2015 IL App (1st) 141581
Sixth Division
Filed: May 1, 2015

No. 1-14-1581

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

BROTHERS FUTURE HOLDINGS, LLC, and CUSTOM GOURMET CONCEPTS, LLC Plaintiffs-Appellees, v. INDIANA INSURANCE COMPANY, ASSURANCE AGENCY, LTD., ANTHONY PARATO, and WENDY COLEMAN, Defendants-Appellants (Arthur Follenweider, Jr., Plaintiff, and Peerless Indemnity Insurance Company, Defendant)	)	Appeal from the Circuit Court of Cook County. No. 11 L 003598 Honorable Raymond Mitchell, Judge Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

ORDER

Held: The circuit court's order entering judgment in favor of the plaintiffs and denying the defendants' motions for judgment *n.o.v.*, a new trial, and a setoff are

affirmed, where (1) there is sufficient evidence in the record to support the jury's finding that an agreement existed between the parties under which the defendants were to procure an insurance policy to cover a vacant building, and that the defendants breached that agreement; (2) there was sufficient evidence to support the finding that the defendants were negligent in procuring the policy requested by the plaintiffs and that their conduct proximately caused the plaintiffs' injury; (3) the plaintiffs' claim for damages was properly calculated under the "replacement cost" method; (4) the defendants forfeited their right to challenge testimony regarding statements made by co-defendant Wendy Coleman on the application for the subject policy; and (5) there was no error in the denial of a setoff.

¶ 1 The plaintiffs, Brothers Holding Company (Brothers), Custom Gourmet Concepts, LLC and Arthur Follenweider, Jr., filed suit against their insurance broker, Assurance Agency Ltd. (Assurance), and its employees, Anthony Parato and Wendy Coleman, for damages the plaintiffs sustained when they were denied coverage for the vandalism to and theft from their building under the vacancy provision of an insurance policy procured by the defendants. The plaintiffs alleged that the defendants breached their contract to obtain appropriate coverage, and that they had acted without reasonable diligence and skill in negotiating and procuring the insurance coverage specifically requested by the plaintiffs.

¶ 2 Following trial, the jury returned a verdict for the plaintiffs in the amount of $2,272,168.34, and the circuit court entered judgment thereon. The defendants filed a motion for judgment *n.o.v.*, for a new trial, and also for a setoff against the verdict. The circuit court denied the motion, and the defendants now appeal, arguing that: (1) there was insufficient evidence to support the jury's finding that the parties had contracted for a policy to cover a vacant building, or alternatively, there was insufficient evidence that the alleged breach of contract proximately caused the plaintiffs' injury; (2) the plaintiffs failed to prove that the defendants acted negligently in obtaining insurance for the plaintiffs' building or that their alleged negligence proximately caused the plaintiffs' damages; (3) the court used an improper method to calculate damages; (4)

they were prejudiced by the admission of irrelevant evidence of Coleman's misstatements on the insurance applications; and (5) the court erred in denying their motion for a setoff. For the reasons that follow, we affirm.

¶ 3 The following facts are provided as a background, and are substantially undisputed. This case involved damage to and theft from a building located in Askum, Illinois (building), on December 8, 2009. The building was formerly the site of the Swissland Packing Company, a slaughterhouse and meat processing business owned and operated by Arthur Follenweider, Sr., and his family. In 1991, Arthur Follenweider, Sr. died, and the business was taken over by his sons, Arthur Follenweider, Jr. (Follenweider, Jr.) and David Follenweider (David).

¶ 4 In 2005, Swissland sold its business, and all operations at the building ceased. Also around that time, the building itself was placed up for sale. In late 2007, ownership of the building was acquired by Brothers, a limited liability company owned by Follenweider, Jr. and David. However, at all times relevant to this case, the building remained vacant and up for sale.

¶ 5 At some point in mid-2007, Follenweider, Jr. and David devised a plan to use a portion of the building for a new custom contract cooking venture under the name of Custom Gourmet Concepts, LLC. (Gourmet Concepts). In preparation for the cooking venture, and also to enhance the value of the premises for a prospective sale, Follenweider, Jr. made improvements to the building, including constructing an addition and purchasing new ovens and a cooking facility.

¶ 6 Follenweider, Jr. retained Parato, a personal friend, to procure insurance for the building on behalf of Brothers. At this point, Parato was employed by an insurance agency other than Assurance, and obtained a policy which provided coverage for vacant buildings through Chubb Custom Insurance with effective dates of August 2007 through February 2008.

¶ 7 In November of 2007, Parato left his former agency and began working at Assurance, and Follenweider, Jr. likewise retained Assurance to act as his insurance broker. Also around this time, Follenweider, Jr. informed Parato that he planned for Gourmet Concepts to be operational by January of 2008. Parato was aware at this point that the building was still vacant and informed his assistant, Wendy Coleman, who was also an insurance producer employed by Assurance, regarding the Chubb policy obtained for Brothers and the fact that the building remained vacant.

