2016 IL App (1st) 150302-U

FOURTH DIVISION
March 24, 2016

No. 1-15-0302

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

KENNETH M. NEIMAN and JANICE K. NEIMAN, Plaintiffs-Appellants, v. FARMERS AUTOMOBILE INSURANCE ASSOCIATION and PEKIN INSURANCE COMPANY, Defendants-Appellees.	) Appeal from) the Circuit Court) of Cook County)) 12-CH-40821)) Honorable) Mary L. Mikva,) Judge Presiding

---

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Trial court did not err in interpreting homeowners' insurance policy and did not err or abuse discretion in granting summary judgment, denying leaving to amend complaint, and entering numerous other rulings challenged on appeal.

¶ 2 Transcripts, court files, and other papers which plaintiff Kenneth M. Neiman was storing in his home were damaged by water allegedly after a technician repairing the Neimans' washing machine did not properly reattach a water line. The couple's insurer, defendant Pekin Insurance Company (Pekin), compensated the Neimans for damage to their residence and its contents. This declaratory judgment action concerns Pekin's reliance on language in its homeowners' policy

which excluded coverage for business records and capped liability at $4,000 for personal property used primarily for business purposes. In their claim submission to another insurer, the Neimans described their damaged documents as "Business records, court transcripts, client files and other papers" and they do not dispute that the specific documents at issue on appeal are mostly transcripts, which they value at $74,289. The Neimans contend the Pekin contract is ambiguous, that the transcripts were no longer business materials because Kenneth was retaining them to reread for pleasure, and that the trial court made numerous errors, including granting summary judgment to Pekin and denying the Neimans leave to add the manufacturer/repairer of the washing machine as a defendant. We set out their various other arguments below.

¶ 3 The insured homeowners are Kenneth and his wife, Janice K. Neiman, who renewed coverage with Pekin on their primary residence at 1705 Overland Trail, Deerfield, Illinois, 60015, effective for the one year period beginning October 15, 2010. On October 11, 2011, a technician from General Electric (GE) performed warranty work on the Neimans' GE brand washing machine and allegedly left a water line unconnected. According to the Neimans, this resulted in water damage to the hardwood flooring in the second story laundry room, the ceiling of the first floor, upstairs carpeting, a staircase, and, most notably here, to stacked file boxes of personal property that were stored in a room adjacent to the laundry room.

¶ 4 The Neimans reported the damage to GE and Pekin. Coverage on the dwelling itself is not at issue. GE's insurer, Electric Insurance Company, issued payments to the Neimans in mid December 2011 totaling $24,936.62 for the dwelling damage and Pekin issued payments on May 29, 2012 and June 4, 2012, totaling $47,136.36 for the dwelling damage.

¶ 5 The Neimans gave GE an itemized list of damages dated November 11, 2011, which included a $39,591 claim for "Business records, court transcripts, client files and other papers.

See attached itemization." GE would subsequently share the list and itemization with Pekin. In July 2012, the Neimans gave Pekin an inventory of personal property and supplemental expenses totaling $74,289. In August 2012, Pekin paid the Neimans $4,000 for their itemized contents damage, pursuant to the policy's "Special Limits of Liability" for certain types of personal property, including the $1,500 limit on "securities, accounts, [and] deeds" and the $2,500 limit on "property, on the 'residence premises', used primarily for 'business' purposes." In correspondence and email dated August 8, 2012, Pekin told the Neimans:

> "Coverage for your contents loss would be found under the special limits of liability on your insurance policy. ***
>
> We are not saying the transcripts are personal property or personal papers, but [are] rather used by you *** primarily for business purposes. The policy excludes business data *** [such as account books, drawings, and other paper records]. It appears this property was used for business purposes as by occupation you are a lawyer. *** As stated in your letter, 'the purchase of a transcript is akin to purchasing a license…'. We feel that the primary use of this property would be in your occupation as a lawyer. As such, the $2,500 limit would apply to your transcripts."

¶ 6 The policy language referenced on the insurer's letter is as follows:

> "HOMEOWNERS 3 – SPECIAL FORM
>
> SECTION I – PROPERTY COVERAGES
>
> * * *
>
> C. Coverage C – Personal Property
>
> 3. Special Limits of Liability
>
> The special limit for each category shown below is the total limit for each loss for all

property in that category. These special limits do not increase the Coverage C limit of liability.

a. $200 on money, bank notes, bullion, gold other than goldware, silver other than silverware, platinum, coins, medals, scrip, stored value cards and smart cards.

b. $1500 on securities, accounts, deeds, evidences of debt, letters of credit, notes other than bank notes, manuscripts, personal records, passports, tickets and stamps. *** This limit includes the costs to research, replace or restore the information from the lost or damaged material.

* * *

h. $2500 on property, on the 'residence premises', used primarily for 'business' purposes.

* * *

4. Property Not Covered

We do not cover:

***

i. 'Business' data, including such data stored in :

(1) Books of account, drawings or other paper records; or

(2) Computers and related equipment."

¶ 7 The Definitions section of the Neimans' policy also states:

"3. 'Business' means:

a. A trade, profession or occupation engaged in on a full-time, part-time or occasional basis; or

b. Any other activity engaged in for money or other compensation, except the

following:

(1) One or more activities, not described in (2) through (4) below, for which no 'insured' receives more than $2,000 in total compensation for the 12 months before the beginning of the policy period;

(2) Volunteer activities for which no money is received other than payment of expenses incurred to perform the activity;

(3) Providing home day care services for which no compensation is received, other than the mutual exchange of such services; or

(4) The rendering of home day services to the relative of an 'insured'."

