SECOND DIVISION
June 30, 2017

Nos. 1-15-2546 & 1-16-0110

ASTOR PLAZA CONDOMINIUM ASSOCIATION, DANIEL G. MOHEN, TRAVIS W. COCHRAN, GEETA KRISHNAMURTHI, and WILLIAM S. LODER, Plaintiffs-Appellees/Cross-Appellants, v. TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, MERRIMACK MUTUAL FIRE INSURANCE COMPANY, MARGARET GOLDBERG, ROSENTHAL BROS., INC., and KASS MANAGEMENT SERVICES, INC., Defendants, (Astor Plaza Condominium Association, Plaintiff-Appellee/Cross-Appellant/Appellant; Merrimack Mutual Fire Insurance Company, Defendant-Appellant/Cross-Appellee/Appellee; Margaret Goldberg, Defendant-Appellant).	)	Appeal from the Circuit Court of Cook County No. 08 CH 41355 The Honorable Franklin U. Valderrama, Judge Presiding.

JUSTICE PIERCE delivered the judgment of the court.
Presiding Justice Hyman and Justice Neville concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court's judgment in this insurance coverage dispute is affirmed where (1) it properly refused to consider extrinsic evidence when granting summary judgment in favor of the individual plaintiffs on the issue of whether the insurer had a duty to defend under a directors and officer's endorsement to an insurance policy, (2) it correctly found that the insurer had a duty to defend, that it breached that duty to defend, and was therefore estopped from asserting any policy

> defenses to coverage, (3) it did not abuse its discretion in awarding the individual plaintiffs attorney fees under section 155 of the Insurance Code, (4) it properly refused to award the individual plaintiffs multiple statutory penalties under section 155, (5) its award of damages to the individual plaintiffs following a bench trial was not against the manifest weight of the evidence, (6) it correctly granted the insurer a set-off based on the plaintiffs' settlement with another insurer, and (7) it correctly determined that the entity plaintiff was not entitled to a defense or indemnity under the directors and officers endorsement.

¶ 2 Margaret Goldberg sued Astor Plaza Condominium Association and the individuals whom she alleged were directors or officers of Astor Plaza's board of directors. The consolidated appeals before us stem from the declaratory judgment action in which Astor Plaza, Daniel Mohen, Travis Cochran, Geeta Krishnamurthi, and William Loder sought a declaration that Merrimack Mutual Fire Insurance Company had a duty to defend and indemnify under a directors and officer's (D&O) endorsement to an insurance policy that it had issued to Astor Plaza. The circuit court found that Merrimack had a duty to defend Mohen, Cochran, Krishnamurthi, and Loder under the D&O endorsement, that it breached that duty, and that it was therefore estopped from asserting any policy defenses to coverage. The circuit court, however, found that Merrimack did not have a duty to defend or indemnify Astor Plaza under the D&O endorsement.

¶ 3 A bench trial was held on the issue of damages, after which the circuit court awarded Mohen, Cochran, Krishnamurthi, and Loder over $500,000 in defense costs. The circuit court also found that Merrimack's conduct was vexatious and unreasonable in violation of section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2014)), and awarded over $400,000 in additional attorney fees and statutory fines. After trial, Goldberg filed a proposed finding of fact and conclusion of law that Merrimack had an independent duty to indemnify Astor Plaza under the D&O endorsement. The circuit court denied Goldberg's requested relief.

¶ 4 Merrimack appeals from the circuit court's judgment that it (1) had a duty to defend Mohen, Cochran, Krishnamurthi, and Loder, (2) was estopped from asserting any policy defenses due to its breach of the duty to defend, and (3) engaged in unreasonable and vexatious conduct under section 155 of the Insurance Code.

¶ 5 Astor Plaza, Mohen, Cochran, Krishnamurthi, and Loder cross-appeal the circuit court's judgment that (1) Merrimack had no duty to defend Astor Plaza, (2) Mohen, Cochran, Krishnamurthi, and Loder were entitled to a single statutory award of $60,000 pursuant to section 155 of the Insurance Code as opposed to a $60,000 award for each named party, (3) Mohen, Cochran, Krishnamurthi, and Loder were entitled to attorney fees at an agreed-to rate rather than the market rate of the fees, and (4) granted Merrimack a set-off based on a settlement with a different party.

¶ 6 Finally, Astor Plaza and Goldberg appeal the circuit court's judgment that Merrimack had no duty to indemnify Astor Plaza under the D&O endorsement.

¶ 7 For the following reasons, we affirm the judgment of the circuit court.