¶ 8 On January 17, 2008, Follenweider, Jr. formally notified Parato regarding the business plan for Gourmet Concepts. As the Chubb policy was set to expire, Follenweider, Jr. faxed Parato an appraisal which described the building as approximately 39,500 square feet with a USDA-compliant meat processing and slaughterhouse facility and an appraised value of $2.17 million. Follenweider, Jr. also notified Parato and Coleman that Brothers was seeking "replacement cost" insurance for the building in the amount of $2.5 million and insurance coverage of $100,000 for the equipment contained therein. A copy of the email contained in the record displays handwritten notations by Parato and Coleman that the building was vacant, and that Gourmet Concept’s business plan would not use more than approximately 6000 square feet, or about 12%, of the building for the business. These notes were consistent with Gourmet Concept's written business plan which stated that the business would occupy less than 25% of the building.

¶ 9 Less than two weeks later, however, on January 31, 2008, David died unexpectedly. Coleman continued in her efforts to procure a policy for the building and submitted an application to Hartford Insurance Company (Hartford), representing that the building was 40% occupied despite her knowledge that it was vacant. Hartford issued a "BOP," or business

owner's policy, effective February 2008 through February 2009, to Brothers and Gourmet Concepts. However, in March of 2008, following a routine underwriting inspection, Hartford determined that there were no business operations at the site and cancelled the policy effective June 8, 2008. Follenweider, Jr. testified that he was surprised upon receiving the cancellation notice, and stated that he asked Parato and Coleman for an explanation. They responded that Hartford did not insure vacant buildings and that they were going to have to procure insurance elsewhere.

¶ 10 In correspondence to Parato dated March 28, 2008, Follenweider, Jr. stated that his plans to open Gourmet Concepts had been delayed due to David's death and that "there have been estate issues and other personal matters." However, Follenweider, Jr. stated that he would be continuing preparations to present the facility for approval by the USDA and that he was looking at equipment for the business which he hoped would be delivered within two weeks. In his testimony, Follenweider, Jr. stated that he had drafted this correspondence at the behest of Parato to be submitted to Hartford in an attempt to convince the company to reinstate its policy.

¶ 11 Shortly thereafter, Follenweider, Jr.'s bank, Old Second National Bank (Old Second), notified him that it was rejecting his request for a $250,000 business operating loan, based in part upon the loss of David's income. Follenweider, Jr. informed Parato at this point that it was highly unlikely that Gourmet Concepts would ever be operational, and that he needed to obtain insurance to cover a vacant building. He testified that he had consistently instructed Parato to find a policy to cover a vacant building, regardless of the cost, and that he never indicated to Parato or Coleman that Gourmet Concepts was operational. In fact, the business never became operational.

¶ 12 On cross-examination, Follenweider, Jr. acknowledged giving Parato and Coleman the impression with the March 28, 2008, letter that he still had plans to get Gourmet Concepts operational. However, he also told Parato that this was exceedingly unlikely, due to his brother's death and the relatively remote location of the premises. According to Follenweider, Jr., Parato responded "don't worry, I'll take care of it."

¶ 13 About June 18, 2008, Coleman processed and submitted an electronic application to Peerless Indemnity Insurance Company (Peerless) for coverage on the building and Gourmet Concepts in the amount of $2.25 million. The application contained several erroneous statements about the premises; in particular, that the building was currently being used as an office, was 100% owner-occupied, and consisted of only 3,990 square feet, rather than nearly 39,500. The application further incorrectly denied that there had been any prior instances where a policy or coverage for the building had been cancelled or not renewed.

¶ 14 Based upon this application, a policy was issued by Peerless effective June 17, 2008, through June 17, 2009 (initial policy), providing replacement cost coverage for, in relevant part, losses due to theft from and vandalism to the building. The policy contained a clause entitled "vacancy provision" (hereinafter vacancy provision or clause), stating that Peerless "will not pay" for any loss or damage if the building has been vacant for more than 60 consecutive days prior to the occurrence of a loss. A building was defined as "vacant" under the vacancy provision if at least 31% of its total square footage was not leased, or used by the owner to conduct customary operations.

¶ 15 Follenweider, Jr. testified that he had no role in the preparation of the application and was never provided with a completed copy. He acknowledged having received a copy of the initial policy itself, but testified that he only "skimmed it" or read it over "vaguely." According to

Follenweider, Jr.'s testimony, he had no training regarding insurance and was not knowledgeable about the variable aspects of vacancy coverage. Rather, he stated that he trusted and relied upon Parato to procure the proper coverage, as he had done in the past.

¶ 16 In June of 2009, the Peerless policy was automatically renewed for the period of June 17, 2009, through June 17, 2010 (renewal policy). In a letter sent to Follenweider, Jr. relating to the renewal policy, Coleman represented that Assurance had "performed a substantial review of your policy using a detailed checklist to verify that they accurately meet the coverages which were proposed."

¶ 17 In July 2009, Follenweider, Jr. notified Assurance that Old Second, which held a mortgage on the property, should be added to the policy as a mortgage holder and be covered for any property damage to the building. Assurance processed this request. Old Second was never asked to complete any type of insurance application or renewal form, nor did Old Second ever receive a copy of the renewal policy.

