2014 IL App (1st) 142534-U

No. 1-14-2534

Fourth Division
December 24, 2015



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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| CLIFFORD WILLIAMS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellant/Cross-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 11 L 6431 |
| | ) | |
| COUNTRY MUTUAL INSURANCE | ) | Honorable |
| COMPANY, | ) | Lorna Propes, |
| | ) | Judge, presiding. |
| Defendant-Appellee/Cross-Appellant. | ) | |

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JUSTICE COBBS delivered the judgment of the court.
Justices Howse and Ellis concurred in the judgment.

O R D E R

¶ 1 *Held*: Trial court did not err in finding that plaintiff did not properly plead consequential damages where plaintiff failed to plead that the parties contemplated at the time the contract was formed that lost rental income above the policy limit, mold, and loss of use could result; trial court was within its discretion when it did not award statutory damages and reduced plaintiff's attorneys' fees pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2012)); Plaintiff forfeited prejudgment interest claim; trial court properly dismissed the common law fraud and consumer fraud counts where plaintiff failed to sufficiently plead conduct other than breach of contract and vexatious and unreasonable delay as a basis for those claims; court did not abuse its discretion when it refused defendant's proposed jury instruction and motion *in limine* requesting actual cash value as the measure of damages; the jury's verdict finding theft was not against the manifest weight of the evidence where substantial evidence was presented to the jury

regarding the alleged theft and vandalism; and the trial court did not abuse its discretion in finding that there was no *bona fide* dispute over coverage where defendant classified damage as resulting from vandalism rather than theft where the determination was not based on adequate evidence, but rather was motivated by defendant's desire for an exclusion to apply.

¶ 2 This appeal arises from defendant, Country Mutual Insurance Company, denying a claim made by plaintiff, Clifford Williams, for payment under a home insurance policy. Plaintiff submitted the claim for losses that occurred when his two-flat, located at 2745 West Warren, Chicago, Illinois, was invaded twice. During the break-ins, walls and fixtures were cut open and metal pipes and appliances were removed. Defendant denied the claim, finding that an exclusion under the policy applied. Plaintiff brought suit against defendant in the circuit court of Cook County for breach of contract, damages under section 155 of the Illinois Insurance Code (Code)(215 ILCS 5/155 (West 2012)), common law fraud, and consumer fraud. The trial court dismissed both the common law fraud and consumer fraud claims pursuant to section 2-615 of the Illinois Code of Civil Procedure, deciding that they were improperly pleaded and preempted by section 155. 735 ILCS 5/2-615 (West 2012).

¶ 3 Plaintiff appeals from the jury trial verdict and judgment in her favor. Finding a breach of the insurance contract, the jury awarded plaintiff $40,000 for the replacement cost of the damage to the dwelling and $14,000 for loss of rental value, for a total of $54,000. Subsequently, the trial court found that defendant's delay in paying plaintiff's claim was vexatious and unreasonable and awarded plaintiff's attorneys $63,185 in fees pursuant to section 155. Plaintiff filed a post-trial motion for *additur*, Judgment N.O.V., or for a new trial on damages, which was denied. Subsequently, defendant filed a post-trial motion requesting *remittitur* or a new trial, arguing that the jury verdict was against the manifest weight of the evidence. The court also denied that motion. Plaintiff raises four issues on appeal: 1) the trial court erred in not allowing consequential damages; 2) the court failed to award reasonable

attorneys' fees and other statutory damages; 3) the court should have awarded prejudgment interest; and 4) the court improperly dismissed the common law fraud and consumer fraud claims. Defendant cross-appeals, arguing that: 1) the court erred when it refused its jury instruction and its motion *in limine*, which set to restrict damages to the actual cash value; 2) the jury's verdict finding the damage was a result of theft was against the manifest weight of the evidence; and 3) the trial court erred when it found that there was no *bona fide* dispute over coverage. Finding no error in any of these rulings, we affirm the judgments of the trial court.

¶ 4 BACKGROUND

¶ 5 Prior to trial, the court conducted extensive proceedings regarding the jury instructions proposed by both parties. During those proceedings, plaintiff submitted a proposed jury instruction that would direct the jury to award plaintiff damages not only for damage to the property, theft, and lost rental income that was covered under the policy, but also for consequential damages that were not included in the insurance contract. These consequential damages included mold, loss of use, and loss of rental income above the policy limit. Defendant objected to this instruction on the basis that the insurance contract prevented recovery for damages that are not covered by the contract. In support of this argument, defendant cited *Heller International Corporation v. Sharp*, 839 F. Supp. 1297 (1993), and *Clark v. Standard Life & Accident Insurance Co.*, 68 Ill. App. 3d 977 (1979), which hold that, generally, in breach of insurance contract cases the amount of damages is limited to the policy amount.

¶ 6 The court agreed that usually damages are limited to the policy amount, but that both *Heller* and *Clark* also hold that "consequential damages may be recovered when they [are]

*** reasonably foreseeable and were within the contemplation of the parties at the time the contract was executed, arising out of special circumstances communicated and known to the parties." The court noted that *Clark* is factually similar to this case and was ultimately decided based on the plaintiff's failure to correctly plead consequential damages.

¶ 7 The trial court then reviewed plaintiff's second amended complaint, and determined that plaintiff did not properly plead consequential damages. Consequently, the jury instruction was denied. The court reasoned:

> "I am looking at the clear language in [*Clark*] *** that the measure of damage is usually limited to the contractual amount. And consequential damages must be pled, and - - do I believe you're going to amend your complaint, I kind of do, and make a relation back argument real fast, won't you? But it doesn't relate back. But, you know, I don't know, that's not the main thing. It isn't pled, and it is - - I don't see it. I don't see anything that suggests here that there are the kind of damages that were reasonably foreseeable in contemplation of both parties at the time the contract was executed and arose out of special circumstances communicated and known to both parties."

¶ 8 Subsequently, the court also denied defendant's *motion in limine* number four, which requested actual cash value as the measure of damages, and defendant's jury instruction number nine, which instructed the jury on actual cash value. The language of the contract states:

> "a. 'We' pay 'replacement cost' unless paragraph b. applies. If a building or structure is rebuilt at a new location, 'replacement cost' may not exceed the cost of restoring the property at the original location.

b. If the applicable limit of liability for the damaged property is less than 80% of its 'replacement cost' at the time of the loss, 'we' will pay 'actual cash value'.

c. ‘We’ will not pay more than ‘actual cash value’ until actual repair or replacement is complete[.] ***

d. 'You' may choose at 'your' election, to accept 'actual cash value' instead of 'replacement cost.' If 'you' do so, 'you' will have one year from the date of the loss to repair or replace the damaged property and request the difference between 'actual cash value' and replacement cost'."