¶ 8 When the Neimans challenged the relevance of the "Special Limits of Liability" clause, Pekin returned, at the end of August 2012, a copy of the Neimans' written inventory with the addition of notes by a Pekin claim representative. As examples, the notation "Personal record" was written next to the Neimans' itemized loss of their Illinois and federal "INCOME TAX RETURNS" for the years 2005 through 2010; the notation "accounts" appeared next to the Neimans' claim for the loss of their "CREDIT CARD STATEMENTS" from American Express, JPMorgan Chase, and Discover Bank for the years 2005 through 2010; and the notation "deeds" was written next to a list of various documents related to "1705 OVERLAND TRAIL, DEERFIELD, ILLINOIS," such as a "Closing File October 1996 including original Warranty Deed." Pekin's letter also indicated that its further review of the file indicated the Neimans were entitled to an additional $200, pursuant to the $200 limit on money and bank notes stated in the "Special Limits of Liability" clause, and that a check for that amount was enclosed. Pekin also provided "Loss Itemization Sheets" and instructions for their completion, and asked the Neimans to fill in and return the forms, as they might assist the insurer in reevaluating the claim.

¶ 9 The Neimans did not return the loss itemization sheets as requested. Nor did they comply with Pekin's request on October 16, 2012, for Kenneth to schedule an examination under oath. This was despite policy language requiring their cooperation after a loss:

"SECTION 1 – CONDITIONS

***

B. Duties After Loss

In case of a loss to covered property, we have no duty to provide coverage under this policy if the failure to comply with the following duties is prejudicial to us. These duties must be performed either by you, an 'insured' seeking coverage, or a representative of either:

* * *

5. Cooperate with us in the investigation of a claim;

***

7. As often as we reasonably require:

a. Show the damaged property;

b. Provide us with records and documents we request and permit us to make copies; and

c. Submit to examination under oath, while not in the presence of another 'insured', and sign the same."

¶ 10 Nonetheless, the Neimans filed this three-count suit, on November 8, 2012, seeking a declaratory judgment of coverage; alleging breach of contract for failure to pay damages encompassed by the policy language; and requesting statutory penalties and attorney fees

pursuant to section 155 of the Illinois Insurance Code on grounds that Pekin had vexatiously and unreasonably delayed resolving the claim. 215 ILCS 5/155 (West 2012).

¶ 11 Pekin filed a motion to dismiss the complaint as premature because Pekin was still investigating the Neimans' claim and the Neimans could not sue without having fulfilled their contractual obligation to comply with Pekin's requests for additional documentation and an examination under oath. After briefing and oral arguments, the trial court ruled, "This litigation is stayed pending completion of the insureds/plaintiffs; Kenneth Neiman's examination under oath. Parties to report to court on July 15, 2013, at 10:30 a.m. with plaintiffs' granted leave, if necessary, to file an amended complaint."

¶ 12 During his examination under oath, Kenneth testified that he is not a lawyer as suggested by Pekin's letter, but that he does purchase legal claims and pursue them *pro se* as an assignee. Kenneth is also currently licensed as a real estate broker and an insurance broker/producer. He is the founder, sole corporate officer, and only employee of Mercantile Brokerage Company. (The records of the Illinois Secretary of State indicate Kenneth is the principal of "Mercantile Holdings, Inc.") Mercantile's mailing address is the Neimans' residence. All of Kenneth's work, "whether it be real estate, insurance work, consulting work, [or legal] claims work" is performed under the name of the corporation or "[o]ftentimes" in Kenneth's name as an individual. Kenneth has earned a profit from every claim he has purchased and he has reported this income on his tax returns. The litigation work has been the "bulk" of Kenneth's income in recent years and he has been litigating on his own behalf or on behalf of his companies since 1992. In 2011, he earned $350,000 litigating claims as an assignee. Kenneth characterized his litigation work as a "hobby" that was "profitable."

¶ 13 The inventoried losses "consist[ed] mostly of transcripts" and Kenneth estimated that about $20,000 of the claimed amount was for documents belonging to his father, Erwin B. Neiman, who is a retired lawyer. Kenneth said he was "temporarily" holding the documents for Erwin but did "[n]ot necessarily" expect Erwin to ever take them back. Erwin had been an Illinois attorney until approximately 2002 or 2003, when he moved to Naples, Florida, and began winding down his affairs.

¶ 14 Kenneth's estimated replacement costs were what it originally cost someone to get the transcripts written. He looked into getting some of the transcripts replaced, but learned that due to their age or some other reason, they were "just not available." At least one of the transcripts was for an old insurance case that Kenneth had no involvement in. He bought the transcript in 1992 because he wanted to learn how the claim process worked. He retained the boxes of transcripts over the years because he still reread them "on a periodic basis out of *** love of learning, curiosity, recollection, memory." He enjoyed rereading what he "did in the past" and he had shown some of the documents to his children in order "to show them either the work that I've done or their grandfather has done or that other people have done." Thus, he no longer considered the documents to be "business related" because they were so old the business matters had been resolved and he was retaining them only for personal reasons.

¶ 15 Other items on Kenneth's inventory which Pekin designated as either not covered or covered but subject to a limitation included replacing Kenneth's bank account statements. Kenneth said he had learned that some of the statements could not be recreated because they exceeded a certain age, and that what could be recreated would likely cost several thousand dollars, at the rate of $30 per hour for the bank's research and $20-to-30 per page. Kenneth listed the loss of appraisals for five pieces of his wife's jewelry and estimated the cost of having the

pieces reappraised would be $30-to-50 per item. The water had also damaged the family's passports and about a dozen personal mementos such as family photos and children's drawings which had been enlarged and mounted for display. There were also files of titles and financing documents for their home on Overland Trial, their rental property on Hemlock Street in Deerfield, and their other residence in Florida.

¶ 16 After Kenneth's examination, Pekin filed a combined motion for summary judgment and to dismiss. The Neimans then filed a motion and Supreme Court Rule 191(b) affidavit indicating it was necessary to continue the proceedings so Kenneth could discover documents and depose three "key claim personnel" about Pekin's defense that Kenneth's refusal to produce certain tax returns after his examination was contrary to his contractual duty of cooperation. Ill. S. Ct. R. 191(b) (eff. Jan. 4, 2013). At the trial court's suggestion, Pekin withdrew without prejudice its noncooperation argument in order to proceed directly to its other arguments and moot any alleged need for discovery. Although granted leave to file an amended complaint, the Neimans instead filed a motion for partial summary judgment on their existing pleading and a motion to join GE as a party.