¶ 18 According to Parato's testimony, based upon what Follenweider, Jr. had told him in January of 2008, that he planned to commence operations at Gourmet Concepts, Parato determined that the best policy for Brothers and Gourmet Concepts would be a business owner's policy (BOP), as the building was no longer going to be vacant. Parato further testified that in early June 2008, after the Hartford policy was cancelled, he emailed Coleman informing her of the cancellation and stating that Follenweider, Jr. had told him that Gourmet Concepts "is finally up and running," and that Coleman should contact Follenweider, Jr. to "get coverage back in place." However, Parato then admitted to being informed by Coleman several days later that Follenweider, Jr. was not yet ready to resume BOP coverage. Further, Parato also testified that,

by June of 2008, he was probably "removed enough" from the application process that he "wasn't aware of the exact requirements."

¶ 19 Parato denied that Follenweider, Jr. ever told him that he wanted to resume vacancy coverage. When the Peerless policy was issued, Parato denied reviewing it and testified that he was unaware that the policy did not pay for a "vacant" premises. However, Parato admitted to testifying in his deposition that, by June of 2008, he knew he needed to procure a policy that covered a vacant building because Gourmet Concepts was still not operational.

¶ 20 In her testimony, Coleman confirmed that she was responsible for preparing and submitting the applications for the Hartford and Peerless policies on behalf of Brothers and Gourmet Concepts. Coleman admitted that she completed both applications fully aware that the building was vacant and that there were no business operations being conducted there. However, she testified that Follenweider, Jr. led her to believe that she was applying for coverage for a premises that would soon have a fully functioning business, and that he never informed her that Gourmet Concepts had not commenced operations. Coleman was also aware that, if Gourmet Concepts did eventually become operational, it would not occupy more than 6000 square feet, or about 12%, of the building space. Despite this knowledge, she admitted stating on the Hartford application that the building was 40% occupied, and stating on the Peerless application that the building was 100% occupied and consisting of only 3,990 square feet. Coleman further admitted to having denied on the Peerless application that there had been any prior policy cancellations for the property, even though she knew that Hartford had just cancelled Brothers' coverage due to lack of business operations.

¶ 21 On December 8, 2009, individuals broke into the building, vandalizing it, removing much of its contents and causing severe damage to the structure. Steve Krones, a longstanding

employee of the plaintiffs who was the maintenance engineer for the building, testified that, on December 9, 2009, he went to the building to show it to prospective buyers and discovered the damage. Krones testified that there were subsequent forced entries into the building during that month, despite attempts to secure it, until the perpetrators were finally caught on the site. Krones prepared an inventory of the missing personal property, estimating the loss at $36,150.34.

¶ 22 Follenweider, Jr. submitted a claim for the loss to Peerless, which assigned the matter to Bradley Bretsch, a large-loss specialist. Bretsch testified that in December 2009, he spoke with Follenweider, Jr. regarding the incident and then went to the building to conduct an inspection. Bretsch observed that there was severe damage to the building structure and that electrical components had been removed, including copper pipes and wiring, along with fixtures and other equipment. According to Bretsch, he also noticed that the building appeared to have been vacant and was not being used as an office as was stated on the policy. He later discussed this issue with his supervisor, after which Peerless sent the plaintiffs a reservation of rights letter informing them of potential issues with their coverage.

¶ 23 Bretsch testified that the policy provided replacement cost coverage in the amount of $2.34 million, which meant that the plaintiffs would be entitled to recover this amount only if they actually repaired or replaced the property following the loss. Bretsch acknowledged that he never completed his adjustment calculation because the claim was subsequently denied by Peerless.

¶ 24 In early 2010, Chad McRoberts, a commercial construction contractor retained by Follenweider, Jr., accompanied Follenweider, Jr. to the building site in order to prepare an estimate to repair the facility. McRoberts noted that the building had been stripped of its entire utility system and that the mechanical equipment had been damaged. He took photographs and

devised a work plan to be used by electrical and mechanical subcontractors to repair the damage. He subsequently returned to the building along with the subcontractors, and they arrived at a cost estimate for the project. On March 26, 2010, McRoberts prepared a detailed proposal and submitted it to Follenweider, Jr., estimating the repair costs to be at least $2,236,018.

¶ 25 On March 30, 2010, Peerless issued a letter to the plaintiffs denying coverage for the loss resulting from the theft and vandalism, based upon the fact that the building had been "vacant" for more than 60 consecutive days prior to the loss. Peerless likewise denied coverage to Old Second for the same reason. Bretsch had made a determination, based upon what Follenweider, Jr. told him, that the building had been for sale and that there had been no business operations there since early 2005. According to Follenweider, Jr., this was the first time he became aware of the vacancy provision in the Peerless policy. Follenweider, Jr. also testified that he was never able to undertake the repairs to the facility, because he lacked the funding as a result of the denial of coverage.