The court decided that the correct measure of damages would be the replacement cost because, under the clear language of the contract, the parties had contracted for replacement cost. The court explained that the provision (paragraph c) imposing a requirement that the repair or replacement be made first, before defendant would pay replacement cost, was not triggered in this case.

¶ 9 At trial, plaintiff testified that he purchased home insurance from defendant in 2009, entering into an insurance contract under which defendant agreed to cover plaintiff's losses related to the building, subject to the terms and exclusions of the contract. When plaintiff was out of town, intruders entered the first floor apartment, cut through walls, removed copper pipes, dismantled the sink, and caused damage to the ductwork and other fixtures. When plaintiff returned to the property on June 21, 2010, he discovered the damage. He made a police report that night and two days later he notified defendant of the break-in and the damage to the property.

¶ 10 Plaintiff argued the damage to his property was due to theft because intruders came into his home to take the metal and in the process damaged the walls and other fixtures. Plaintiff

also presented evidence that he had been occupying the property prior to the break-ins. This evidence included defendant's investigator's initial determination that the first floor unit "appeared to be lived in" and a statement from plaintiff's neighbor that plaintiff had been living at the property. He asserted that although the gas bill indicated that there was no usage, the meter was not working properly.

¶ 11 Defendant then presented evidence supporting its contention that the loss was a result of vandalism or vandalism with ensuing theft. Defendant's witness, Carlos Cagadas, a claims supervisor, testified that prior to a claims representative inspecting the property, plaintiff reported to him that his building had been "vandalized." Nevertheless, the claim was first classified as theft. Subsequently, Stephen Crawley, defendant's claims representative, visited the property to assess the damage. Crawley testified that:

> "There was a forced entry at the front door. And the majority of the damage was in the basement. Drywall was opened up to get to the copper lines. The sink and shower controls were taken. Lines from the water heater were gone. Furnace was gone. Ductwork was damaged. The rear door was gone, but the insured replaced it.
>
> On the second floor the kitchen sink was damaged and the faucet feed lines were taken. Bathroom tub controls were taken. The vanity top was removed and thrown into the main room scratching the wood floor. Feed lines to the vanity were taken."

¶ 12 Crawley further testified that during the visit he suspected that the building had been vacant prior to the break-in. He received authorization from plaintiff to obtain utility bills for the property. Thereafter, Crawley submitted his initial investigation report to Cagadas. The report stated that "the drywall [was] opened up to get to copper water lines" and contained photographs depicting the walls opened with pipes exposed. Several photographs depicted

walls that were cut open with copper pipes on the floor. Another depicted a sink top removed from the bathroom and left on the floor in the main living area.

¶ 13 After reviewing the report, Cagadas re-categorized the claim from theft to vandalism based on plaintiff's original statement that the home was "vandalized" and these photographs. Cagadas testified that "if you look at the photos that were taken during the inspection *** basically the drywall was *** torn out in order to access the pipes," and "I think the ripping out of the drywall to access the plumbing, ripping out of fixtures, throwing of a sink top on the ground, just kind of going through the home and *** ransacking it. These are all activities that would make us believe that the claim was majority-wise a vandalism claim."

¶ 14 The insurance contract defines vandalism as: "Vandalism and Malicious Mischief[.] This peril means only willful and malicious damage to or destruction of property." Under the contract, when a loss is due to vandalism, an exclusion to coverage applies if the property is vacant for more than 60 consecutive days prior to the loss. The contract states:

> "Exclusions—Sections 2 through 6 [.]
>
> * * *
>
> 14. Unoccupied dwelling [.] Vandalism and malicious mischief, and any ensuing loss caused by an intentional and wrongful act committed in the course of the vandalism or malicious mischief, if the dwelling has been unoccupied for more than 60 consecutive days immediately before the loss."

Notably, this exclusion does not apply if the losses are due to theft.

¶ 15 Defendant also presented evidence that it conducted an investigation to determine whether the property was unoccupied for 60 consecutive days prior to the first break-in. Defendant reviewed utility bills from ComEd and Peoples Gas and obtained a statement from

plaintiff's former second floor tenant, Sharon Moore, that the first floor was not occupied. However, Moore had moved out of the building before the relevant time period and plaintiff contended that the gas meter was not working properly.

¶ 16 Defendant denied both of plaintiff's claims on November 1, 2010. It determined that the damage from both break-ins were the result of vandalism and that the property was unoccupied for 60 consecutive days prior to the losses. Therefore, the provision in the contract that excludes losses that are a result of vandalism when the property is unoccupied for 60 consecutive days applied, and the claims were not covered.

¶ 17 Ultimately, the jury found in favor of plaintiff and against defendant. The jury verdict form indicates that the loss was a result of theft. Because the jury found the damage was from theft, the vandalism exclusion did not apply and the jury did not make a determination on occupancy. The jury awarded plaintiff $40,000 for the replacement cost of the damage to the dwelling and $14,000 for the amount of rents lost from the second floor unit as a result of the claimed loss, as allowed under the policy, for a total of $54,000.

¶ 18 Subsequent to trial, the court held a hearing to determine whether plaintiff was entitled to damages under section 155 of the Code. 215 ILCS 5/155 (West 2012). Defendant argued that the court should not award any damages under section 155 because there was a *bona fide* dispute over whether the losses were due to vandalism or theft and therefore, defendant was reasonable in denying the claim. Plaintiff asserted that defendant’s denial was vexatious and unreasonable as evidenced by the jury’s verdict and the fact that there was very little evidence supporting the decision to classify the damage as vandalism rather than theft. The court agreed with plaintiff and stated:

"Fundamentally, the claim was denied. On the basis *** of whether it was theft or vandalism. I heard the facts. I found it unpersuasive at the time. I found [Mr. Cagadas'] testimony to be not persuasive. I found the paperwork that was done by the company and that was presented by both sides to suggest exactly what [plaintiff's attorney] said and what he argued to the jury. It appears to me that what the company did was that they didn't really undertake to investigate a vandalism claim, and in the course of that investigation, began to question the issue of occupancy.

Once the defendant began to expect [*sic*] the plaintiff didn't occupy the home on a regular basis, they changed the claim from theft to vandalism precisely so that there would be an available exclusion. That's this court's view of the evidence as well as the natural corollary of the jury verdict. *** The company essentially recategorized the claim, not because there was new information about the break-in, the damage of the home or the extent of the theft, but in order to avail themselves of an otherwise unavailable exclusion."

