations period. See *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 530 (1996) ("Compliance with the suit limitation provision of [an insurance] policy is a condition precedent to recovery under a policy"); see also *Schoonover v. American Family Insurance Co*., 214 Ill. App. 3d 33, 44 (1991) (same); *Williams v. Prudential Property & Casualty Insurance Co.*, 223 Ill. App. 3d 654, 661 (1992) (holding that any lawsuit filed after a

contractual time limitation has expired is time-barred unless an insurer has waived the requirements, by some conduct or representation).

¶ 36 Nevertheless, the plaintiffs assert that they may proceed with their cause of action. They contend that when the insurance company denied their claim, it did not give them notice of the number of days they had to file suit, as it was required to do pursuant to section 143.1 of the Illinois Insurance Code (Insurance Code) (215 ILCS 5/143.1 (West 2002)) and correspondingly section 919.80(d)(8)(C) of the Illinois Administrative Code (Administrative Code) (50 Ill. Admin. Code § 919.80(d)(8)(C)). Section 143.1 of the Insurance Code provides that whenever any insurance policy contains a provision limiting the period within which the insured may bring suit, the running of such period is tolled from the date proof of loss is filed until the date the claim is denied in whole or in part. See 215 ILCS 5/143.1 (West 2002).[3] In addition, section 919.80(d)(8)(C) of the Administrative Code provides that when the period within which the insured may bring suit is tolled in accordance with section 143.1 of the Insurance Code, the insurance company, at the time it denies the claim, in whole or in part, must advise the insured in writing of the number of days the period was tolled, and how many days are left before the expiration of the time to bring suit. 50 Ill. Admin. Code § 919.80(d)(8)(C).[4] Citing to *Mathis v.*

[3] The statute provides in full:

> "Whenever any policy or contract for insurance, except life, accident and health, fidelity and surety, and ocean marine policies, contains a provision limiting the period within which the insured may bring suit, the running of such period is tolled from the date proof of loss is filed, in whatever form is required by the policy, until the date the claim is denied in whole or in part." 215 ILCS 5/143.1 (West 2002).

[4] That section reads in pertinent part:

Lumbermen's Mutual Casualty Insurance Co., 354 Ill. App. 3d 854 (2004), the plaintiffs contend that the failure of the insurance company to comply with these regulations resulted in waiver and now estopps the insurance company from relying on the contractual limitations period contained in the insurance policy. For the reasons that follow, we disagree, and find the decision in *Mathis* inapposite.

¶ 37 It is well-settled in Illinois that parties to a contract may validly agree to set a reasonable time limit within which a suit on the contract must be filed, and that any suit filed after the contractual period has expired is barred unless the insurer has, by some conduct or representation, waived the requirement. *Village of Lake In The Hills*, 153 Ill. App. 3d 815, 817 (1987) (citing *Florsheim v. Travelers Indemnity Co*., 75 Ill.App.3d 298, 303 (1979)). An insured demonstrates waiver of a provision of an insurance policy: (1) when the conduct of the insurer has misled the insured into acting on a reasonable belief that the insurer has waived some provision of the policy; (2) by showing facts from which it would appear that enforcement of the provision would be unjust or unconscionable, such as where the insurance company dissuades the insured from filing a lawsuit by implying that it will settle a claim; or (3) where waiver can otherwise be inferred from the circumstances. See *Village of Lake In The Hills*, 153 Ill. App. 3d at 817; see also *Tibbs v. Great Central Insurance Co*., 57 Ill. App. 3d 866, 868 (1978). Although the insured need not produce

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"When the period within which the insured may bring suit under a residential fire and extended coverage policy is tolled in accordance with Section 143.1 of the Code [215 ILCS 5/143.1], the company, at the time it denies the claim, in whole or in part, shall advise the insured in writing of the number of days the period was tolled, and how many days are left before the expiration of the time to bring suit." 50 Ill. Admin. Code § 919.80(d)(8)(c).

"uncontroverted proof of waiver or estoppel [citation], it must nevertheless show that the insurer's conduct was inconsistent with an intent to insist on compliance with the provision [citation] or that the insurer's conduct unfairly induced the insured to delay filing suit." *Village of Lake In The Hills*, 153 Ill. App. 3d at 817; *State Farm Mutual Automobile Insurance Co. v. Gray*, 211 Ill. App. 3d 617, 621 (1991) ("Strong proof is not required to establish a waiver of a policy defense, but only such facts as would make it unjust, inequitable[,] or unconscionable to allow the defense to be asserted. [Citations.]"). While waiver and estoppel are ordinarily issues for the trier of fact, where the complaint states no facts indicating negotiation or other conduct consistent with a waiver or estoppel, dismissal with prejudice is appropriate as a matter of law. *Village of Lake In The Hills*, 153 Ill. App. 3d at 817; see also *Florsheim*, 75 Ill. App. 3d at 303.