¶ 17 The trial court considered written briefs and oral arguments and then denied the Neimans' motion to join GE and took the parties' cross-motions under advisement. The court subsequently issued a written order which included a summary of the relevant facts, such as Kenneth's testimony during his examination under oath. An examination under oath is sometimes referred to as an EUO. The court stated: "Much of the EUO was devoted to determining how Mr. Neiman makes his living [Citation.] *** [T]he testimony establishes that he makes a living, or at least part of his living, in the 'business' of litigating claims *pro se* directly or as an assignee–he is a

professional *pro se* litigant. " The court summarized the EUO testimony, including the fact that the income Kenneth earns from his litigation business is reported on his tax returns. Also:

> "Although Mr. Neiman refused to produce his tax returns, his EUO made it clear that he engaged in litigation as a 'trade, profession or occupation' [as that phrase is used in the insurance policy.] Indeed, Mr. Neiman acknowledged that the litigation business has been the 'bulk' of his income in recent years. [Citation.] A simple LexisNexis search confirms how active Mr. Neiman has been as a litigant. *See, e.g., Kenneth M. Neiman v. Irmen*, 379 B.R. 299, 306 (Bankr. N.D. Ill. 2007) (suing *pro se* as a third party beneficiary to a contract between a debtor and Mercantile); *Kenneth M. Neiman v. Econ. Preferred Ins. Co.*, 357 Ill. App. 3d 786, 793 (1st Dist. 2005) (suing *pro se* on behalf of himself and as assignee of Erwin Neiman). In addition to pursuing claims as an assignee, he also opts to litigate on behalf of himself against companies with which he deals in his personal life. *See, e.g., Kenneth M. Neiman v. Chase Bank, USA, N.A.*, No. 13 C 8944, 2014 U.S. Dist. LEXIS 101553 (N.D. Ill. July 25, 2014) (suing *pro se* his bank); *Kenneth M. Neiman v. Larson*, 576 N.W. 2d 89 (Wisc. Ct. App. 1998) (suing *pro se* his cosmetic surgeon, though Erwin Neiman later appeared 'for limited purposes')."

¶ 18 The trial court concluded that Kenneth's transcripts "were primarily used for business purposes" and were therefore subject to the policy's $2,500 "Special Limits of Liability."

¶ 19 With respect to the documents that purportedly belonged to Erwin but were being stored "temporarily" at the Neiman residence, the trial court noted that Erwin was an attorney and found that "[Kenneth's own] description of the documents related to Erwin make[s] clear that they are documents, such as transcripts, related to specific legal cases." Thus, the court found,

"Documents related to Erwin Neiman's law practice were also documents used primarily for business purposes."

¶ 20 The trial court also rejected an entry for "Specific Supplemental Expenses [of $3,149] as of April 25, 2013," which neither party had addressed and which appeared to be the Neimans' litigation costs in this suit and purchasing storage materials for personal property which were not covered by the policy.

¶ 21 The court concluded the Neimans' "supplemental claim vastly overstated what was recoverable" under the policy. However, there were a few items which were inadequately described, did not include a claimed value, or did not appear to be " 'business' related" or otherwise within the Special Limits of Liability. Accordingly, if the Neimans intended to seek further payment from Pekin, they were ordered to give the insurer by September 19, 2014, specific details of those items and their value.

¶ 22 The court's written order grants in part the insurer's motion for summary judgment and denies the Neimans' cross-motion for partial summary judgment. The court set a status date and ordered that "both parties should be prepared to advise the Court what items remain at issue."

¶ 23 Shortly before the court entered its summary judgment ruling, Pekin mailed the Neimans a certified copy of their homeowners' policy. The Neimans took the position that this version's declarations page and "Notice to Policyholders" may have broadened their insurance coverage beyond the contract's "Special Limits of Liability." After the summary judgment ruling, the Neimans orally sought leave to file an amended complaint based on (1) this purportedly different coverage and (2) newly-discovered damage to the dwelling's furnace and injuries from carbon monoxide poisoning. The court instructed Kenneth to file a written motion which included a copy of the purportedly new coverage, and, later denied the motion. The court stated on the

record that its summary judgment ruling had resolved the Neimans' lawsuit, other than for the "small amount" of damages the Neimans subsequently documented and received from Pekin ($1,558.28 for contents and $831.34 for replacement carpeting), and that the policy language the court scrutinized before entering judgment "is exactly the same under this purportedly new policy," which was "the determining issue" as to whether the court should reopen pleadings after entering judgment.

¶ 24 On appeal, the Neimans contend the proceedings were rife with errors. They contend the summary judgment ruling for Pekin and denial of the Neimans' motion for partial summary judgment was based on a misinterpretation of the policy's terms " 'business' " and " 'business data.' "

¶ 25 We review the entry of summary judgment *de novo*. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 370-71, 875 N.E.2d 1082, 1089 (2007). Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). Also, the construction of an insurance policy is a question of law, which is reviewed *de novo*. *Rich*, 226 Ill. 2d at 371, 875 N.E.2d at 1090.

¶ 26 Our primary objective when construing the language of an insurance policy is to ascertain and give effect to the intentions of the parties as expressed by the words of their contract. *Rich*, 226 Ill. 2d at 371, 875 N.E.2d at 1090. Clear and unambiguous policy language is applied as written, with the words being given their plain, ordinary, and popular meaning. *Rich*, 226 Ill. 2d at 371, 875 N.E.2d at 1090. " 'Usual and ordinary meaning' has been stated variously to be that meaning which the particular language conveys to the popular mind, to most people, to the

average, ordinary, normal [person], to a reasonable [person], to persons with usual and ordinary understanding, to a business[person], or to a lay [person]." *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 115, 607 N.E.2d 1204, 1216 (1992) (quoting 2 Couch on Insurance 2d § 15:18 (rev. ed. 1984)). However, if the words used in the insurance policy are reasonably susceptible to more than one meaning, they are considered ambiguous and will be construed strictly against the insurer who drafted the policy. *Outboard Marine,* 154 Ill. 2d at 108-09, 607 N.E.2d at 1212; *Dora Township v. Indiana Insurance Co.*, 78 Ill. 2d 376, 379, 400 N.E.2d 921, 922 (1980) (ambiguous policies are construed in favor of coverage). A contract is not ambiguous merely because the parties disagree on its interpretation. *Rich*, 226 Ill. 2d at 372, 875 N.E.2d at 1090. A court will consider only reasonable interpretations of policy language and will not strain to find an ambiguity where none exists. *Rich*, 226 Ill. 2d at 372, 875 N.E.2d at 1090.