The court then awarded plaintiff's attorney David J. Piell $48,185 and plaintiff's attorney Michael Blumenthal $15,000 in attorney's fees. The court decided that these damages were sufficient penalties and did not award any other damages pursuant to section 155.

¶ 19 ANALYSIS

¶ 20 Plaintiff first contends that he was entitled to consequential damages for mold, loss of use, and loss of rental income above the policy limit that he suffered as a result of defendant's breach of the insurance contract. He argues that the court erred in preventing him from seeking consequential damages based on defendant's insistence that plaintiff could not recover consequential damages under *Heller International Corporation*, 839 F. Supp. 1297,

1302, and it erred when it found that these damages were not properly pleaded. Defendant first points out that plaintiff failed to cite a specific ruling from the trial court that it is appealing and asks this court to consider this argument waived. However, defendant acknowledges that prior to trial the court denied plaintiff's jury instruction on consequential damages. Defendant responds that this denial was not an abuse of discretion and further asserts that the trial court did not err in finding that mold was an excluded loss under the terms of the contract.

¶ 21 We must first ascertain the specific ruling below on consequential damages that plaintiff is appealing. We agree with defendant that plaintiff's argument on this issue is not clear because he does not explicitly state where and how the court erred in "preventing him from seeking consequential damages." Plaintiff contends in his reply brief that his argument adequately points this court to the error because he cites to the portion of the record where the trial court made its ruling. Merely citing to the record is insufficient for making an argument on appeal. Illinois Supreme Court Rule 341(h)(7) requires parties include proper argument with their contentions and support for those contentions. IL. S. Ct. R. 341 (h)(7) (eff. Feb. 6, 2013). We admonish plaintiff that the appellate court is not a depository into which the appellant may dump the burden of argument and research (*Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36), and that a reviewing court is entitled to have the issues *clearly defined* with citations to relevant authority. *Id.* That said, the portion of the record to which plaintiff cites does provide some guidance as to where "the lower court . . . prevent[ed] plaintiff from seeking consequential damages." Plaintiff points to the hearing where, in ruling on plaintiff's jury instruction on consequential damages, the court decided that evidence of consequential damages was not admissible because these

damages were not properly pleaded. Therefore, evidence of such damages could not be presented to the jury. "A reviewing court has the choice to review the merits, even in light of multiple Rule 341 mistakes." *Marzouki v. Najar-Marzouki*, 2014 IL App (1st) 132841, ¶ 12. Because we can gather from plaintiff's brief and the record that the issue to be decided is whether the court erred in ruling evidence of consequential damages was inadmissible and consequently in denying plaintiff's jury instruction[1], we choose to exercise our discretion and consider the merits of whether evidence of consequential damages should have been allowed.

¶ 22 A trial court's decision to deny a jury instruction will not be disturbed absent a clear abuse of discretion. *Jones v. DHR Cambridge Homes, Inc.*, 381 Ill. App. 3d 18, 31 (2008) (citing *Hiscott v. Peters*, 324 Ill. App. 3d 114, 125 (2001)). "An abuse of discretion occurs when the lower court acted arbitrarily without the employment of conscientious judgment or, in view of all the circumstances, exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted." (Internal quotation marks omitted.) [Citations.] *Estate of Bass ex rel. Bass v. Katten*, 375 Ill. App. 3d 62, 67 (2007). Generally, the jury is not instructed on issues that are not raised by the pleadings. *Marek v. Stepkowski*, 241 Ill. App. 3d 862, 869 (1992) (citing *Blackburn v. Johnson*, 187 Ill. App. 3d 557, 564 (1989)). In fact, "[t]o instruct a jury on an issue not raised in the pleadings is error." *Id.* Although we review the refusal of a jury instruction for an abuse of discretion, issues relating to the sufficiency of pleadings are questions of law and are subject to *de novo* review. *Mermelstein v. Menora*, 372 Ill. App. 3d 407, 417 (2007).

[1]In his reply brief plaintiff asserts the he is not arguing that the court's error in preventing evidence of consequential damages occurred when the court denied his jury instruction on that issue. However, he has not directed our attention to any ruling of the court other than the one on jury instructions. It is evident from the portion of the record that plaintiff cited that the court made a pretrial ruling that evidence of consequential damages was inadmissible when it denied his jury instruction. Thus, we review plaintiff's claimed consequential damages error in the context of jury instruction error.

¶ 23 Accordingly, the relevant inquiry on appeal is whether plaintiff properly pleaded consequential damages in his complaint so that evidence of such damages could be presented to the jury. In Illinois, when a contract is breached, the non-breaching party is entitled to damages to put it in the same position that it would have been in had the contract been performed. *In re Illinois Bell Telephone Link-Up II*, 2013 IL App (1st) 113349, ¶ 19. In other words, the party is entitled to all damages that "naturally result from the breach." *Midland Hotel v. Ruben H. Donnelley*, 118 Ill. 2d 306, 318 (1987). Generally, these damages are limited to the contractual amount. *Mohr v. Dix Mutual County Fire Insurance Co.*, 143 Ill. App. 3d 989, 996 (1986). However, in some circumstances, a party can recover consequential damages. *Id.* These circumstances include when the consequential damages were "reasonably foreseeable, were within the contemplation of the parties at the time the contract was entered, or when they arose out of special circumstances known to the parties." *Id.* (citing *Clark*, 68 Ill. App. 3d at 986).

¶ 24 These general contract principles apply to insurance contracts. *Clark*, 68 Ill. App. 3d at 986. Thus, a party could receive consequential damages in the event that an insurance contract is breached. *Mohr v. Dix Mutual County Fire Insurance Co.*, 143 Ill. App. 3d 989, 996 (1986). As a prerequisite, however, the plaintiff must allege the circumstances that would give rise to consequential damages, including that they were reasonably foreseeable and within the contemplation of the parties at the time the contract was executed.

¶ 25 This court's decision in *Clark* further supports this principle. 68 Ill. App. 3d 977 (1979). In *Clark*, the court addressed pleading requirements for consequential damages applicable to a breach of an insurance contract claim. *Id.* In that case, the plaintiff purchased disability insurance in conjunction with a purchase of home insurance from the defendant. *Id.* at 979.