¶ 26 Julie Brown was the commercial underwriter for Peerless who processed the application submitted by Coleman on behalf of Brothers and Custom Gourmet. According to Brown, the sole reason Peerless had denied coverage following the theft from and vandalism to the building was because of the vacancy clause in the policy. She testified that she never inspected the property prior to preparing the initial policy because she had relied upon Coleman's representation in the application that the building was being used as an office and was 100% owner-occupied. Brown testified that she would not have issued the policy had she known that the property was vacant, or even if it were only "32%" occupied, and similarly would have rejected the application had she been informed that the building was actually 39,500 square feet rather than 3,990.

¶ 27 The plaintiffs offered the testimony of Jim Leatzow, as an insurance expert. Leatzow testified that, in obtaining the policy, the defendants breached the standard of care for insurance producers by failing to adhere to the demands of the plaintiffs to obtain vacancy coverage; misstating information about the building on the insurance application; procuring a BOP on a business they knew was not operational; not inquiring to ascertain whether the business ever commenced operations at the building; and failing to explain to Follenweider, Jr. that he lacked coverage for a vacant building. Leatzkow further gave the opinion that BOPs do not include coverage for any type of vacancy and that, had the building been characterized properly on the application, the Peerless policy never would have been issued.

¶ 28 Michael Schwartz, a property-loss adjuster and the defendants' expert as to damages, inspected the building in 2013 and gave the opinion that it would cost approximately $2.22 million to repair the damage to the building. However, Schwartz believed that, in this case, the more appropriate method for the insurer to compensate the plaintiffs would be for the insurer to reimburse them for the "actual cash value" of the loss, which was calculated by first determining the replacement cost of the property that was destroyed or stolen, and then deducting an amount for the depreciation of that property. Schwartz testified that, in general, replacement cost payment is proper only when the repairs or replacement have actually been done. Accordingly, Schwartz calculated the actual cash value of the damage to the building to be $783,272, and the actual cash value of the stolen property to be $23,688.

¶ 29 At the close of the plaintiffs' case, the defendants moved for a directed verdict, which was denied. Following trial, the jury returned a verdict for the plaintiffs in the amount of $2,272,168.34, and the circuit court entered judgment thereon. The jury responded in the affirmative to four special interrogatories, one of which requested a determination of whether

there was a contract between the parties to procure insurance. The defendants thereafter filed a motion for judgment *n.o.v.*, for a new trial, and also for a setoff against the verdict in the amount of $816,833.13, which reflected a prior judgment entered in favor of Old Second in its suit against Peerless for breach of the policy. On May 15, 2014, the court denied all of the defendants' post-trial motions, and the instant appeal followed.

¶ 30 The defendants first argue that the circuit court erred in denying their motion for a directed verdict and for judgment *n.o.v.* with regard to the breach of contract claims. The basis for this argument is that the parties never agreed upon the type of policy the defendants were to obtain. They acknowledge that there is no dispute that the plaintiffs requested that they obtain insurance coverage for vandalism to and theft from the building. Rather, the primary controversy in this case turns upon whether the defendants had agreed to obtain a policy that would cover a facility that remained vacant for more than 60 days prior to a loss. According to the defendants, the plaintiffs produced "no evidence" to support the jury's conclusion that there was a meeting of the minds as to this issue. Therefore, the defendants argue that the trial court erred in denying their motion for a directed verdict and for judgment *n.o.v.* on the breach of contract claim. We disagree.

¶ 31 First, we note that we do not review the denial of the defendants' motion for directed verdict. Where the defendant elects to proceed with its case following the denial of its motion for a directed verdict, the ruling merges into the eventual judgment and cannot properly be raised on appeal from that judgment. *Nilsson v. NBD Bank,* 313 Ill. App. 3d 751, 767 (1999); *Labate v. Data Forms, Inc.,* 288 Ill. App. 3d 738, 740 (1997); *In re L.M.*, 205 Ill. App. 3d 497, 513 (1990). Accordingly, we limit our review in this case to the circuit court's denial of the defendants' motion for judgment *n.o.v.*

¶ 32 On appeal from the denial of a motion for judgment *n.o.v.*, we employ a *de novo* standard of review. *McClure v. Owens Corning Fiberglass Corp.*, 188 Ill. 2d 102, 132 (1999). Judgments notwithstanding the verdict should not be entered unless the evidence, "viewed in the light most favorable to the opponent, so overwhelmingly favors the movant that no contrary verdict based on that evidence could ever stand." *Id.* at 131–32; *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). In making this determination, the trial court must be mindful of the role of the jury as factfinder, and must not reweigh the evidence, reevaluate the credibility of the witnesses or set aside a verdict merely because a contrary result is reasonable. *Maple v. Gustafson*, 151 Ill. 2d 445, 452 (1992). Likewise, this court should not "usurp the function of the jury and substitute its judgment on questions of fact fairly submitted, tried, and determined from the evidence." *Id.* A motion for judgment *n.o.v.* should be denied "if there is any evidence, together with reasonable inferences to be drawn therefrom, demonstrating a substantial factual dispute, or where the assessment of credibility of the witnesses or the determination regarding conflicting evidence is decisive to the outcome." *Hamilton v. Hastings*, 2014 IL App (4th) 131021 ¶ 23, quoting *Maple*, 151 Ill. 2d at 454.