¶ 27 The Neimans' first specific argument is that the definition of business in section B(3)(a) is ambiguous because it does not include an applicable time period and it is unclear whether the phrase "engaged in" refers to the present or past. Also, if B(3)(a) refers to the present, "then it conflicts with the policy definition [in the subsequent paragraph, B(3)(b)] stating business property is partly defined as property that generated in excess of $2,000 in income in the twelve months preceding the inception of the policy." Furthermore, "If it's not ambiguous, the property cannot be subject to the Special Limits of Liability because there was no evidence the property generated any income in twelve months preceding the inception of the policy."

¶ 28 We do not find the Neimans' argument persuasive. There is no present or past qualification in B(3)(a)'s definition of business as "[a] trade, profession or occupation engaged in on a full-time, part-time, or occasional basis" and the Neimans cite no principle or authority that

requires there to be a time constraint. Thus, the definition is unqualified and encompasses both time periods.

¶ 29 Furthermore, as Pekin points out, the other policy definition the Neimans rely on in B(3)(b), which is constrained to the 12 months before the beginning of the policy period, is prefaced by the word "or," meaning that it is an alternative to B(3)(a). See *Zurich Insurance Co. v. Northbrook Excess & Surplus, Inc.*, 145 Ill. App. 3d 175, 188, 494 N.E.2d 634, 642 (1986) "each of the three terms is separate and distinct, as evidenced by the use of the disjunctive 'or,' and must be considered separately"); *People v. Vraniak*, 5 Ill. 2d 384, 389, 125 N.E.2d 513, 517 (1955) (collecting cases and stating, "As used in its ordinary sense, the word ‘or’ marks an alternative indicating that the various members of the sentence which it connects are to be taken separately.").

¶ 30 As alternatives to each other, the sections B(3)(a) and B(3)(b) are not to be read together and they do not result in ambiguity. The trial court reached the same conclusion and stated, "The Neimans ignore that there are two definitions of business in the Pekin policy" and that the second definition is "an alternative definition." Section B(3)(a) controls and, as the trial court correctly concluded, "It does not matter whether Mr. Neiman made money in the twelve months before the beginning of the policy period from any of his varied occupations."

¶ 31 There is a principle that the various provisions of an insurance policy are to harmonized (*Rich*, 226 Ill. 2d at 371, 875 N.E.2d at 1090), but this principle does not permit us to change the parties' clearly worded agreement by rewriting or disregarding the word "or" that separates section B(3)(a) from section B(3)(b).

¶ 32 Furthermore, we are to take into account the type of insurance provided, the nature of the risks involved, and the overall purpose of the contract. *Outboard Marine*, 154 Ill.2d at 108, 607

N.E.2d 1204; *Rich*, 226 Ill. 2d at 371, 875 N.E.2d at 1090. This was a homeowners' policy. The purpose of this agreement between the Neimans and Pekin was to insure a "dwelling" and the associated personal property, not a business. Even so, this homeowners' policy provided *some*, limited coverage for business property and business data while those items were on the residence premises. The Neimans paid a premium that corresponded with the risks undertaken by their homeowners' insurer. The Neimans have been compensated for the damage to their dwelling and personal property, and to some extent for the damage to their business property, in keeping with the overall purpose of the insurance agreement.

¶ 33 The Neimans also argue that the court mischaracterized Kenneth's testimony in reaching the conclusion "that he makes a living, or at least part of his living, in the 'business' of litigating claims *pro se* directly or as an assignee–he is a professional *pro se* litigant." The Neimans point to his testimony that he was a real estate broker, insurance broker, and "served as a business consultant" and contend there was no testimony that supports the court's conclusion that he was in the "litigation business." "Further, it's undisputed that Kenneth's primary source of income is derived from being a licensed real estate broker and a licensed insurance producer." They contend the conclusion was instead based on the court's independent factual computer search into litigation purportedly involving the Neimans, which was improper, and that we should disregard the court's reliance on those cases. The Neimans cite *NYC Medical & Neurodiagnostic, P.C. v. Republic Western Insurance Co.*, 8 Misc. 3d 33, 37-38, 798 N.Y.S.2d 309, 313 (2004), which is a New York case in which the plaintiff did not adequately demonstrate grounds for the court to exert jurisdiction over an out-of-state defendant, so the trial judge took it upon himself to conduct his own search on the Internet and then use the facts he discovered as grounds for denying the defendant's motion to dismiss for lack of jurisdiction. The reviewing court indicated

the trial judge should have ruled on the basis of the parties' submissions, rather than usurping the role of counsel and denying the parties an opportunity to address those facts before the ruling. *NYC Medical*, 8 Misc. 3d at 37-38, 798 N.Y.S.2d at 313. The Neimans further argue that it was against the manifest weight of the evidence to conclude that Kenneth was a professional *pro se* litigant, in light of his testimony that he purchased some of the transcripts for educational use, personal edification, love of learning, and so forth, and that he enjoyed reading them. Also, the Neimans contend there was no testimony or other evidence as to each and every claimed item and that Pekin should have allowed Kenneth to speak about "every single receipt" during his EUO.