When the plaintiff became disabled, the insurance company failed to pay the disability claim. *Id.* Without the disability payments, the plaintiff was unable to make his mortgage payments, causing him to quitclaim his interest in his home. *Id.* at 986. The plaintiff brought a claim for breach of contract against his insurance company and, among other things, requested consequential damages for the loss of his home. *Id.* The trial court dismissed the consequential damages allegation and the appellate court affirmed. *Id.* However, in doing so, the court explained, "where *** it is claimed that an insurer has refused to comply with the provisions of an insurance policy, the measure of damages is usually limited to the contractual amount. [Citations.] In select cases, consequential damages may be recovered when they 'were reasonably foreseeable and were within the contemplation of the parties at the time the contract was executed,' [Citation.] arising out of special circumstances communicated and known to both parties." *Id.*

¶ 26 The court noted that, although on appeal the plaintiff alleged that the loss of his house was foreseeable, his pleadings below did not allege the foreseeability of the loss of the house or that it was contemplated by the parties that he would exclusively rely on the policy payments to make mortgage payments if he became disabled. *Id.* at 986. The court reasoned that because his pleadings were missing these elements, the consequential damages claim was properly dismissed. *Id.* The court also instructed that on remand the plaintiff should be granted leave to amend his complaint to include these allegations. *Id.*

¶ 27 Similarly, here, plaintiff requested consequential damages in his initial complaint and in both subsequent amended complaints. However, he did not allege the circumstances necessary to receive consequential damages or any facts to support this allegation. The

provisions regarding consequential damages in the second amended complaint, in their entirety, are quoted below:

> "Between the two burglaries, the Plaintiff's direct losses (i.e., not including consequential damages) are approximately seventy-six thousand dollars ($76,000.00). Consequential damages resulting from Defendant COUNTRY MUTUAL's conduct are at least thirty-one thousand dollars ($31,000.00) and rising[.]"
>
> * * *
>
> WHEREFORE, Plaintiff, CLIFFORD WILLIAMS, prays this Honorable Court enter a decree judgment in favor of the Plaintiff and against Defendant COUNTRY MUTUAL for: (a) actual and consequential damages in the amount of ONE HUNDRED SEVEN THOUSAND DOLLARS AND NO CENTS ($107,000.00) or such greater amount as the proofs may show (b) prejudgment and post-judgment interest, and (c) the costs of suit."

¶ 28 Although plaintiff uses the term consequential damages and requests monetary compensation for them, he completely fails to allege what the consequential damages are for and that these losses were foreseeable and within the contemplation of the parties at the time the contract was executed. On appeal, plaintiff explains that as a result of defendant's breach, he suffered consequential damages in the form of mold damage, loss of use, and loss of rental income above the policy limit. However, there is no mention of mold or loss of rental income above the policy limit in the second amended complaint at all, there is only a general assertion that the property was "uninhabitable." Accordingly, we find that the court did not err in finding plaintiff's pleadings on the consequential damages claim insufficient and in

denying plaintiff's jury instruction, preventing him from presenting evidence of consequential damages to the jury.

¶ 29 In plaintiff's reply brief he contends that, if consequential damages were not properly pleaded, the trial court should have allowed him to amend his pleadings to substantiate his allegations. Plaintiff points to a pretrial hearing where the court commented that an amendment would not relate back and argues that this ruling was error. However, we do not equate the court's statement with a ruling that plaintiff could not file an amended complaint. Plaintiff never presented the court with a proposed amendment and never asked for leave to amend. The statement appears to have been no more than an off-hand comment by the court which generated neither a response nor a request from plaintiff regarding amending the complaint. Additionally, because we find no error, we do not reach defendant's fortuitous loss doctrine argument.

¶ 30 Section 155

¶ 31 Attorneys' Fees and Statutory Damages

¶ 32 We next consider plaintiff's contention that the circuit court erred when it failed to award statutory damages and reasonable attorney's fees after finding that defendant's delay in payment was unreasonable and vexatious. In his fee petition plaintiff's attorney David Piell requested $126,060 for 420.2 hours worked and plaintiff's attorney Michael Blumenthal requested $30,440 for 76.1 hours worked. The trial court first decided that only the hours up to and including trial would be considered for a total of 307 hours. It then awarded Piell $48,185.00 and Blumenthal $15,000 in attorney's fees pursuant to section 155 of the Code. 215 ILCS 5/155 (West 2012). Plaintiff asserts that this amount is unreasonable because the trial court ignored relevant precedent and divided their hourly rates in half. Plaintiff also

asserts that the court erred when it did not award other damages allowed by the statute. Defendant responds that the court's reduction in attorneys' fees was not an abuse of discretion because plaintiff's attorneys initially requested fees for time spent on matters that are not compensable under the statute, and therefore, the fees should have been reduced. Defendant further maintains that the court did not err in refusing other damages under section 155 because they are not mandatory but within the court's discretion.

¶ 33 Section 155 allows the court discretion to award additional extracontractual damages that are not usually available for a breach of contract when an insurance company is "vexatious and unreasonable" in delaying payment under the policy. 215 ILCS 5/155 (West 2012); *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 519 (1996). Section 155 provides, in relevant part:

> "(1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
>
> (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $60,000;
>
> (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the

company offered to pay in settlement of the claim prior to the action." 215 ILCS 5/155 (1) (West 2012).

¶ 34 Section 155 was enacted to punish insurers and provide plaintiffs with a remedy for insurer misconduct. *Cramer*, 174 Ill. 2d at 519-20. By allowing recovery of attorneys' fees and other penalties, it made suits against insurance companies economically feasible for insureds, who are generally in a weaker financial position. *Id.* at 520 (citing *UNR Industries, Inc.*, 607 F. Supp 855, 866 (N.D. Ill. 1984)). Additionally, section 155 discourages insurance companies from using their superior financial position to delay making payments on legitimate claims by making insurers responsible for plaintiffs' expenses in prosecuting claims. *Cook*, 2014 IL App (1st) 123700, ¶46 (citing *Neiman v. Economy Preferred Insurance Co.*, 357 Ill. App. 3d 786, 797 (2005)). The decision to grant fees and penalties pursuant to section 155 is within the discretion of the trial court, taking into account the totality of the circumstances, and its determination will not be disturbed on review absent an abuse of discretion. *Songer v. State Farm Fire and Casualty Co.*, 106 Ill. App. 3d 141, 146 (1982).