¶ 33 In Illinois, a contract to procure insurance is established when (1) one of the parties seeks to be insured and the other party agrees to obtain insurance for him; (2) the subject, period, amount and rate of insurance are ascertained or understood by both parties; and (3) the premium is paid. *Zannini v. Reliance Ins. Co. of Illinois, Inc.*, 147 Ill. 2d 437, 454, (1992); *Scarsdale Villas Associates, Ltd. v. Korman Associates Insurance Agency, Inc.*, 178 Ill. App. 3d 261, 264 (1988). The essential terms of the contract must be definite and specific, and there must be mutual assent, or a "meeting of the minds" as to those terms. *Academy Chicago Publishers v. Cheever*, 144 Ill. 2d 24, 30 (1991). Preliminary contracts to procure insurance are properly

established either by written or parol evidence. *Pickett v. First American Savings & Loan Ass'n*, 90 Ill. App. 3d 245, 252 (1980). Further, a factfinder may imply such a contract from prior business between the parties, their previous correspondence or conversations, or customs prevalent in the locale where contract was formed. *Id.*; see also *United States Fidelity & Guaranty Co. v. Continental Casualty Co.*, 198 Ill. App. 3d 950 (1990).

¶ 34 In this case, there was more than enough evidence to support the jury's conclusion that the parties contracted for coverage for a vacant building. There is no dispute that the building stood vacant and without any type of business operations from 2005 until the time of loss. Follenweider, Jr. testified clearly and unequivocally that both Parato and Coleman were made aware of this fact, and told to obtain insurance for a vacant building, regardless of the cost. Further, both Parato and Coleman conceded that they knew the building was vacant at the time they obtained both the Hartford and Peerless policies.

¶ 35 The evidence also clearly demonstrated that, by the time the defendants submitted the application for the initial Peerless policy in June of 2008, they knew or should have known that Gourmet Concepts was not operational and that it was unlikely ever to become operational. Indeed, Follenweider, Jr. admitted to preparing a plan for the business in early 2008, and that he still aspired to establish the business during that time period, despite personal and professional setbacks following his brother's death. However, by April of that year, Old Second had declined his business operations loan, and he had made clear to Parato that it was highly unlikely that Gourmet Concepts was going to commence operations, and that they needed to procure a policy to cover the vacant building. In fact, Follenweider, Jr. was surprised when the Hartford policy was cancelled due to vacancy, as the building had been vacant all along. There was no dispute that, with full knowledge of all these facts, Parato agreed that he would "take care" of the

plaintiffs. Although Parato and Coleman testified at certain points that they did not know Gourmet Concepts was never operational, their testimony was wavering and inconsistent, and could reasonably be disbelieved by the jury. Accordingly, there was sufficient evidence to support the conclusion that the parties in this case had contracted for coverage for a vacant building, and the defendants' motion for judgment *n.o.v.* was, therefore, properly denied.

¶ 36 In the alternative, the defendants argue that they should have been granted a new trial because the manifest weight of the evidence indisputably supported a conclusion contrary to that reached by the jury. We disagree.

¶ 37 On a motion for a new trial, the circuit court considers the proof at trial and may set aside the verdict if it is contrary to the manifest weight of the evidence. *Hamilton*, 2014 IL App (4th) 131021 ¶ 26, citing *Maple*, 151 Ill. 2d at 454. A verdict is against the manifest weight of the evidence where an opposite conclusion is clearly apparent, or where the jury's findings are unreasonable, arbitrary, and not based upon any of the evidence. *Maple*, 151 Ill. 2d at 454. The court's ruling on a motion for a new trial will not be set aside except in those instances where it is affirmatively shown that the court abused its discretion. *Id*. In determining whether an abuse of discretion occurred, we consider whether the jury's verdict was supported by the evidence and whether the losing party was denied a fair trial. *Id*. at 455.

¶ 38 Based upon our analysis above, we reject the defendants' argument that the court abused its discretion in refusing to grant them a new trial. The defendants completed the electronic application representing that the building was 100% occupied, when they knew that it was vacant. Follenweider, Jr. testified that he made it clear to Parato months prior to the submission of the application that he required a policy to cover a vacant building. Parato then agreed to "take care" of the plaintiffs. In light of this evidence, we are unable to conclude that the verdict

is against the manifest weight of the evidence or that a conclusion opposite that reached by the jury is readily apparent. *Maple*, 151 Ill. 2d at 454.

¶ 39 Next, the defendants argue that the court erred in denying their motions for directed verdict and for judgment *n.o.v.* as to the plaintiffs' claim for negligence, because the plaintiffs failed to prove that the defendants' actions proximately caused the damages they incurred. Again, for the reasons discussed above, we restrict our consideration on appeal to the denial of the motion for judgment *n.o.v.* See *Nilsson*, 313 Ill. App. 3d at 767; *In re L.M.*, 205 Ill. App. 3d at 513.