¶ 8 BACKGROUND

¶ 9 In *Goldberg v. Astor Plaza Condominium Association*, 2012 IL App (1st) 110620, we set forth the basic, undisputed facts of the underlying action that gave rise to this coverage dispute. Astor Plaza is an eight-unit condominium in Chicago, governed by the Astor Plaza Condominium Association (Astor Plaza). Margaret Goldberg, Daniel G. Mohen, Travis W. Cochran, Geeta Krishnamurthi, and William S. Loder were unit owners at all times relevant to the issues in this appeal. On October 8, 2005, Goldberg's attorney sent a letter to Astor Plaza's Board expressing concerns that Goldberg had with the condominium building and how it was being run. These concerns included problems with the building's windows and balconies, as well

as a lack of notice to unit owners regarding Board meetings and access to minutes of those meetings.

¶ 10 The undisputed facts show that in November 2005, a unit owner named David Drew invited all of the unit owners to a meeting in his unit. At the meeting, several unit owners expressed concerns about the building and its management. Goldberg did not personally attend the meeting, but her attorney attended on her behalf and expressed Goldberg's concerns. One topic discussed at the November 2005 meeting was the need to constitute a board. At the time of the November 2005 meeting, there was no formally elected board because all of the previously-elected board members had moved out of the building and no elections had been held to fill the vacant positions. Mohen, Cochran, Krishnamurthi, and Loder (collectively, the Individual Plaintiffs) were formally elected to Astor Plaza's board at a meeting in March 2006. In September 2006, the board held a meeting to discuss a renovation plan and a financing proposal for certain improvements to the building. Goldberg voiced concerns at the September 2006 meeting that the renovation plan would increase the costs to repair her window frames and that the financing proposal would adversely affect unit owners with small or no personal mortgages. The board designated a person to meet with Goldberg. In a September 2006 letter, the board informed Goldberg that it had redefined "limited common element" to include window frames and balconies, making unit owners responsible for maintenance and repairs of those elements. The board approved the renovation plan and financing plan at a November 2006 meeting.

¶ 11 A. Goldberg's Initial Complaint

¶ 12 Shortly after the November 2006 meeting, Goldberg filed a two-count complaint against Astor Plaza and the Individual Plaintiffs, both in their individual capacities and as members of Astor Plaza's board of directors. Goldberg's complaint made the following allegations. In

October 2005, she was compelled to retain counsel because the board was disregarding her concerns and had failed to complete necessary repairs to common elements. Her attorney sent a letter setting forth various concerns that Goldberg had and requested that the board meet to address those concerns. In November 2005, the board agreed to meet, and Goldberg's attorney attended that meeting to express concerns on her behalf, namely that she "had not received copies of minutes from the most recent meetings, at which the current Association Board had ostensibly been elected, and at which a change to the By-Laws had supposedly been agreed upon which changed the make-up of the Board to include any unit owners who 'want to be on the board.' " The unit owners in attendance agreed to review the situation, but despite certain promises made at the meeting, "over the course of the last year" the board reneged on its commitments, ignored her complaints, and selectively enforced rules.

¶ 13 Goldberg's complaint further alleged that in September 2006, the board held a meeting to approve a renovation plan and a financing proposal. Goldberg voiced her concerns at the September 2006 meeting, and the board designated a person to meet with Goldberg. In a September 2006 letter, the board informed Goldberg that it had redefined "limited common element" to include window frames and balconies, making unit owners responsible for maintenance and repairs. The board approved the renovation plan and financing agreement.

¶ 14 Count I of Goldberg's complaint asserted a claim for oppression of a minority shareholder pursuant to the Illinois Business Corporations Act (805 ILCS 5/1 (West 2006)), and requested relief in the form of an order (1) requiring the board to pay for repairs to Goldberg's window frames and balcony, (2) prohibiting financing agreements that create liens "on the common elements, common fund or individual units of owners," (3) appointing a receiver to manage Astor Plaza until a board was constituted that was "prepared to perform its duties in

accordance with" Astor Plaza's governing documents, and (4) granting Goldberg her costs and other additional relief. Count II sought a declaration that Astor Plaza's governing documents limited unit owners in their ability to pursue financing that would result in an encumbrance of any kind and that would affect the property or any part of the property.

¶ 15 B. Tender of Goldberg's Original Complaint and The Merrimack Policy

¶ 16 Astor Plaza and Individual Plaintiffs tendered defense of Goldberg's original complaint to Merrimack Mutual Fire Insurance Company. Merrimack received the tender on December 4, 2006. Astor Plaza was identified as the "Named Insured" on a Businessowners Liability Insurance policy issued by Merrimack for the policy period of December 27, 2004, to December 27, 2005. The policy contained a directors and officers (D&O) endorsement, which contained the following provisions:

> "Section I—Coverages
>
> A. Insuring Agreements
>
> 1. We will pay those sums that the 'Insured' becomes legally obligated to pay as damages, in excess of the ' Insured's ' retention, because of any civil claims first made against the 'Insured' during the policy term, or during the Insured's Extended Discovery Period, arising out of any 'Wrongful Act' committed during the policy term. No other obligation or liability to pay sums or perform acts or services is covered unless provided for under Supplementary Payments.
>
> * * *

> 2. This insurance applies to 'Wrongful Acts' only if a claim for damages because of a 'Wrongful Act' is first made against an 'Insured' during the policy term or Insured's Extended Discovery Period."