¶ 35 Here, the court awarded plaintiff's attorneys $63,185, less than half the amount that they requested. Plaintiff asserts that once the court decided to award attorneys' fees, it no longer had full discretion to determine the amount, but had to base its award on the established factors courts consider when awarding attorneys' fees in other circumstances. These factors include, "the skill and standing of the attorneys employed, the nature of the case, the novelty and difficulty of the issues involved, the degree of responsibility required, the usual and customary charge for the same or similar services in the community, and whether there is a reasonable connection between the fees charged and the litigation." *Harris Trust and Savings*

*Bank v. American National Bank and Trust Co. of Chicago*, 230 Ill. App. 3d 591, 595-96 (1992) (citing *Blankenship v. Dialist International Corp*., 209 Ill. App. 3d 920, 927 (1992)). We believe that the appropriate analysis in determining fees under Section 155 was articulated in *Marcheschi v. Illinois Farmers Insurance Co.*, 298 Ill. App. 3d 306, 311 (1998). In *Marcheschi*, the court noted that "the statute contains permissive rather than mandatory language *** [and] does not *require* the court to provide such relief even in the face of the most unreasonable and vexatious delay by an insurance company in settling a claim." (Emphasis in original.) *Id.* at 311. As the court in *Marcheschi* reasoned, "[i]t follows that the amount of fees to be granted is also not mandated and after review of the totality of the circumstances, the trial court clearly has discretion to determine the appropriate amount." *Id.* at 743.

¶ 36 Here, in deciding the award, the court stated:

"I've looked at the spreadsheet, and this case did have a tortured history, all kinds of things that we're aware of which is all included up through trial including the efforts at the Department of Insurance and the sworn statements and all that stuff.

It's not the court's job to disaggregate that, and it might fall on either of you so perhaps you could have said, 'I think this is the fairer number' based on the fact that I've taken out everything. So see, now as I sit here, I really can't remove all those things.

***

I'm going to consider the 307 hours at an hourly rate of $150 an hour, and I think all in all, that would be a fairer result, and that would mean dividing 92,370 by two."

¶ 37 Clear from the comments is that the court reviewed plaintiff's fee petition detailing the number of hours worked and their hourly rates and considered the history of the case. The

court explained that it was reducing the amount plaintiff's attorneys requested because it was unable to determine from the information provided which hours were compensable and which were not. We recognize that the court mistakenly believed that plaintiff's attorney included hours for time spent on the case at the Illinois Department of Insurance. Review of the fee petition reveals that there are no entries for the administrative case. However, this misunderstanding does not negate the court's finding that this case "had a tortured history" and that plaintiff did not attempt to exclude hours worked on claims that were dismissed or otherwise non-compensable. We conclude that the court properly considered the totality of the circumstances and that it was within its discretion to reduce the attorneys' fees.

¶ 38 Plaintiff asserts that we should find that the court abused its discretion on policy grounds because the court's award abrogates the purpose of section 155. In support of this contention, plaintiff cites *Saskill v. 4-B Acceptance*, 139 Ill. App. 3d 143 (1985). He asserts that the court's decision in *Saskill* demonstrates that the trial court should have awarded more attorneys fees because the purpose of fee shifting statutes, and in particular section 155, is to "place the insured in as good a position as he would have been in had the insurance company complied with the Insurance Code." *Id.* at 146. Not only is this a gross misreading of *Saskill*, (explaining that the purpose of fee shifting statutes is to penalize violators), but it clearly goes against the case law that explains that the purpose of section 155 is to punish insurance companies and make it possible for insureds to bring lawsuits. *McGee v. State Farm Fire and Casualty Co.*, 315 Ill. App. 3d 673, 681 (2000); *Cramer*, 174 Ill. 2d at 521. To the extent that *Saskill* – a case not interpreting section 155 but, rather, interpreting the Interest Act – states that compensation is the purpose of section 155, it is at odds with *Cramer* and *McGee*.

¶ 39 Moreover, although the court could have awarded no attorneys' fees, here, the court awarded $63,185. We do not find that by reducing plaintiff's attorneys' fees the court threatened the purpose of section 155 or disincentivized insureds from bringing cases against insurance companies. With this award, defendant was penalized for its vexatious and unreasonable conduct and plaintiff did not bear the burden of the full cost of prosecuting the claim to the extent the court felt was appropriate under the circumstances.

¶ 40 Likewise, we do not find that it was an abuse of discretion for the court to refuse other statutory damages under section 155. The court explained that it did not award other damages "for a variety of reasons, again, all of these sanctions are discretionary, and I am aware that in addition to attorneys' fees, other amounts are allowable and not mandatory, and I believe that the award of attorneys' fees is sufficient to resolve this issue under section 155." The court heard all of the evidence at trial, considered the parties' arguments, and decided that further damages were not appropriate. We do not find that this decision was without employment of conscientious judgment, exceeded the bounds of reason, or ignored principles of law so that substantial prejudice resulted. *Estate of Bass ex. Rel Bass v. Katten*, 375 Ill. App. 3d 62, 67 (2007).

¶ 41 Prejudgment Interest

¶ 42 Plaintiff next contends that the court erred when it did not award him prejudgment interest on the money that defendant owed him under the policy but delayed in paying. Defendant responds that the amount owed was not easily computed, and therefore was not subject to prejudgment interest. Plaintiff did not cite to the record to direct this court to the ruling the trial court made denying prejudgment interest and the reasons for the denial. Further, in arguing that the court erred in not awarding prejudgment interest, plaintiff

confuses his own argument regarding whether he was entitled to prejudgment interest under the Illinois Interest Act (815 ILCS 205/2 (West 2012)) or under section 155 of the Code. 215 ILCS 5/155 (West 2012). Regardless, "[t]he failure to provide proper citations to the record is a violation of Rule 341 (h)(7), the consequence of which is the forfeiture of the argument." Il. S. Ct. R. 341 (h)(7); *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (2) 111151, ¶ 12. We reiterate and again admonish plaintiff that the appellate court is not a depository for the burden of argument and research and we decline to search through the record to make an argument on plaintiff's behalf. *Lake County Grading Co., LLC v. Village of Antioch*, 2014 IL 115805, ¶ 36. "Illinois Supreme Court Rules are not suggestions; they have the force of law and must be complied with." *Estate of Prather v. Sherman Hospital* Systems, 2015 IL App (2d) 140723, ¶ 32. Therefore, this claim is forfeited on appeal. *Id.*

¶ 43 Preemption by Section 155 of the Code

¶ 44 Plaintiff next argues that the trial court erred when it dismissed count III of the second amended complaint alleging common law fraud and count IV alleging consumer fraud, because he pleaded all the elements of common law fraud and consumer fraud with specificity and because section 155 does not preempt his claims. Defendant asserts that plaintiff did not meet his pleading burdens and that the court did not err in finding the claims were preempted.

¶ 45 A general discussion of preemption by section 155 **is** helpful to our analysis. Our supreme court in *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513 (1996), examined the preemptive effect that section 155 had on other tort claims. In its discussion, the court reviewed the history of section 155 and its purpose of providing a remedy to insureds who experience unreasonable and vexatious delay from their insurance companies. *Id.* at 519-22.