¶ 34 In our opinion, Kenneth's testimony amply supports the trial court's conclusion that the transcripts were purchased for Kenneth's "business." Neiman's testimony under oath indicates he purchases claims in order to earn money, he has been successful in every claim, he reports the "income" on his tax returns, and the "bulk" of his income in recent years has been from those claims. Thus, Kenneth has engaged in litigation as a "trade, profession or occupation" and the court did not misconstrue Kenneth's testimony. Even if Kenneth did not profit from the endeavors, worked on only an "occasional basis," and derived most of his income from his other interests, his efforts at litigation would fit within the policy's definition of a "business." The transcripts were purchased for this "trade, profession or occupation." Whether Kenneth enjoyed reading the materials is of no consequence, as the policy definition of "business" does not depend upon the insured's state of mind about the business property. The insured's state of mind is as relevant as the passage of time—neither can transform business materials into something else. Stored business materials, whether they are in a box forgotten or are repeatedly reread for pleasure or the love of learning are business materials within the meaning of this policy. The

policy provides an objective description that is not affected by the criteria the Neimans now attempt to incorporate into their insurance contract.

¶ 35 It was unnecessary for the court to engage in further research in order to confirm Neiman's testimony that he has been litigating on behalf of himself or involved in his companies' litigation since 1992. The court's citation to lawsuits purportedly involving the Neimans added nothing to the order on appeal, did not weigh into our consideration, and was quoted in our own order only to provide context for the Neimans' arguments. The record created by the parties and the policy language indicates the summary judgment order was warranted.

¶ 36 As for the contention that the trial court did not consider and categorize each item the Neimans claimed, the order is comprehensive and indicates the court actually addressed items that neither party briefed. The court questioned whether Pekin should have rejected certain items and set a deadline for the Neimans to document those items, which resulted in the Neimans receiving additional compensation. Furthermore, the summary judgment order concludes with the statement, "Status is reset for September 30, 2014 at 9:45 a.m., at which time both parties should be prepared to advise the Court what items remain at issue." Accordingly, we are not persuaded that the court gave short shrift to the insurance claim, lacked adequate detail about the inventoried losses, or "made a wholesale assumption [that] all claimed contents were business related."

¶ 37 The Neimans next contend the transcripts which Erwin left at the Neiman residence before moving to Florida were fully covered by the Pekin policy and were not subject to the "Special Limits of Liability." However, they reach this conclusion by quoting only a portion of the policy:

"C. Coverage C – Personal Property

1. Covered Property

We cover personal property owned or used by an 'insured' while it is anywhere in the world. After a loss and at your request, we will cover personal property owned by:

a. Others while the property is on the part of the residence premises occupied by an insured***[.]"

¶ 38 We find that the paragraph entitled "1. Covered Property," must be read in conjunction with the related paragraphs that follow it, including "2. Limit For Property at Other Residences," "3. *Special Limits of Liability*," and "4. Property Not Covered." (Emphasis added.) When we construe the language of an insurance policy, we must assume that every provision was intended to serve a purpose. An insurance policy must be considered as a whole, and all of the provisions, rather than an isolated part, should be examined and harmonized. *Rich*, 226 Ill. 2d at 371, 875 N.E.2d at 1090. "For purposes of contract interpretation, intent is ascertained, not by a process of dissection in which words or phrases are isolated from their context, but rather from a process of synthesis in which the words and phrases are given a meaning in accordance with the obvious purpose of the contract as a whole." *Motorsports Racing Plus, Inc. v. Arctic Cat Sales, Inc.*, 666 N.W.2d 320 (Minn. 2003). The paragraph that extends coverage to the "personal property" of "Others" is curtailed by the subsequent paragraph that caps liability for personal property "on the 'residence premises', used primarily for 'business' purposes." Thus, the "Special Limits of Liability" are not uniquely applicable to the property of an insured.

¶ 39 In the alternative, the Neimans contend that if the "Special Limits of Liability" are applicable to the property of third parties as we have concluded, then those limits did not apply to Erwin's files because Kenneth testified that (a) his father retired approximately six years before the water damage occurred, meaning that Erwin was no longer currently "engaged in"

business as that phrase is used in the definitions section and (b) the files were definitely no longer being "used primarily for 'business' purposes" as that phrase is used in the "Special Limits of Liability." This argument is based on the premise we rejected above that the policy language is ambiguous because it does not include a time constraint. As we stated above, the limitations at issue apply to past or present business endeavors and are not ambiguous. The legal files are business property regardless of when they were last used. The Neimans have failed to show that the court erred in its analysis of the parties' arguments or a record which indicates the Neimans have been compensated up to the stated limits of their coverage.

¶ 40 The Neimans' next contention is unclear but appears to be that the court abused its discretion "by ordering the EUO." The Neimans rely on (1) the letter Pekin sent early in the claim process stating, "It appears this property was used for business purposes as by occupation you are a lawyer" and (2) the payments Pekin made toward the Neimans' dwelling and contents damage. As best we can tell, the Neimans are contending that after Pekin "denied" the insurance claim on grounds that Kenneth was a lawyer and paid the $4,200, Pekin could no longer investigate the claim and thus waived its contractual right to take Kenneth's examination under oath. ("Pekin cannot deny the claim for one reason (that Neiman is a lawyer, the transcripts are related to a law practice and that said property constitutes 'business') and when those reasons are proven false, conduct an EUO to come up with different reasons to deny the claim.") According to the Neimans, the trial court erroneously rejected this argument. And, the "imposition of a stay to afford Pekin the chance to take [an] EUO was akin to a discovery order because the substance was the same," meaning that we should review the ruling as if it were a discovery ruling, under the abuse of discretion standard." This reasoning leads the Neimans to conclude, "But not for [this abuse of discretion], Pekin couldn't use the EUO testimony to seek dismissal," and

"Therefore, this Court should vacate the 'Order' granting summary judgment on the above basis including Pekin waiving the right to the EUO."