The D&O endorsement contained an exclusion, which provides that "[t]his insurance does not apply to claims *** [f]or anything other than money damages."

¶ 17 Section II of the D&O endorsement defined certain terms. "Loss" was defined as "any amount which an 'Insured' is legally obligated to pay or which the 'Named Insured' may be required or permitted by law to pay as indemnity to an 'Insured', for a claim or claims made against the 'Insured', individually or collectively, for which insurance is provided and shall include but be limited to damages, judgements [*sic*], or settlements ***." "Named Insured" was defined as "the organization named in the Declarations of this coverage part," which in this case was Astor Plaza. "Insured" was defined as "all Directors and Officers of the 'Named Insured' ***. The word 'Insured' shall also include persons *** who are no longer Directors and Officers of the 'Named Insured' *** at the time of discovery of a 'Wrongful Act' giving rise to a claim hereunder, but who were at the time when the 'Wrongful Act' upon which a claim is based was committed." "Wrongful Act" was defined as "any negligent act, any error, omission or breach of duty of Directors or Officers of the 'Named Insured' while acting in their capacity as such."

¶ 18 Section VI of the D&O Endorsement set forth the Insured's Extended Discovery Period, and provided that, in the event of non-renewal or cancellation of the policy, "such insurance afforded prior to such change shall not apply to 'Wrongful Acts' unless claim is made or 'suit' is brought within three years of the effective date of such change. The Insured's 'Extended Discovery Period only applies to 'Wrongful Acts' occurring during the policy period and shall be

excess over any other valid and collectible insurance." The D&O endorsement does not define "civil claim," "claim," "damages," or "monetary damages."

¶ 19 On January 9, 2007, Merrimack denied coverage. According to Merrimack's denial letter, it concluded that Goldberg's original complaint did not seek any money damages and did not allege any "wrongful act" as defined in the D&O endorsement. Merrimack stated that it would review and respond to any additional information or arguments if any were submitted, but Astor Plaza and Individual Plaintiffs did not submit any additional information or arguments.

¶ 20 C. Goldberg's Amendments to the Underlying Complaint

¶ 21 1. Goldberg's First Amended Complaint

¶ 22 On February 22, 2007, Goldberg filed her first amended complaint, which contained the same two counts from her original complaint, but sought additional relief. In count I of the first amended complaint, Goldberg sought an order requiring the board to (1) maintain and make available accurate minutes from its board meetings, (2) enforce the rules and regulations and impose fines on unit owners who have violated the rules and regulations, and (3) modify its governing documents to provide for dispute resolution procedures to avoid costly litigation. Count II asserted the same allegations as the original complaint, and sought the same declaratory relief, along with an additional request that if the board entered into a financing agreement, it should be construed as limited in enforceability to the property interests of only those unit owners who voted in favor of the financing agreement. Astor Plaza and Individual Plaintiffs did not tender the defense of Goldberg's first amended complaint to Merrimack.

¶ 23 2. Goldberg's Second Amended Complaint

¶ 24 On August 28, 2007, Goldberg filed a second amended complaint containing eight counts. The Individual Plaintiffs were named as defendants "solely in their capacity as individual

unit owners and not in their capacity as members of the *** Board." Count I sought to compel Astor Plaza to produce minutes of all board meetings from 2004 forward, and to grant Goldberg fees and costs. Count II sought recovery of attorney fees and costs incurred in requesting current copies of Astor Plaza's rules and regulations for 2005 through 2007. Count III sought a money judgment against Loder for "unauthorized assumption of corporate powers" based on promises he allegedly made on behalf of the board that he allegedly lacked authority to make. Count IV sought a declaration against Astor Plaza that Goldberg had a right to designate a representative to appear at board meetings on her behalf. Count V sought a declaration against Astor Plaza and the Individual Plaintiffs, "in their capacities as unit owners," that the financing agreement approved by the Board in November 2006 was in violation of Astor Plaza's governing documents. Count VI alleged that the Individual Plaintiffs, as members of the Board, imposed *de facto* segregation of unit owners, and Goldberg sought a declaration that the Astor Plaza governing documents prohibited *de facto* segregation of classes among unit owners. Count VII sought a declaration that Astor Plaza was responsible for repairs to Goldberg's balcony and certain window frames. Count VIII sought an order (1) declaring that *de facto* segregation was not permitted and that Astor Plaza's rules and regulations should be enforced evenly, (2) requiring Astor Plaza to complete the work required on the limited common elements adjacent to Goldberg's unit, (3) declaring that the financing agreement could not create any liens or rights on Goldberg's property, (4) appointing a receiver to manage Astor Plaza, and (5) for any other relief.