The court concluded that section 155 does not preempt separate and independent tort actions. *Id.* at 518. However, the court also held that there was no separate and independent tort of bad faith because the statute provides a remedy for that specific harm. *Id.* The court reasoned that separate and independent tort claims are not preempted by the statute because they address different injuries. *Id.* For example, the court explained, "[w]ell-established tort actions, such as common law fraud, require proof of different elements and remedy a different sort of harm than the statute does." *Id.* at 523. By contrast, a tort of bad faith, or a claim that merely alleges that the insurance company engaged in unreasonable and vexatious behavior, does not allege an injury that is different from the injury that the legislature provided a remedy for in section 155. *Id.* The court explained that where all of the necessary elements of an independent tort are alleged and proved, then a plaintiff could bring a separate claim. *Id.* The court advised, "[c]ourts therefore should look beyond the legal theory asserted to the conduct forming the basis for the claim." *Id.*

¶ 46 In *Young*, the court was asked to evaluate whether a consumer fraud claim was preempted by section 155. *Young*, 361 Ill. App. 3d at 151. The plaintiff brought an action against an insurance company claiming, among other things, damages under section 155 and consumer fraud. *Id.* at 155. Looking to *Cramer* for guidance on whether the plaintiff could bring both claims, the court found that the consumer fraud action was preempted. *Id.* at 169. The court reasoned that the plaintiff essentially alleged breach of contract and unreasonable and vexatious conduct to support the consumer fraud claim. *Id*. Therefore, the court explained, the consumer fraud claim was preempted because the plaintiff already had a contractual remedy for that conduct. *Id.* We note that damages pursuant to section 155 are a statutory, not contractual, however, they follow from an unreasonable and vexatious breach

of contract. Nevertheless, we agree with the court's analysis and subsequent courts have followed this reasoning. See *Cook ex rel. Cook v. AAA Life Insurance Co.*, 2014 IL App. (1st) 123700 (holding that a consumer fraud claim was preempted by section 155 where it did not allege conduct that was more than breach of contract and unreasonable and vexatious conduct. *Id.* at ¶ 31.).

¶ 47 Furthermore, in interpreting Illinois law, the Southern District of Illinois found that even where the plaintiff attempted to "shoehorn" an insurance company's unreasonable and vexatious conduct into the elements of a consumer fraud claim by alleging that the underlying conduct was intentional, the claim was still preempted where, on its face, the plaintiff alleged unreasonable and vexatious conduct resulting in the same type of injury for which section 155 provides a remedy. *Sieron v. Hanover Fire and Casualty Insurance Co.*, 485 F. Supp. 2d 954, 961 (2007). The court explained, "[w]hen a purported tort claim boils down to an insurer's failure to pay, the remedies provided in § 155 and for breach of contract cover the claim and are sufficient." *Id.*

¶ 48 In the instant appeal, plaintiff brought claims for damages under section 155, for common law fraud, and for consumer fraud. Therefore, we will examine whether plaintiff sufficiently stated the elements for common law fraud and consumer fraud distinct from, or more than, his claims for unreasonable and vexatious delay in paying his claim and does not just allege that the delay was intentional.

¶ 49 Common Law Fraud

¶ 50 An order granting a motion to dismiss pursuant to section 2-615 of the Illinois Code of Civil Procedure and finding a claim preempted is reviewed *de novo*. 735 ILCS 5/2-615 (West 2012); *Young v. Allstate Insurance Co.*, 351 Ill. App. 3d 151, 160 (2004). To

successfully bring a common law fraud claim, a plaintiff must allege: "(1) a false statement of material fact; (2) the defendant's knowledge that the statement was false; (3) the defendant's intent that the statement induce the plaintiff to act; (4) the plaintiff's reliance upon the truth of the statement; and (5) the plaintiff's damages resulting from reliance on the statement." *Kirkpatrick v. Strosberg*, 385 Ill. App. 3d 119, 128 (2008). In his second amended complaint, plaintiff alleged that defendant's "claim policies and practices *** [that] were in place when Defendant COUNTRY MUTUAL solicited Plaintiff's business and issued Plaintiff's insurance policy *** were designed to find[] an excuse to deny Plaintiff's claim." Plaintiff further alleged that multiple employees and agents of defendant made misrepresentations to him that under the contract he would be paid for damage to his home, that he relied on these misrepresentations and was induced to pay premiums, when in fact, defendant would not cover his losses.

¶ 51 Essentially, plaintiff has taken the same conduct alleged for unreasonable and vexatious delay – that defendant looked for an excuse to deny his claim – and alleged that it was intentional inducement. However, plaintiff does not allege any additional facts to support his allegation that it was defendant's practice and policy to look for an excuse to deny claims other than the fact that defendant looked for an excuse to deny his claim. On their face, these allegations boil down to defendant's unreasonable and vexatious failure to pay plaintiff. Thus, plaintiff does not purport to allege an injury that is different than the injury he suffered when defendant delayed his payment. "When conduct is merely a breach of contract or conduct proscribed by section 155," a tort claim is preempted by section 155. *Cook*, 2014 IL App (1st) 123700, ¶ 31. Because the legislature provided a statutory remedy for this type of harm, plaintiff's common law fraud claim is preempted by section 155.

¶ 52 We are mindful that plaintiff's complaint also alleges that defendant engaged in fraud when it reinstated his insurance policy after he filed a complaint at the Illinois Department of Insurance. However, we find that this claim was properly dismissed pursuant to section 2-615 of the Illinois Code of Civil Procedure. 735 ILCS 2/615 (West 2012). In reviewing a grant of a motion to dismiss under section 2-615, this court views the complaint in the light most favorable to the nonmoving party and accepts all reasonable facts and inferences as true. 735 ILCS 5/2-615 (West 2012); *Reynolds v. Jimmy John's Enterprises, LLC*, 2013 IL App (4th) 120139, ¶25. A cause of action should not be dismissed unless it is clearly apparent that there is no set of facts that would entitle the plaintiff to a judgment. *Id.* Here, plaintiff asserts that defendant reinstated the policy even though it knew it would not pay for any damage to his property. However, plaintiff did not allege that, after reinstatement, new damage occurred for which defendant inappropriately refused to pay plaintiff.[2] All of plaintiff's allegations involve the prior damage, for which plaintiff already knew defendant had denied coverage. Therefore, plaintiff did not allege any damages from the policy being reinstated. Accordingly, this claim was properly dismissed under section 2-615. 735 ILCS 5/2-615 (West 2012).