¶ 40 In order to prove negligence, a plaintiff must establish that the defendant had a legal duty to perform some act, that it breached that duty, and that the breach proximately caused injury to the plaintiff. *Ziemba v. Mierzwa*, 142 Ill. 2d 42, 45 (1991). Under section 2–2201 of the Code of Civil Procedure (735 ILCS 5/2-2201 (West 2008)), insurance producers and brokers have a duty to act with ordinary care and skill in "renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured." See also *Skaperdas v. Country Casualty Insurance Co.*, 2013 IL App (4th) 120986. With respect to the insured, the broker's principal function is to faithfully negotiate and procure a policy according to its client's wishes and requirements. *Shults v. Griffin-Rahn Insurance Agency, Inc.*, 193 Ill. App. 3d 453 (1990). If a broker fails to exercise reasonable competence and diligence in carrying out the business entrusted to it, it will be responsible to its principal for any loss resulting from such failure to do so. *Id.* at 456; see also *Kanter v. Deitelbaum*, 271 Ill. App. 3d 750, 753 (1995).

¶ 41 The defendants contend that Follenweider, Jr. had a copy of the initial policy in his possession since at least August of 2008, over one year prior to the loss, and that "the law placed the onus on him" to read the policy and the renewal policy and to ensure that they included

"vacancy coverage," or, more specifically, that the policies would pay for losses occurring when the building had remained vacant for more than 60 consecutive days prior to the loss. Accordingly, any resulting damage to the plaintiffs was caused by the failure of Follenweider, Jr. to read the initial policy. Further, according to the defendants, Follenweider, Jr. was a sophisticated businessman who sought a BOP for the building, well aware that such policies do not typically contain coverage for a vacancy of more than 60 consecutive days. The defendants' argument is misplaced for several reasons.

¶ 42 As stated above, in resolving this issue, we consider whether the evidence, viewed in the light most favorable to the plaintiffs in this case, so overwhelmingly favored defendants that no contrary verdict based on that evidence could ever stand. *Pedrick*, 37 Ill. 2d at 510.

¶ 43 First, while Illinois law does place a burden on the insured to know its needs for coverage and the contents of its policies (see *Garrick v. Mesirow Fin. Holdings, Inc*., 2013 IL App (1st) 122228, ¶ 49), this does not absolve the broker, who has been retained and compensated for his or her particular expertise in coverage, from the duty to competently carry out the explicit requests of the insured. See *Black v. Illinois Fair Plan Ass'n,* 87 Ill App. 3d 1106, 1111 (1980) (failure to read policy never contributory negligence as a matter of law); *Golf v. Henderson,* 376 Ill. App. 3d 271, 278 (2007)). As discussed above, there was overwhelming evidence in this case that the plaintiffs submitted the application to Peerless seeking a BOP for a building that was 100% occupied, when in fact, they had been told by Follenweider, Jr. that he required just the opposite, a policy ensuring protection for a vacant building with no business operations.

¶ 44 The cases cited by the defendants are readily distinguishable based upon the facts of this case. In *Connelly v. Robert J. Riordan & Co*., 246 Ill. App. 3d 898, 901 (1993), for example, involving a plaintiff who was underinsured, there was no evidence that the defendant broker

procured a policy other than that which was expressly requested by his insured. Thus, that case is inapposite.

¶ 45 Second, the defendants cite no evidence to support their position that Folleweider, Jr. possessed "particular knowledge of vacancy exclusions" or that he knew the risk of opting for a BOP. In fact, Follenweider, Jr. testified to the contrary, that he had no training with regard to insurance or "vacancy coverage," and that he entrusted the defendants with the responsibility of obtaining a policy to cover a vacant building. Further, any knowledge Folleweider, Jr. may have had is of no consequence in this case, where the building had been vacant for years, and after the Hartford policy was cancelled, Follenweider, Jr. informed the defendants that they needed to find a policy to cover vacancy regardless of cost. By its verdict, it is clear that the jury accepted this testimony, and there is no basis to disturb the jury's conclusion on this issue.

¶ 46 As their final contention with regard to proximate cause, the defendants claim that, assuming the plaintiffs did seek a policy to cover their vacant building, they have not proven that such a policy existed or was obtainable. This argument is without merit, as both Coleman and Parato testified that they could have immediately located vacancy coverage had it been requested by Follenweider, Jr.. Accordingly, this argument fails.

¶ 47 We likewise reject the defendants' argument that the court abused its discretion in denying their request for a new trial because the jury's verdict as to the plaintiffs' negligence claim was against the manifest weight of the evidence. Again, the defendants base this argument upon Parato and Coleman's testimony, and the defendants' own interpretation of the evidence, that Follenweider, Jr. believed Gourmet Concepts would be operational within a short time and therefore did not require vacancy coverage. This position was not only directly contradicted by Follenweider, Jr.'s testimony, but is further discredited by the undisputed fact that, even if

Gourmet Concepts had become operational, it was never intended to occupy anywhere near the 31% of building space that was required to escape the application of the vacancy provision of the Peerless policy. Even accepting, *arguendo,* that Parato and Coleman at some point believed that Gourmet Concepts would eventually become operational, the policy they obtained was still not appropriate for the plaintiffs in light of the proposed limited occupancy of the building. Therefore, the jury's finding that the defendants were negligent in obtaining coverage for the plaintiffs was not contrary to the manifest weight of the evidence (see *Hamilton*, 2014 IL App (4th) 131021 ¶ 26, citing *Maple*, 151 Ill. 2d at 454), and there was no abuse of discretion in the denial of the defendants' motion for a new trial. *Maple*, 151 Ill. 2d at 454.