¶ 25 Astor Plaza and the Individual Plaintiffs tendered Goldberg's second amended complaint to Merrimack. Merrimack's counsel acknowledged receipt of the tender on September 18, 2007, and indicated in a letter that he would forward a copy of the second amended complaint to

Merrimack for review. Merrimack never issued a coverage opinion with respect to the second amended complaint.

¶ 26 3. Goldberg's Third Amended Complaint

¶ 27 On June 6, 2008, Goldberg filed a third amended complaint, which repleaded counts I through VIII of her second amended complaint, and added count IX, seeking declaratory relief with respect to Astor Plaza's 2008 board election, count X, seeking declaratory relief against Astor Plaza for failing to keep, maintain, and produce minutes of board meetings going back to 2004, and count XI, which added three party defendants, but sought no specific relief.

¶ 28 4. Amendment to Goldberg's Third Amended Complaint

¶ 29 On April 9, 2009, Goldberg filed an "Amendment to Third Amended Complaint," which added three additional counts. Count XII sought an order declaring that the board did not have the power to change or modify Astor Plaza's governing documents, and that amendments were governed by Astor Plaza's declaration and bylaws. Count XIII alleged that the Individual Plaintiffs, "in their individual capacities and not in their capacities as current or former members of the *** Board," acted in their own interests and for their own benefit, including negotiating the financing agreement and causing substantial sums to be paid by the Association for defending Goldberg's action. Count XIV sought an order restraining the Individual Plaintiffs from taking any action, expending any funds, or making any binding representations on behalf of Astor Plaza.

¶ 30 D. The Instant Declaratory Judgment Action

¶ 31 Meanwhile, on November 3, 2008,[1] Astor Plaza and the Individual Plaintiffs filed the declaratory judgment action subject at issue in this appeal in the circuit court against Merrimack and Goldberg.[2] Relevant to the issues on appeal is count I, which sought a declaration that Merrimack breached its duty to defend Astor Plaza and the Individual Plaintiffs in Goldberg's underlying lawsuit, and that Merrimack should be estopped from asserting any policy defenses, and count III, which sought a declaration that Merrimack acted in a vexatious and unreasonable manner in violation of section 155 of the Insurance Code. Attached to the complaint were Goldberg's original complaint and her first and second amended complaints. Goldberg was named as a defendant in the declaratory judgment complaint, but Astor Plaza and the Individual Plaintiffs sought no specific relief against Goldberg.

¶ 32 On January 5, 2009, before Merrimack answered the declaratory judgment complaint, Mohen, Cochran, and Krishnamurthi were voluntarily dismissed as plaintiffs from the declaratory judgment action. On March 4, 2009, Astor Plaza and Loder filed a first amended complaint, asserting the same counts from the original declaratory judgment complaint that are relevant to this appeal and seeking the same relief. Attached to the first amended complaint were Goldberg's original complaint, and her first, second, and third amended complaints. The first amended complaint for declaratory judgment sought no specific relief against Goldberg.

[1]The Individual Plaintiffs originally filed the declaratory judgment action in the circuit court on October 7, 2007, but it was removed to federal court where Astor Plaza and the Individual Plaintiffs voluntarily dismissed the complaint.

[2]Travelers Casualty and Surety Company of America, Rosenthal Bros., Inc., and Kass Management were also named as defendants in the declaratory judgment action. They are not parties to this appeal.

¶ 33 On May 15, 2009, Merrimack answered the declaratory judgment complaint, and filed a counterclaim for declaratory judgment seeking a declaration that there was no coverage for Loder under the D&O endorsement.

¶ 34 On August 24, 2009, Goldberg filed a five-count counterclaim against Travelers, Merrimack, Kass Management, Rosenthal Bros., Inc., Astor Plaza, the Individual Plaintiffs, and others who are not parties to this appeal. Goldberg sought various forms of declaratory and injunctive relief. Several parties moved to dismiss Goldberg's counterclaim. The circuit court struck Goldberg's counterclaim on May 28, 2010, and granted her leave to file an amended counterclaim. Goldberg did not file an amended counterclaim.

¶ 35 On November 5, 2009, Astor Plaza and Loder moved for partial summary judgment, arguing that Goldberg's November 2006 action sought damages for alleged wrongful acts committed during Merrimack's policy period, and that Merrimack had a duty to defend under the D&O endorsement.

¶ 36 The parties then engaged in discovery. David Drew, another unit owner, testified in a discovery deposition that he was friends with Goldberg and reviewed her attorney's October 8, 2005, letter. Drew testified that in November 2005, he held an informal "meet-and-greet" for unit owners in his unit where unit owners could discuss any issues they had with the building. Drew stated that it was not a board meeting because he had no authority to call a board meeting.