¶ 41 This argument misstates the facts and lacks legal support. The court did not order Neiman to undergo an examination under oath, but instead stayed the litigation. Pending at the time was Pekin's motion to dismiss the Neimans' declaratory judgment and breach of contract claims, on grounds that Neiman's failure to comply with Pekin's request for an EUO was a failure to satisfy the conditions precedent under the policy for filing suit. Alternatively, Pekin's motion asked "that the lawsuit be stayed pending a resolution of [the Neimans'] insurance claim, including the performance of an examination under oath." Pekin did not request that Neiman be ordered to sit for an EUO and the trial court did not order that Neiman sit for an EUO. Thus, the Neimans' argument relies on a misstatement of the history of this case. Furthermore, the letter which the Neimans cite as a "denial" is not a denial and was sent during the claims investigation which was still ongoing when the Neimans filed this suit. The Neimans cite no authority indicating that an erroneous statement such as "you are a lawyer" during a claims investigation binds the insurer to that statement. Also, with regard to the $4,200 payments, the Neimans cite no authority indicating partial payments to an insured prevent an insurer from continuing its claim investigation. In fact, the Neimans rely almost entirely on *Sykes*, which does not support their appeal. *Lumbermen's Mutual Casualty Co. v. Sykes*, 384 Ill. App. 3d 207, 890 N.E.2d 1086 (2008).

¶ 42 In *Sykes*, the insurer hired mold inspectors and paid for the homeowner's hotel stay while the insurer investigated the cause and extent of water infiltration and mold growth in the insured's home after a heavy snow melt. *Sykes*, 384 Ill. App. 3d at 209, 890 N.E.2d at 1090. When the insurer denied the claim, the insured contended the insurer had admitted in

correspondence and email with her and in its internal records that the damage was covered by the policy. *Sykes*, 384 Ill. App. 3d at 213, 890 N.E.2d at 1092-93. The insurer's communications and claim notes indicated, however, that while it attributed *some* of the water infiltration to covered "ice damming" the claim was ongoing at the time and the insurer repeatedly reserved its right to deny coverage for damage that it determined resulted from noncovered causes. *Sykes*, 384 Ill. App. 3d at 221-22, 890 N.E.2d at 1099. The insurer later determined that the water infiltration was caused by a defective roof design which was not covered by the policy and had been occurring for many years, even prior to the policy's inception. *Sykes*, 384 Ill. App. 3d at 210, 890 N.E.2d at 1090. The insurer denied the claim and informed the hotel that it would pay for only one additional week in the rented room. *Sykes*, 384 Ill. App. 3d at 212, 890 N.E.2d at 1092. The court found that the insurer's communications indicating some damage was covered was not an admission that all damage was covered. *Sykes*, 384 Ill. App. 3d at 222, 890 N.E.2d at 1099. The court made no mention of the hotel bill. We do not read *Sykes* as an indication that Pekin's misapprehension of an inconsequential fact and partial payments during its investigation resulted in waiver of Pekin's contractual right to continue its investigation. *Sykes*, 384 Ill. App. 3d 207, 890 N.E.2d 1086.

¶ 43 Ultimately, the Neimans' conclusion that the EUO unfairly gave Pekin a different reason to limit coverage for the transcripts, is incorrect because the record shows that both before and after the examination, Pekin consistently relied on the "Special Limits of Liability." The Neimans' initial communications to Pekin created the impression that Kenneth was a lawyer who used the transcripts in his litigation practice,[1] but the EUO clarified that he was a *pro se* litigant

[1] Even in these proceedings, Kenneth referred to himself during oral arguments in the trial court as "another lawyer," and somehow the designation "Kenneth Neiman, Esq." has made its way into the record compiled for our review.

who used the transcripts in his litigation business. The distinction the Neimans now draw is a distinction that makes no difference in their coverage. Before and after the EUO, Pekin expressly relied on the "Special Limits of Liability." Accordingly, we are not persuaded that the EUO affected the outcome of this coverage dispute and warrants the reversal of the summary judgment ruling in favor of Pekin.

¶ 44 The Neimans' next argument is that the circuit court never adjudicated the bad faith allegations set out in Count III of the Neimans complaint and that we should remand the case for further proceedings on this count. This is another argument that is factually incorrect. The order on appeal does refer to the bad faith claim, stating, "The Neimans' *pro se* Complaint seeks a declaration that the claimed losses are covered and includes a claim for breach of contract and for unreasonable, vexatious, and bad faith conduct under Section 155 of the Illinois Insurance Code, 215 ILCS 5/155." In its motion for summary judgment, Pekin addressed the allegations of bad faith, arguing, for instance, "Pekin has satisfied its maximum obligations under the Policy by paying Plaintiffs the full extent of the Special Limits of Liability for property used primarily for 'business purposes' and Plaintiffs' attempt to recover moneys beyond those limits is without merit." By granting Pekin's motion for summary judgment on the three-count pleading, the court effectively resolved the bad faith claim in Pekin's favor.

¶ 45 The Neimans next contend "without justification or a stated reason" the trial court erroneously denied their motion for a default judgment against another defendant, Farmers Automobile Insurance Association, which we refer to as Farmers. The policy includes the names and logos of both Pekin and Farmers, and, according to the Neimans they sued both companies because the companies' respective interests in the policy were "unclear." The Neimans contend their complaint "was properly served upon Farmers" and emphasize this was at "the same

address service of process was effected upon Pekin; and the same person (Angela Wikoff) served on behalf of Pekin *** was also served *** as to Farmers." Then, "since Farmers failed to appear and answer or otherwise plead within term time," the court should have granted the default. The Neimans rely on a civil practice statute which states, "Judgment by default may be entered for want of an appearance, or for failure to plead, but the court may in either case, require proof of the allegations of the pleadings upon which relief is sought." 735 ILCS 5/2-13401(d) (West 2012). The Neimans propose that we remand with an order to enter a default and a money judgment against Farmers on the Neimans' "undisputed" "Sworn Statement of Proof of Loss" totaling $74,289. The Neimans also propose that they be given leave to file an amended complaint and that we instruct the circuit court not to prevent the Neimans from pursuing Farmers for the difference between the $74,289 money judgment and any additional amount "proven through" the amended pleading.

¶ 46 Pekin responds that the Neimans are not legitimately looking to rectify an error that impacted their ability to be made whole, but rather, are presenting a frivolous argument with the hopes of obtaining a windfall.