¶ 48 The defendants next argue that the court erred in denying their motion for judgment *n.o.v.* because the plaintiffs failed to properly prove damages.

¶ 49 Where an insurance broker has failed to faithfully and competently procure the coverage requested by his insured, the broker is liable for any damage to the insured resulting from his breach. *Scarsdale*, 178 Ill. App. 3d at 264. The measure of such damages is determined based upon the terms of the policy which was sought by the insured but which the broker failed to procure. *Lake County Grading Co. v. Great Lakes Agency, Inc.*, 226 Ill. App. 3d 697, 701 (1992); *Scarsdale*, 178 Ill. App. 3d at 264.

¶ 50 Both parties agree that, in this case, the proper measure of damages should not be based upon the Peerless policy, but upon the policy the defendants should have obtained for the plaintiffs. *Scarsdale*, 178 Ill. App. 3d at 264. Although the desired coverage was never procured, the terms of a specific policy are unnecessary to establish damages. *Id.* at 265, citing *Pickett*, 90 Ill. App. 3d at 252. Further, in a contract to obtain insurance, it will be presumed that the parties contemplated a form of policy with such conditions and limitations as are typical in

similar cases or have been used in prior dealings between the parties. *Scarsdale*, 178 Ill. App. 3d at 264; *Pickett*, 90 Ill. App. 3d at 254.

¶ 51 In the case at bar, the evidence showed that the plaintiffs requested that the defendants procure a "replacement cost" policy, or a policy covering the expenses to replace stolen items and replace or repair damaged portions of the building's structure, just as they had done with the previous Hartford policy. The defendants do not deny that the plaintiffs presented detailed and unrebutted proof of the costs to repair the damage to the building and replace the stolen equipment. However, they contend that, as there was no evidence the plaintiffs ever actually made or planned to go through with those proposed repairs, the appropriate measure of damages was not the replacement cost method, but the "actual cost" method, calculating loss based upon the replacement cost of the structural damage and property, minus depreciation. Accordingly, the defendants argue, as the plaintiffs failed to provide any proof of the amount of the "actual cost," they failed to prove damages.

¶ 52 It is well established that damages are intended to make the aggrieved party whole, or place him in the position in which he would have been had the contract been performed. *Kalal v. Goldblatt Brothers, Inc.*, 53 Ill App. 3d 109, 112 (1977). In this case, it was clear from the evidence that Follenweider, Jr. had every intention to rebuild the plant, which had been in his family for decades, but that he was foreclosed from doing so by Peerless' denial of coverage.

¶ 53 In the policy with Peerless, as well as the prior policy with Hartford, Follenweider, Jr. sought "replacement cost" coverage for the building. Within one or two months of the vandalism and theft, he worked to begin the process of such repair and replacement. He retained McRoberts to examine the loss and then prepare a detailed proposal to rebuild the facility to regain its original functionality. McRoberts testified that he completed this proposal after two visits to the

site. Bretsch similarly began an estimate as to the replacement cost for the building. Shortly after this process began, however, Peerless denied coverage, and Follenweider, Jr. testified that, without these funds, he could not afford to make the repairs. He further stated that, ultimately, Peerless' refusal to pay under the policy caused him to default on his mortgage with Old Second.

¶ 54 We conclude that, based upon the above evidence, there was no need for the plaintiffs to furnish proof under the actual cost method. It was reasonable for the jury to conclude that, but for the lack of funds, the plaintiffs planned to replace the damaged portions of the building and restore it to its former condition. Had the defendants obtained the proper coverage, the plaintiffs would have had the money to carry out their intended repairs, the cost of which was sufficiently proven. Accordingly, the cost of the actual loss was not at issue, and we reject the defendants' argument that the plaintiffs failed to prove damages.

¶ 55 Next, the defendants contend that they were prejudiced by the admission of irrelevant evidence regarding Coleman's application for the Peerless policy. In particular, the plaintiffs were allowed to elicit "testimony," which they do not specifically identify, that Coleman misstated the square footage of the building, the occupancy percentage of the property, and the description of the building's use, when the plaintiffs' expert, Leatzow, testified that none of these factors had any bearing upon the denial of coverage.

¶ 56 The defendants fail to explain how the statements on the application could be considered irrelevant, as they go directly to the controversy at issue. Regardless, we find this issue to be forfeited. Although the defendants moved *in limine* to exclude either all or some of Coleman's statements, they failed to renew their objection during trial. Following an adverse ruling on a motion *in limine*, the movant remains obligated to contemporaneously object when the complained-of evidence is offered, or the objection will be deemed forfeited. *Sher v. Deane H.*

Tank, Inc., 269 Ill. App. 3d 312, 317 (1995); *Gonzalez v. Prestress Engineering Corp*., 194 Ill. App. 3d 819 (1994). Based upon our review of the record, not only did the defendants fail to object to the testimony as to Coleman's statements as it was elicited, they made reference to the contents of the application in their opening statement. Accordingly, the matter is forfeited.