¶ 37 Loder testified at his deposition that Goldberg complained to him in 2005 about issues she had with her windows and asked him to inspect her windows "as a neighbor," which he did. He stated that at the time, he was not in charge of the building and was not an officer or director of the board. He testified that he did not know of any actual or purported board members in 2005, and that he did not attend any board meetings. Loder attended the November 2005 "meet-

and-greet" in Drew's unit, and one of the topics discussed was the need to reconstruct a board, since all of the board members had moved out. Loder testified that he was surprised that Goldberg's attorney appeared at the gathering on Goldberg's behalf. He testified that a board was elected at a meeting on March 6, 2006, and he was elected to the board.

¶ 38 Cochran testified that he became a unit owner in April 2005, and was not aware of any unit owner that was a member of the board in 2005. He attended the November 2005 "meet-and-greet" where there was a consensus among unit owners that a board needed to be constructed. He testified that no board was elected until March 6, 2006. He further stated that no one told Goldberg's attorney that they were going to take any action with respect to any concerns of the unit owners in any capacity as officers or directors of Astor Plaza.

¶ 39 E. The Circuit Court's First Set of Summary Judgment Rulings

¶ 40 On April 21, 2010, Merrimack responded to the motion for partial summary judgment, arguing that there was no board in 2005 and that Loder was not elected to the board until March 2006, and therefore it was impossible for Loder to have committed any "wrongful act" in his capacity as a director or officer in 2005. Merrimack also argued that Loder was being sued individually and not in his capacity as a board member. Furthermore, Merrimack argued that Astor Plaza was not an "Insured" under the D&O endorsement, and was not entitled to a defense.

¶ 41 On May 28, 2010, the circuit court granted partial summary judgment in favor of Loder, finding that Merrimack had a duty to defend Loder and that Merrimack breached that duty. The circuit court, however, denied partial summary judgment to Astor Plaza. The circuit court also struck Goldberg's counterclaim pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2010)), and gave her leave to file an amended counterclaim on or before July 7, 2010. Goldberg did not file an amended counterclaim.

¶ 42 F. The Second Amended Complaint for Declaratory Judgment

¶ 43 On July 30, 2010, Astor Plaza and the Individual Plaintiffs filed a seven-count second amended complaint for declaratory judgment, adding Mohen, Cochran, and Krishnamurthi as plaintiffs. The second amended complaint contained the same relevant counts from the original complaint. Count I of the second amended complaint sought a declaration that Merrimack owed Mohen, Cochran, and Krishnamurthi a duty to defend and that Merrimack breached that duty, and count III sought a declaration that Merrimack's conduct violated section 155 of the Insurance Code.

¶ 44 On September 17, 2010, Astor Plaza and the Individual Plaintiffs invited Merrimack to participate at a mediation between the Association and Travelers. Merrimack declined to attend.

¶ 45 G. The Circuit Court's Second Set of Summary Judgment Rulings

¶ 46 On October 1, 2010, Merrimack moved for summary judgment against Astor Plaza, arguing that it was not an "Insured" under the D&O endorsement.

¶ 47 On March 22, 2011, the circuit court granted summary judgment in favor of Merrimack and against Astor Plaza, finding that Astor Plaza was not an "Insured" under the D&O endorsement, and therefore Merrimack had no duty to defend or indemnify Astor Plaza.

¶ 48 On April 20, 2011, Mohen, Cochran, and Krishnamurthi moved for partial summary judgment on the second amended complaint, arguing that Goldberg's action was a suit seeking damages for alleged "Wrongful Acts" committed during Merrimack's policy period, and that Merrimack owed a duty to defend. Merrimack responded with the same arguments it raised in response to Loder's motion for partial summary judgment. See *supra* ¶ 40.

¶ 49 On August 18, 2011, Merrimack moved for reconsideration of the circuit court's May 28, 2010, order granting summary judgment in favor of Loder and finding that Merrimack owed him

a duty to defend. The record does not reflect whether the circuit court ruled on Merrimack's motion to reconsider.

¶ 50 On September 22, 2011, the circuit court denied Mohen, Cochran, and Krishnamurthi's motion for partial summary judgment, but on February 27, 2013, Mohen, Cochran, and Krishnamurthi moved to reconsider. In a written order dated October 9, 2013, the circuit court granted the motion to reconsider, finding that it should not have considered the deposition testimony and other extrinsic evidence as to when Mohen, Cochran, and Krishnamurthi were elected to the Board.