¶ 47 The trial court's handwritten order appears to have been drafted by Pekin's attorney and states simply, "Motion for default is denied." We will neither speculate on the court's reasoning nor assume it to be flawed. The Neimans could have drafted a detailed order for the court to enter which included the court's "justification and stated reason." In the absence of a sufficiently complete record, we presume that the court ruled consistently with both the facts and law and that the information missing from the record supports the court's ruling. *Webster v. Hartman*, 195 Ill. 2d 426, 432, 749 N.E.2d 958, 963 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392, 459

N.E.2d 958, 959 (1984) ("Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.").

¶ 48 The Neimans next contend it was "reversible error *** to rule in Pekin's favor without adjudicating Farmers' interests in the policy," despite a prayer for relief in Count I asking the court to "[d]eclare which defendant(s) is/are the insurer(s) under the attached policy" and an allegation in Count II that "Pekin Insurance Company and/or Farmers Automobile Insurance Association breached the attached insurance policy."

¶ 49 Pekin responds in part that the Neimans spent two years litigating against Pekin only, never moved for a declaration regarding Farmers, and now contend that the court somehow erred. Pekin points out that, unlike the previous issue, the Neimans do not claim that the issue of Farmers' interest in the policy was before the court.

¶ 50 We find that an argument presented for the first time on appeal does not warrant our consideration and that the argument has been waived. *Miner v. Fashion Enterprises, Inc.*, 342 Ill. App. 3d 405, 419, 794 N.E.2d 902, 915 (2003) (unless an argument appears in the trial court record it is forfeited on appeal). Waiver aside, the argument is illogical and easily dispensed with on the merits: the entry of summary judgment for Pekin on the Neimans' complaint was a full and complete resolution of all the allegations and prayers for relief, and the court had no reason to address individual allegations or prayers on a piecemeal basis.

¶ 51 The Neimans also contend the circuit court "erred" in denying items listed in the "Specific Supplemental Expenses as of April 25, 2013." The court remarked that neither party had addressed those items but nothing in that category was recoverable. More specifically, some of the list "appears to be costs the Neimans incurred in the litigation," which are not compensable under the policy. And other entries "appear[] to be replacement costs for items that are covered

by the Special Limits of Liability" which is a category that had already been paid in full. The Neimans take issue with the court's use of the words "appear" or "appears," and contend these are indications the court assumed facts not in evidence. "Without any evidence in the record, [the court] made improper assumptions about the nature of the supplemental expenses," which warrants reversal and remand for an order to pay all claimed expenses consistent with the policy. The Neimans fail to cite or discuss any legal principle that supports their conclusion that the court "erred."

¶ 52 Pekin responds that the court's statement reflects that the Neimans did not adequately present the issue prior to the court's ruling and have waived our consideration.

¶ 53 We agree with Pekin that the Neimans are only highlighting the deficiency of their advocacy in the circuit court and their misapprehension of the role of an appellate court. A trial court judge is a neutral jurist, not an advocate for either party. The court was under no obligation to prod the Neimans to address each and every one of their claimed expenses. To the extent the plaintiffs did describe those items in their insurance claim, they were describing items that did not entitle them to any additional compensation. The court stated this in the summary judgment order. Moreover, at the conclusion of the summary judgment order, the court set a status date and ordered the parties to "be prepared to advise the Court what items remain at issue." We are not persuaded that the court made "improper assumptions" and we affirm the court's conclusions.

¶ 54 Having resolved all the Neimans contentions regarding the entry of judgment, we turn to their contention that it was an abuse of discretion for the court to decline to vacate the order and grant leave to file a new complaint alleging coverage based on the certified copy of the policy the Neimans received in the mail shortly before the court entered its written order. The policy included a declarations page and a document entitled "Notice to Policyholders." The certification

statement at the bottom of the declarations page stated "this is a true copy of the policy as of 10/12/11," which was one day after the purported water damage, and thus, according to the Neimans, helped create a material question as to whether there was coverage under this certified version of the policy. Within the "Notice of Policyholders," under the heading "BROADENING OF COVERAGE" was a statement that in this renewal policy[2] included revised terminology under the Special Limit categories h, i, and k. The only one of these categories at issue here is category h, quoted fully above, which is the $2,500 limit on "property, on the 'residence premises,' used primarily for 'business' purposes." This is the policy language analyzed fully above. Following this statement was the sentence that the Neimans rely on: "Now, any such property you own that was used in a former trade, profession or occupation, or that is occasionally used in business, will be subject to the Coverage C limit instead of the special limit that applies to business property." The Neimans contend they sought leave to amend as soon as the "newly disclosed purported policy was uncovered."

¶ 55 We fail to appreciate how the misstated date in the certification statement could have any effect on the Neimans' coverage. As for the Notice to Policyholders, that document is a summary that does not provide coverage and expressly states that if the policy and the Notice to Policyholders conflict, the policy controls. At the top of the first page of the Notice to Policyholders is a disclaimer stating in capitalized, bold font: **"CAUTION: NO COVERAGE IS PROVIDED BY THIS NOTICE; NOR CAN IT BE CONSTRUED TO REPLACE ANY PROVISION OF YOUR POLICY. COVERAGES, LIMITS AND DEDUCTIBLES MAY HAVE CHANGED [in this renewal policy]. PLEASE READ YOUR POLICY AND ENDORSEMENTS, AND REVIEW YOUR DECLARATION PAGE FOR COMPLETE**

[2] During his examination under oath, Neiman said he had homeowner's coverage through Pekin for about 10 years. Thus, the policy at issue was a renewal.

INFORMATION ON THE COVERAGES, DEDUCTIBLES AND LIMITS THAT YOU ARE PROVIDED."

¶ 56 The disclaimer is followed by a salutation and introduction:

> "Dear Policyholder,
>
> We are pleased to provide our Homeowners 2000 policy with this renewal. We feel that this new program will offer you and your agent greater flexibility in selecting those coverages that best fit your needs.
>
> The form and endorsements that make up your renewal policy differ from those in your former policy. Some changes give you broader coverage or clarify coverage intent, while others may reduce coverage. This Policyholders Notice summarizes the major changes made to your policy. "

¶ 57 The disclaimer that appears on the first page also appears on the final page, just above the writer's closing and signature.