¶ 57 Finally, the defendants argue that the court erred in denying their motion for a setoff in the amount of $816,833.13 against the verdict, reflecting the amount recovered by Old Second in its suit against Peerless for breach of the policy.

¶ 58 In a related action, Old Second had filed suit against Peerless alleging that, notwithstanding the rights of Brothers, Gourmet Concepts and Follenweider, Jr. to coverage for the loss to the building, Peerless had breached the policy with regard to Old Second by denying its claim for coverage under the policy's mortgagee clause. The circuit court agreed, and in an order of July 23, 2013, entered judgment in favor of Old Second and against Peerless for $816,833.13, the amount of debt outstanding under the mortgage. The defendants now assert that they are entitled to a setoff in this amount, because: (1) the plaintiffs obtained a "significant benefit" arising from the defendants' procurement of a policy which included a mortgage clause, as their mortgage obligation to Old Second has now been reduced by $816,833, and (2) by denying the setoff, the court sanctioned a double recovery for the plaintiffs. We disagree.

¶ 59 The circuit court's denial of the defendants' request for a setoff presents a question of law, and therefore is subject to a *de novo* standard of review. *Thornton v. Garcini*, 237 Ill. 2d 100, 115-16 (2010). The purpose of compensatory damages is to make the plaintiff whole for injuries resulting from the defendants' conduct, but not to permit a double recovery for the same injury. *Kravcik v. Golub & Co.,* 286 Ill. App. 3d 406, 415 (1997); *Schutt,* 135 Ill. App. 3d at 140. In order to accomplish this end, the court may set off a judgment against the defendant by amounts

already recovered by the plaintiff from other defendants, providing that those amounts derived from a single and indivisible injury to the plaintiff. *Pasquale v. Speed Products Engineering,* 166 Ill. 2d 337, 369 (1995); *Thornton v. Garcini,* 382 Ill. App. 3d 813, 820 (2008) *aff'd,* 237 Ill. 2d 100 (2010). The party seeking the setoff bears the burden of proving what portion of the prior judgment or settlement is attributable to the claim for which it has been found to be liable. *Id.;* see *Kipnis v. Meltzer,* 253 Ill. App. 3d 67. Further, the party desiring the setoff must meet this burden with clear evidence, as the court will not speculate as to such matters, and will deny the request if the party has failed in that burden. *Thornton,* 382 Ill. App. 3d at 820; see also *Kravcik,* 286 Ill. App. 3d at 416 (setoff denied based upon failure to establish which portion of damage award was allocated to plaintiff or request hearing to permit such determination); *Dolan v. Gawlicki,* 256 Ill. App. 3d 153, 156–57 (1994).

¶ 60 In the instant case, the defendants have failed to prove what portion of Old Second's recovery against Peerless, if any, would enure to the plaintiffs' benefit, directly or indirectly. As an initial matter, the two damage awards at issue were obtained by different plaintiffs, against different defendants, arising from separate and distinct injuries. This fact alone makes this case distinguishable from that relied upon by the defendants in claiming their entitlement to a setoff, as that case involved only a single plaintiff who had personally recovered against two defendants (see *Hildreth v. Bergeron,* 110 N.H. 197, 263 A.2d 664 (1970)). The action by Old Second against Peerless was an effort to recover only the bank's interest in its collateral, and was based upon a breach of the policy terms, namely, Peerless' denial of coverage to Old Second despite the mortgagee clause. The plaintiffs' claim against the defendants, by contrast, involved the defendants' negligent failure to procure a proper policy to begin with and the damages resulting from that failure, including the destruction of the plaintiffs' building and property, and the

plaintiffs' subsequent inability to repair or restore the building. The two claims do not involve a single, indivisible injury to one plaintiff, as each arises from separate acts or omissions and resulted in distinct losses. See *Clear-Vu Packaging, Inc. v. National Union Fire Insurance Co.* 105 Ill. App. 3d 671 (1982); see also *Felde v. Chrysler Credit Corp.,* 219 Ill. App. 3d 530 (1991).

¶ 61 More importantly, as argued by the plaintiffs, there is no indication that they will ever benefit from any portion of the proceeds awarded to Old Second. The record indicates that Peerless' denial of coverage forced the plaintiffs to default on the mortgage to Old Second. The building and surrounding land ultimately were sold at two separate auctions, for which the plaintiffs received no payment. None of these facts are disputed by the defendant. With the mortgage now extinguished and the building sold, and with none of the sale proceeds having gone to the plaintiffs in this case, the defendants have failed to show how the judgment for Old Second has provided the plaintiffs with a double recovery. For this reason, they have failed to prove their entitlement to a setoff. See *Kravcik,* 286 Ill. App. 3d at 416*; see also Thornton,* 237 Ill. 2d at 117.

¶ 62 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 63 Affirmed.