¶ 51 Mohen, Cochran, and Krishnamurthi and Merrimack then filed cross-motions for summary judgment on the issue of whether Merrimack owed Mohen, Cochran, and Krishnamurthi a duty to defend. On March 6, 2014, prior to ruling, the circuit court found that the matter was eligible for mediation and, by stipulation of the parties, appointed a mediator. However, counsel for Merrimack sent a letter to Astor Plaza, Mohen, Cochran, and Krishnamurthi's counsel denying that it requested or agreed to the mediation order. Krishnamurthi, on her own behalf and on behalf of Astor Plaza, and Travelers appeared at the mediation, and a representative from Merrimack participated by telephone. The mediation was unsuccessful. Travelers and Mohen, Cochran, and Krishnamurthi moved for sanctions against Merrimack pursuant to Cook County Circuit Court Rule 21.04(A) (Cook Co. Cir. R. 21.04(A) (Aug. 1, 2013)) for failing to appear in person at the mediation. The circuit court denied Mohen, Cochran, and Krishnamurthi's motion for sanctions but granted Travelers' motion for sanctions against Merrimack.

¶ 52 On May 8, 2014, the circuit court granted Mohen, Cochran, and Krishnamurthi's renewed motion for partial summary judgment and denied Merrimack's cross-motion for summary

judgment, finding that Merrimack owed Mohen, Cochran, and Krishnamurthi a duty to defend, and that it breached that duty. Specifically, the circuit court found that (1) Mohen, Cochran, and Krishnamurthi were "Insureds" under the D&O endorsement, (2) Goldberg had alleged sufficient facts to show "Wrongful Acts" during the policy period, (3) Goldberg's original complaint alleged "damages," (4) the "money damages" exclusion in the Merrimack policy was ambiguous, and (5) Merrimack was estopped from asserting any policy defenses regarding whether it had a duty to defend against Goldberg's first, second, and third amended complaints.

¶ 53 H. Trial on Remaining Issues

¶ 54 On July 29, 2014, the circuit court set the case for trial on the issues of defense costs and whether there had been a section 155 violation. Merrimack filed a motion for partial summary judgment on the issues of whether Merrimack violated section 155 of the Insurance Code and on defense fees. On October 7, 2014, Astor Plaza and the Individual Plaintiffs requested leave to file a third amended complaint for declaratory judgment to include count VIII against Merrimack for breach of contract. The proposed count VIII alleged that Merrimack had not undertaken a defense of the Individual Plaintiffs, and that Astor Plaza suffered damages as a result. Furthermore, the proposed count VIII alleged that Astor Plaza was entitled to reimbursement from Merrimack under the D&O endorsement for defense costs that Astor Plaza paid on behalf of the Individual Plaintiffs. On the first day of trial, the circuit court denied Merrimack's motion for summary judgment on the issue of defense fees. The circuit court also denied Astor Plaza and the Individual Plaintiffs' motion for leave to file a third amended complaint as untimely but without prejudice to renewing the motion following trial.

¶ 55 The following testimony at trial is relevant to the issues on appeal. Loder testified that he attended a meet-and-greet in November 2005, and that Goldberg's attorney raised issues on her

behalf regarding her railings, balcony, and windows. Loder was not a member of Astor Plaza's board in November 2005 and was unaware of whether there was in fact a board at that time. He was elected to the board in March 2006. He testified that as a result of the Goldberg action, special assessments were assessed against unit owners. He further testified Astor Plaza hired the law firms of Keough & Moody and Edward T. Joyce & Associates to defend against Goldberg's action. He testified that he was never contacted by Merrimack after summary judgment was granted in his favor in 2010, that he had been unable to sell his unit, that his mortgage lenders obtained judgments against him, and that he moved out of Astor Plaza in 2008. Loder testified that he tried to contact Merrimack regarding its failure to provide him with a defense, and that Merrimack's counsel responded by threatening him with a defamation lawsuit.

¶ 56 Ann Marie Ryan testified that she was a claims examiner for Andover Company, that Merrimack is one of Andover's companies, and that she was the examiner assigned to the Goldberg action. She testified that Merrimack immediately retained an attorney to respond to the tender of Goldberg's original complaint, and that Merrimack did not update its coverage position after it received Goldberg's second amended complaint.

¶ 57 Mohen testified that he attended a get-together of unit owners in November 2005, and that Goldberg's attorney attended and raised issues on her behalf. Mohen was not a member of the board in November 2005, and was first elected to the board in March 2006. He did not believe that there was a board in 2005.

¶ 58 Krishnamurthi testified that she became a unit owner in October 2005, and did not attend the November 2005 "meet-and-greet." She was not aware of any board members in 2005, and did not become a board member until March 2006.

¶ 59 Cochran testified that he attended the November 2005 "meet-and-greet." He stated that at the "meet-and-greet," there was a discussion about forming a board and who would hold positions on the board. He stated that at the end of the "meet-and-greet," the unit owners discussed who would be willing to serve on the board and in what capacity. He testified, however, that there was no formal election for the board prior to March 6, 2006. He further testified that due to the special assessments for payment of attorney fees in the Goldberg action, he was unable to maintain payments on his unit, and his mortgage lender foreclosed on his unit.