¶ 58 Given the disclaimers, whatever else the Notice to Policyholders states is inconsequential in this coverage dispute. The Neimans acknowledge that the disclaimers state that the Notice to Policyholders provides no coverage, does not replace the policy, and that the policy prevails over the Notice to Policyholders. Nonetheless, the Neimans contend, "the fact that the 'Notice to Policyholders' isn't coverage *per se* doesn't relieve [Pekin] from considering [the Neimans'] claim under a policy conforming to the Notice to Policyholders." The argument is unclear and unpersuasive. Again, given the disclaimers, the policy itself is controlling. When we look to the policy language at issue, we find no difference in the coverage or limitations on Pekin's liability for business property or business data. This is why the trial court concluded that the policy language the court relied on in resolving the cross-motions for summary judgment "is exactly the

same under this purported new policy." And, "So there's absolutely no reason to reconsider any of this. There's no reason to let you file an amended complaint." We affirm the court's denial of leave to amend on the basis of the "new" coverage.

¶ 59 The Neimans next contend they should have been given leave to amend their complaint with allegations of additional damage to the dwelling and bodily injuries for carbon monoxide poisoning. Although the Neimans devote a considerable portion of their brief to this contention and cite authority regarding amendments, this contention is inadequately explained and we decline to address it. A deficient presentation results in waiver of our analysis. Ill. Sup. Ct. R. 341(e)(7) (eff. Apr. 11, 2001) (rule of appellate practice requiring appellants to provide reasoned argument supported by citation to the record and relevant authority); *Fortech, L.L.C. v. R.W. Dunteman Co., Inc.*, 366 Ill. App. 3d 804, 818, 852 N.E.2d 451, 463 (2006) (finding waiver due to failure to abide by rules of appellate practice).

¶ 60 The Neimans also contend it was an abuse of discretion to deny leave to amend without vacating a prior order granting leave to amend. This is another contention that is inadequately explained. Also, the Neimans fail to cite any authority which remotely supports their conclusion. They have waived this theory. *Fortech*, 366 Ill. App. 3d at 818, 852 N.E.2d at 463.

¶ 61 The Neimans contend it was an abuse of discretion for the court to deny leave to join GE as a party and to "presumptuously" say, "Well, I don't believe this case has anything to do with GE. That's a different policy. If you have a suit." The joinder of defendants is governed by section 405 of the Code of Civil Procedure. 735 ILCS 5/2-405 (West 2012). Defendants "against whom a liability is asserted either jointly, severally or in the alternative arising out of the same transaction or series of transactions" may be joined. 735 ILCS 5/2-405(a) (West 2012). The objective of joinder is the economy of actions and trial convenience. *Boyd v. Travelers Insurance*

Co., 166 Ill. 2d 188, 199, 652 N.E.2d 267, 272 (1995). The determining factors are that the claims arise out of closely related "transactions" and that the case presents a significant question of law or fact that is common to the parties. *Boyd*, 166 Ill. 2d at 199, 652 N.E.2d at 272. In addition to citing and discussing section 405(a), the Neimans remark that they "have a right to pursue GE, pursuant to § 5/2-405(b) and (c), in [the] alternative." 735 ILCS 5/2-405(b), (c) (West 2012). This is their only mention of subsections (b) and (c) and we find that the deficient presentation results in waiver of these additional subsections. Ill Sup. Ct. R. 341(e)(7) (eff. Apr. 11, 2001); *Fortech*, 366 Ill. App. 3d at 818, 852 N.E.2d at 463. The Neimans also rely on section 2-407 of the Code, which provides as follows: "No action shall be dismissed for *** nonjoinder of necessary parties without first affording reasonable opportunity to add them as parties. New parties may be added *** at any stage of the cause, b efore or after judgment, as the ends of justice may require and on terms which the court may fix." 735 ILCS 5/2-407 (West 2012).

¶ 62 The Neimans refer to GE as "the underlying tortfeasor *** that triggered the insurance claim" and contend GE was "a necessary party because [the insurance claim against Pekin arose from] GE's negligence." They contend it was "reversible error to deny joinder *** when there's questions over which items are or are not insured under either policy."

¶ 63 Pekin points out that the Neimans fail to explain why after filing this case in November 2012, the Neimans waited until April 2014 to first seek leave to join GE. Pekin argues there is simply no reason why GE, the alleged tortfeasor, would need to be joined two years into first-party coverage litigation where the disparate nature of the issues involved would actually hamper judicial economy. In addition to saying, "I don't believe this case has anything to do with GE," the court said, "I believe this case is almost over. *** [W]e're not going to wait around for whatever your dispute is for GE. File a separate lawsuit. It's a separate policy."

¶ 64 We agree with Pekin that the presentation of the motion, years into the suit and at the conclusion of the summary judgment hearing, is unusual. More significantly, it is unclear to this court what type of claim the Neimans wanted to bring against GE. On the one hand, the Neimans' use of the words "negligence" and "tortfeasor" suggest they are discussing a potential tort claim against GE. On the other hand, the Neimans' statements about there being "a *different* policy" and "questions over which items are *** insured under *either* policy" suggest they are discussing a contract dispute about GE's written insurance policy with Electric Insurance Company. The Neimans tell us they attached a proposed verified complaint to their motion to join GE as a defendant. There is, however, nothing attached to the motion in the record on appeal. The Neimans were aware of this deficiency, because they cite only to their five-page motion, as "Supplemental Record at C 64- 68." Nonetheless, the Neimans did not attempt to further supplement the record with the missing attachment.

¶ 65 In the absence of a sufficiently complete record, we presume that the court's denial of the motion to join GE was consistent with both the facts and law and that the information missing from the record supports the court's ruling. *Webster*, 195 Ill. 2d at 432; *Foutch*, 99 Ill. 2d at 392.

¶ 66 For the reasons discussed, we affirm the trial court's orders.

¶ 67 Affirmed.