¶ 53 Consumer Fraud

¶ 54 Similarly, plaintiff argues that the trial court erred when it dismissed count IV of his complaint alleging consumer fraud under the Illinois Consumer Fraud and Deceptive Business Practices Act. 815 ILCS 505/2 (West 2012). Plaintiff argues that even if we find that the common law fraud claim is preempted by section 155, this court does not necessarily need to find that the consumer fraud claim is preempted. He asserts that a claim under the

[2]We note that after reinstatement the terms of the contract still applied, and that the policy covers various perils, only some of which are excluded if the property is unoccupied.

Illinois Consumer Fraud and Deceptive Business Practices Act does not require an allegation or showing of intent to deceive, only that the defendant intended to have the plaintiff rely on a misleading statement. He further argues that, for a consumer fraud claim, a plaintiff does not need to allege that a practice was deceptive, only that it was unfair. We find these arguments mostly inconsequential to the analysis of whether a claim is preempted by section 155. Their only relevance to this discussion is the extent that, because the elements of consumer fraud are different than common law fraud, plaintiff actually alleged conduct to support the elements of consumer fraud that is different than conduct that would be merely breach of contract and unreasonable and vexatious delay under section 155.

¶ 55 Here, plaintiff's consumer fraud claim was preempted and dismissed pursuant to section 2-615 of the Illinois Code of Civil Procedure, thus it is reviewed *de novo*. 735 ILCS 5/2-615; *Young v. Allstate Insurance Co.*, 351 Ill. App. 3d 151, 160 (2004). As discussed above, a claim will not be preempted by section 155 if all the elements of the separate and independent cause of action are alleged and the underlying conduct that gives rise to the claim is different, or more than, conduct that is merely vexatious and unreasonable. *Cook*, 2014 IL App (1st) 123700, ¶ 31. Thus, no claim is categorically preempted by section 155, other than the tort of bad faith, as explained in *Cramer*. *Cramer*, 174 Ill. 2d at 523.

¶ 56 We agree with the trial court that plaintiff's consumer fraud claim is preempted by section 155. Plaintiff alleged that the same conduct that gave rise to the common law fraud claim gave rise to a consumer fraud claim because it occurred in the course of business and had an effect on consumers. We have already found that this conduct was not more than breach of contract and unreasonable and vexatious delay in payment. Therefore, the consumer fraud claim is also preempted by section 155. Because we find that plaintiff's

consumer fraud claim was preempted, we will not address whether it was sufficiently pleaded to survive a motion to dismiss.

¶ 57 We do not hold that an insurance company's conduct could never give rise to both a section 155 claim and a common law fraud or consumer fraud claim. As the court in *Cramer* explained, where the elements of a separate and independent cause of action are alleged and proved, demonstrating a different injury than the one suffered by the unreasonable and vexatious delay in payment, both claims could be successfully brought. *Cramer*, 174 Ill. 2d at 523. Where, as here, however, the alleged injury to the plaintiff is the same type of harm that was caused by the delay in payment and remedied by section 155, the claims are preempted.

¶ 58 III. CROSS-APPEAL

¶ 59 Measure of Damages

¶ 60 On cross-appeal, defendant first contends that it is entitled to a new trial because the trial court erred when it improperly conducted the trial on the incorrect assumption that actual cash value was not the measure of damages. Defendant further argues that the court erred in this regard in both the denial of defendant's motion *in limine* and the refusal of defendant's jury instruction, which related to this issue. Plaintiff responds that the court did not err when it decided that the measure of damages was the replacement value under the contract because a breaching party cannot rely on a condition precedent, and defendant's denial of his claim prevented him from replacing the damage.

¶ 61 We must interpret the language of the contract to determine what measure of damages applies in this case. The interpretation of a contract is a matter of law and reviewed *de novo*. *Village of Palatine v. Palatine Associates, LLC*, 2012 IL App. (1st) 102707, ¶44. In reviewing an insurance contract, we are guided by the same principles that guide the

interpretation of contracts generally. *Clark*, 68 Ill. App. 3d 977, 986. "The primary goal in construing a contract is to give effect to the intent of the parties." *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 16, 164 (2002). To give effect to the parties' intent, we view the contract as a whole and apply the plain and ordinary meaning to unambiguous terms. *McRaith v. BDO Seidman, LLP*, 391 Ill. App. 3d 565, 577 (2009).

¶ 62 The language of the contract states:

"Conditions- SECTIONS 2-6 (Includes Limitations)[.]

* * *

C. Loss Settlement[.]

Covered losses are settled as follows:

1. Loss Settlement 1 -80% Insurance Requirement[.]

If '1' appears in the Declarations under "LOSS STLMT"

a. 'We' pay 'replacement cost' unless paragraph b. applies. If a building or structure is rebuilt at a new location, 'replacement cost' may not exceed the cost of restoring the property at the original location.

b. If the applicable limit of liability for the damaged property is less than 80% of its 'replacement cost' at the time of the loss, 'we' will pay 'actual cash value'.

c. 'We' will not pay more than 'actual cash value' until actual repair or replacement is complete[.] ***

d. 'You' may choose at 'your' election, to accept 'actual cash value' instead of 'replacement cost.' If 'you' do so, 'you' will have one year from

> the date of the loss to repair or replace the damaged property and request the difference between 'actual cash value' and replacement cost'."

¶ 63 Here, sub-paragraph a. clearly states that defendant will pay the replacement cost for damage. Sub-paragraph b. is not applicable in this case. Sub-paragraph c., read with sub-paragraph d, states that, it will pay only actual cash value before repair or replacement is complete. Finally, sub-paragraph d. states that insureds may choose, at their election, to accept the actual cash value, and if they do so, they can still repair or replace the damage within a year and receive the difference between the actual cash value that they already received and the replacement cost.

¶ 64 We interpret the language of the contract to mean that an insured has three options for payment by defendant. The first option would be to first repair or replace the damage and request the replacement cost. The second option would be to first accept the actual cash value instead of the replacement cost, repair within a year of the loss, and then request the difference, and the third option would be to accept the actual cash value and not repair or replace. The language of paragraph c. explicitly states that defendant will not pay more than actual cash value until repair or replacement is made. There is no qualification, however, as to when the repair or replacement must be made. The only time limit in receiving the replacement cost is if the insured first accepts the actual cash value. If an insured does so, the insured must make the repairs or replace the property within a year of the loss to receive the greater amount.