¶ 60 Art Aufmann testified on the issue of attorney fees. He and Jake Armstrong, attorneys at the Edward T. Joyce & Associates, represented Astor Plaza and the Individual Plaintiffs in the underlying action. Aufmann testified that he and his firm are experienced litigators in the field of complex litigation, and that his standard rate was $450 per hour, while Armstrong's standard rate was $250 per hour. Aufmann agreed to handle Astor Plaza and the Individual Plaintiffs' defense at a reduced rate of $375 per hour, while Armstrong's reduced rate was $175 per hour. Aufmann testified that he undertook the defense at a lower rate because Astor Plaza and the Individual Plaintiffs were under financial strain—they already owed Keough & Moody around $200,000, and Astor Plaza's insurers were refusing to pay defense costs. He testified that the reduced rate was contingent on his bills being promptly paid. He testified that his bills were not promptly paid, but that he did not increase the rate because "I wasn't going to ask my office manager to go back and change a bunch of invoices and change whatever she was doing in a situation where there was no payments [*sic*] being made at all. It was just something that I didn't want to bother with." He then testified that the lower rate was conditioned on the bills being paid promptly, which they were not. Aufmann testified that he gave another discount contingent on a lump-sum payment being made, but that the payment was not made.

¶ 61 After the trial, the circuit court granted Astor Plaza and the Individual Plaintiffs leave to file a third amended complaint to conform the pleadings to proofs at trial. The third amended complaint was identical to the second amended complaint, with the addition of count VIII. Count VIII sought (1) a declaration that Merrimack had a contractual duty to reimburse Astor Plaza for "losses" incurred in connection with defending against Goldberg's action, including amounts that Astor Plaza was required or permitted to pay to indemnify Mohen, Cochran, Krishnamurthi, and Loder, (2) an order finding that Merrimack breached that duty, (3) damages equal to the amount of defense fees and costs, and (4) an order awarding Astor Plaza damages as Mohen, Cochran, Krishnamurthi, and Loder's subrogee.

¶ 62 I. Posttrial Motions and Filings

¶ 63 On December 19, 2014, Goldberg submitted proposed findings of fact and conclusions of law. She contended that, in the underlying suit, the issue of liability on Count X of her third amended complaint had been resolved in her favor and against Astor Plaza in *Goldberg*, 2012 IL App (1st) 110620. She therefore argued that the issue of whether Merrimack had a duty to indemnify Astor Plaza for amounts that it owed her was ripe for adjudication; and that the amount of those damages would be determined in the underlying action. Goldberg claimed that, in the underlying action, the circuit court had previously determined that any damages arising from the Individual Plaintiffs' wrongful acts should be paid by Astor Plaza, and thus Astor Plaza was obligated to indemnify the Individual Plaintiffs. Her argument was essentially that Merrimack should not be able to avoid indemnifying Astor Plaza for losses it incurred as a result of indemnifying the Individual Plaintiffs for their wrongful acts.

¶ 64 On December 29, 2014, Merrimack filed a motion for a set-off, contending that any award on count I of Astor Plaza and Individual Plaintiffs' complaint should be reduced by amounts that Astor Plaza received in a settlement it reached with Travelers and Rosenthal.

¶ 65 J. The Circuit Court's Orders and Judgments and Appeal No. 1-15-2546

¶ 66 On February 27, 2015, the circuit court issued a written order that contained its findings of fact and conclusions of law. The circuit court found that Merrimack's policy covered the term of December 17, 2004, to December 27, 2005, that Astor Plaza's board of directors was formally elected in March 2006, and that Goldberg's action was initiated within the three-year Extended Discovery Period. The circuit court reaffirmed its findings from its May 28, 2010, order, and its May 8, 2014, order, that Merrimack owed the Individual Plaintiffs a duty to defend, and that Merrimack breached that duty. The circuit court found that Merrimack was obligated to pay for all reasonable defense costs incurred by the Individual Plaintiffs in defending against the Goldberg action. After deducting for certain charges unrelated to the defense of the Goldberg action, the circuit court awarded the Individual Plaintiffs $224,356.26 in reasonable attorney fees incurred by the Keough & Moody firm.

¶ 67 The circuit court then considered Aufmann's testimony regarding an express agreement to charge a reduced fee, and determined that Aufmann's and Armstrong's agreed-to reduced hourly rates of $375 and $175 per hour, respectively, were the proper and reasonable rates for calculating defense fees. After deducting certain billing entries not related to defending against the Goldberg litigation, the circuit court awarded the Individual Plaintiffs $492,022.45 as reasonable attorney fees incurred by the Joyce firm.