¶ 38 In the present case, the plaintiffs have entirely failed in their burden to establish waiver of the contractual limitation period by the insurance company. First, the record is clear that the insurance policy itself expressly provides that any waiver of the policy's provisions or conditions must be in writing. Second, the plaintiffs have presented no evidence whatsoever that the insurance company's conduct had any role in causing them to delay ten years in filing their suit. The record indisputably establishes that only 16 days after the plaintiffs provided notice of their claim to the insurance company in 2002, the insurance company promptly paid out a portion of that claim and denied coverage of the other portion. The insurance company did not in any way sit on the claim in order to deprive the plaintiffs of a fair opportunity to litigate the claim. Nor did it waiver from its position of denying the plaintiffs' claim, so as to permit the plaintiffs to reasonably believe that it would waive its limitation period. Our courts have repeatedly held that "[n]o waiver occurs where the insurer denies liability and does nothing thereafter to indicate either that it would reconsider its decision or that it would waive the period for bringing suit."

See *e.g.*, *Hermanson v. Country Mutual Insurance Co.*, 267 Ill. App. 3d 1031, 1035 (1994); see also *Florsheim*, 75 Ill. App. 3d at 303. Accordingly, under this record, we find that the circuit court properly concluded that the insurance company did not waive the contractual limitations period in the policy and that dismissal of the action as time-barred was proper.

¶ 39 In coming to this decision, we have considered the case of *Mathis v. Lumbermen's Mutual Casualty Insurance Co.*, 354 Ill. App. 3d 854 (2004), cited to by the plaintiffs and find it inapposite. Contrary to what the plaintiffs' would have us believe, *Mathis* by no means stands for the proposition that a failure by an insurance company to provide notice pursuant to section 919.80(d)(8)(C) of the Illinois Administrative Code necessarily results in waiver of the policy's suit limitation provision. Rather, *Mathis*, which was explicitly decided on the facts of that case, only provides that a violation of section 143.1 of the Insurance Code and (215 ILCS 5/143.1 (West 2002)) and correspondingly section 919.80(d)(8)(C) of the Illinois Administrative Code "is a fact that a court *can* consider in determining whether an insurer waived a time limitation provision *when enforcement of the provision would be unjust, inequitable, and unconscionable*." (Emphasis added.) *Mathis*, 354 Ill. App. 3d at 860.

¶ 40 "The purpose of section 143.1 [the Insurance Code's tolling provision] is to prevent an insurance company from sitting on a claim, allowing the limitation period to run and depriving the plaintiff of the opportunity to litigate her claim in court." *Burress–Taylor*, 2012 IL App (1st) 110554, ¶ 18 (citing *American Access Casualty Co. v. Tutson*, 409 Ill. App. 3d 233, 237 (2011)). Here, to the extent that any party was "sitting on a claim," it was the plaintiffs and not the insurance company. Unlike in *Mathis*, where the plaintiff filed her complaint less than 14 months after their claim was denied, in the present case, the plaintiffs waited ten years to file a

complaint. What is more, they did so, after accepting the insurance company's initial payment of a portion of their claim. Accordingly, *Mathis* does not apply here.

¶ 41 C. Leave to Amend the Complaint

¶ 42 We finally turn to the plaintiffs' contention that the circuit court erred when it denied them leave to amend their complaint. The parties agree that the trial court erred when it denied the plaintiffs' leave to amend on the basis that it was not timely filed within the requisite 30 day limitation period for posttrial motions. They agree that the court erred in computing the number of days, including State holidays, which had transpired between the dismissal order and the filing of the motion for leave to amend.

¶ 43 Nevertheless, it is axiomatic that regardless of the error in the circuit court's reasoning, we may affirm the judgment of that court on any grounds appearing of record. See *Hernandez v. Pritkin*, 2012 IL 113054 ¶ 54; see also *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 192 (2007) (explaining that the reasons given by a trial court for its decision "are not material if the judgment or order itself is correct."); see also *Johnson v. Condell Memorial Hosp.*, 119 Ill. 2d 496, 502 (1988).

¶ 44 In deciding whether an amendment to a complaint should be allowed, we look to four factors: (1) whether the proposed amendment would cure a defect in the pleading, (2) whether the proposed amendment would surprise or prejudice the opposing party, (3) whether the proposed amendment was timely filed, and (4) whether the moving party had previous opportunities to amend the complaint. *Grove v. Carle Foundation Hospital*, 364 Ill. App. 3d 412, 417-418 (2006) (citing *Board of Directors of Bloomfield Club Recreation Ass'n v. Hoffman Group, Inc.*, 186 Ill. 2d 419, 432 (1999)). The plaintiff must meet all four factors, but if the proposed amendment does not state a cognizable claim, and thus, fails the first factor, leave to amend

should be denied. See *Hayes Mechanical, Inc.*, 351 Ill. App. 3d at 7 ("It is not necessary for the parties to go through the process of filing an amended pleading and then testing its sufficiency by a motion to dismiss--when ruling on a motion to amend, the court may consider the ultimate efficacy of a claim as stated in a proposed amended pleading").

¶ 45 In the present case, after reviewing the record before us, for the reasons already articulated above, we conclude that the plaintiffs' proposed amended complaint could not have cured any of the defects in their original pleading. The same one-year contractual limitation period would necessarily have acted to bar any additional claims that the plaintiffs sought to introduce ten years after their initial alleged loss. Accordingly, leave to amend was properly denied.

¶ 46 III. CONCLUSION

¶ 47 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 48 Affirmed.