¶ 65 In this case, defendant denied liability, and consequently, plaintiff was never presented with these options. However, looking to paragraph a., the parties clearly intended for plaintiff to receive the replacement cost for covered losses to the property. Defendant asserts that

plaintiff is limited to actual cash value because sub-paragraph c. requires that repair or replacement actually be made before replacement cost will be paid. It is undisputed that plaintiff has not repaired or replaced the property. Taking defendant's argument to its logical conclusion would mean that plaintiff either needed to repair before liability was determined or would need to first receive an award from the jury of actual cash value, make the repairs or replacements, and then request the replacement cost from defendant. At which point, defendant would deny the request because the jury award was the actual cash value and the loss occurred more than a year prior to the judgment. This is an absurd result. An insurance company cannot wrongly deny liability, force an insured to take the case to court, and then claim the benefit of its delay. Moreover, a jury award of damages for breach of contract is different than an insurance company paying actual cash value for a claim under the policy. Therefore, we conclude that sub-paragraph c. is inapplicable to the case at bar and replacement cost was the correct measure of damages. Accordingly, the court did not err when it denied defendant's motion *in limine* and its jury instruction, which sought to limit damages to actual cash value.

¶ 66 Jury Verdict

¶ 67 Defendant makes the additional argument that the jury's verdict finding that the loss was due to theft and not vandalism with ensuing loss of theft was against the manifest weight of the evidence because it was undisputed that the walls and other fixtures of plaintiff's property were damaged. Plaintiff responds that defendant fails to demonstrate the absence of any evidence to support the jury's verdict or any prejudicial evidentiary error.

¶ 68 A jury's verdict will not be overturned unless it is against the manifest weight of the evidence. *Dunning v. Dynegy Midwest Generation, Inc.*, 2015 IL App (5th) 140168, ¶ 18. A

verdict is against the manifest weight of the evidence only when the opposite conclusion is clearly evident or when the jury's findings are unreasonable, arbitrary, and not based upon any of the evidence. *Id.* ¶ 19. There was an extensive trial in this case at which both parties presented evidence of the damage to plaintiff's property. Plaintiff contended that the losses were a result of intruders who cut open his walls so that they could steal copper pipes and also stole appliances. Defendant presented its theory that the intruders vandalized the home and stole property in the process. Multiple witnesses testified, including plaintiff, Cagadas, and Crawley. In addition, the jury reviewed documentation from the investigation and photographs of the damage. It is apparent from the record that there was substantial evidence to support the jury's finding. Furthermore, it is the jury's role to resolve evidentiary conflicts, determine the credibility of witnesses, and decide the weight to give each witness' testimony. *Liskowski v. MacNeal Memorial Hospital Association*, 381 Ill. App. 3d 275, 282-83 (2008). We will not reweigh the evidence merely because another conclusion is possible. *Id.* at 283. The fact that the walls and fixtures were destroyed did not require the jury to find that the damage to the property was from vandalism.

¶ 69 Additionally, because we conclude that it was not against the manifest weight of the evidence for the jury to find that the loss was from theft, we also find that defendant was not prejudiced by the fact that the jury did not decide occupancy. The occupancy exclusion only applied if the loss was from vandalism. Defendant's argument that the verdict was unreasonable, arbitrary and not based on any evidence presented is completely without merit. Accordingly, we find no error in the jury's verdict.

¶ 70 *Bona Fide* Dispute

¶ 71 Finally, defendant contends that the court erred in awarding plaintiff's attorneys fees pursuant to section 155 because there was a *bona fide* dispute over whether the losses were due to vandalism or theft and therefore defendant was reasonable in denying the claim. Plaintiff responds that defendant was vexatious and unreasonable in its delay in payment because there was insufficient evidence to support the classification of vandalism instead of theft.

¶ 72 Whether an insurance company was vexatious and unreasonable is determined by the totality of the circumstances. *Mohr*, 143 Ill. App. 3d at 998-99. A court's decision that an insurance company was unreasonable and vexatious will not be overturned absent an abuse of discretion. *Cook*, 2014 IL App (1st) 123700, ¶ 47. In making this determination, the court can consider that the insured was forced to file suit in order to recover for a legitimate claim. *Norman v. American National Fire Insurance Co.*, 198 Ill. App. 3d 269, 304 (1990). However, a plaintiff is not entitled to damages under section 155 merely because the insurance company was unsuccessful. *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 745 (2010). Thus, a court will not award attorneys fees or other penalties pursuant to section 155 if there is a *bona fide* dispute over coverage. *Id.*

¶ 73 In this case, defendant maintains that there was a *bona fide* dispute over whether the damage to the property was caused by theft or vandalism with ensuing theft. To support the contention that there was evidence of vandalism, defendant points to the testimony of Crawley and Cagadas as well as the investigation report and photographs of the damage.[3]

[3] Defendant also makes the argument that it is entitled to a new trial because plaintiff's attorney admitted to the court that there was "an element of theft and an element of vandalism" during trial. Defendant made this argument below and it was correctly rejected. As the trial court noted, this entire case was about whether the loss was due to theft or vandalism. Contrary to defendant's insistence, this issue was not admitted by the plaintiff's attorney in responding to a comment made by the trial court about the content of Cagadas' testimony. The argument is without merit and we decline **to expend** judicial resources to entertain it.

¶ 74 Here, the trial court determined that there was not a *bona fide* basis for defendant's denial of plaintiff's claim. In a detailed and well reasoned ruling, the court explained that it found defendant's witness Cagadas to be unpersuasive. From its review of the paperwork for the claim the court commented as follows:

> "[defendant] didn't really undertake to investigate a vandalism claim [.] *** Once the defendant began to expect the plaintiff didn't occupy the home on a regular basis, they changed the claim from theft to vandalism precisely so that there would be an available exclusion. That's this court's view of the evidence as well as the natural corollary to the jury verdict."

It is apparent that the court carefully considered the evidence presented at trial. The court specifically noted that it did not find defendant's witness persuasive and that the documentation showed that the claim was reclassified so an exclusion would apply. In addition, the court's comments demonstrate its attention to the totality of the circumstances in finding that there was no *bona fide* dispute.

¶ 75 Furthermore, we agree with the trial court that disputes that arose between the parties after litigation commenced are not sufficient to support a *bona fide* dispute for purposes of section 155. When a plaintiff takes legal action, there will inevitably be many disputes between the parties. Therefore, we conclude that the court did not abuse its discretion in finding that defendant was vexatious and unreasonable in denying plaintiff's claim.

¶ 76 CONCLUSION

¶ 77 Accordingly, we affirm the judgments of the trial court.

¶ 78 Affirmed.