¶ 68 The circuit court then found that Merrimack's conduct toward the Individual Plaintiffs was vexatious and unreasonable because Merrimack (1) denied coverage of Goldberg's original

complaint, (2) failed to provide an updated coverage position after receiving Goldberg's second amended complaint, (3) forced Astor Plaza and the Individual Plaintiffs to file a declaratory judgment action, (4) although it raised good faith arguments regarding its coverage position, never undertook a defense of the Individual Plaintiffs after the circuit court's May 28, 2010, order finding that Merrimack owed Loder a duty to defend, and (5) did not participate in the settlement mediation following the May 28, 2010, order. The circuit court awarded the Individual Plaintiffs a single $60,000 statutory penalty pursuant to section 155 of the Insurance Code, and granted the Individual Plaintiffs leave to file a petition for attorney fees in order to prove up their attorney fees in connection with the section 155 award.

¶ 69 Finally, the circuit court found that count VIII did not conform to the proofs at trial. The circuit court found that count VIII was essentially an attempt to relitigate the circuit court's prior ruling that Merrimack had no duty to defend Astor Plaza, and that Merrimack would be prejudiced if the circuit court effectively reconsidered its March 22, 2011, ruling based on the purported new theory of recovery. The circuit court therefore dismissed count VIII of the third amended complaint.

¶ 70 On August 17, 2015, the circuit court entered a judgment order which incorporated the February 27 order containing its findings of fact and conclusions of law. The circuit court found that Merrimack breached its duty to defend and awarded damages in favor of the Individual Plaintiffs in the amount of $716,378.71. The circuit court allowed Merrimack's motion to apply a $200,000 set-off from an earlier settlement between the plaintiffs and Travelers, and then added $22,075.30 in postjudgment interest, for a total award on count I of $538,454.01.

¶ 71 On the Individual Plaintiffs' section 155 claim, the circuit court found that Merrimack acted vexatiously and unreasonably and assessed taxable costs and reasonable attorney fees in

the amount of $338,362.65 plus $2565 in postjudgment interest. The circuit court also assessed a statutory penalty of $60,000, for a total award on the section 155 claim of $401,018.65.

¶ 72 In sum, the Individual Plaintiffs were awarded $939,381.66 plus the costs of suit.

¶ 73 The August 17, 2015, judgment order contained a finding pursuant to Supreme Court Rule 304(a) (eff. Feb. 26, 2010) that there was no just cause for delaying enforcement or appeal, and that all matters in Merrimack's counterclaim had been resolved. Merrimack filed its notice of appeal on September 9, 2015, from the circuit court's February 27 and August 17 orders. Astor Plaza and the Individual Plaintiffs filed their notice of cross-appeal on September 18, 2015, which identified in relevant part the March 22, 2011, order granting summary judgment in favor of Merrimack as to its duty to defend Astor Plaza, as well as the February 27 and August 17 orders. Merrimack's appeal and the cross-appeal were assigned docket no. 15-2546.

¶ 74 K. Final Judgment and Appeal No. 1-16-0110

¶ 75 Despite having entered final judgments on all of Astor Plaza's claims, as well as all of Merrimack's claims, on December 30, 2015, the circuit court entered an order on Goldberg's "Trial Memorandum in Support of Judgment on the Issue of Indemnity against Merrimack." The circuit court's order set forth the procedural history of the case, including the observation that Goldberg's counterclaim was stricken in May 2010, and that she never filed an amended counterclaim. The circuit court also observed that Merrimack had questioned Goldberg's right to submit her trial memorandum, since she had no pleading on file for Merrimack to address. The circuit court did not address whether Goldberg's filing was properly before it. The circuit found that the issue of indemnity was ripe for adjudication, and that Astor Plaza and the Individual Plaintiffs' complaint and Merrimack's counterclaim all referenced a determination of the issue of indemnity. The circuit court observed, however, that it had already determined that Merrimack

had no duty to defend or indemnify Astor Plaza. The circuit court therefore entered judgment in favor Merrimack finding that it had no duty to indemnify Astor Plaza.

¶ 76 On January 21, 2016, Astor Plaza and the Individual Plaintiffs filed a notice of appeal, which was assigned docket no. 1-16-0110, from the circuit court's December 30, 2015, judgment order, as well as all of the orders previously identified in the September 18, 2015, notice of appeal. Also on January 21, Goldberg filed her "notice of appeal/joining prior appeal" from the circuit court's March 22, 2011, order granting summary judgment in favor Merrimack on the duty to defend Astor Plaza, and the December 30, 2015, order finding that Merrimack had no duty to indemnify Astor Plaza. Astor Plaza and the Individual Plaintiffs and Goldberg's appeal were assigned docket no. 16-0110. We have consolidated all of the appeals.

¶ 77 ANALYSIS

¶ 78 A. Merrimack's Appeal

¶ 79 On appeal, Merrimack argues that the circuit court erred by (1) granting summary judgment in favor of the Individuals Plaintiffs on the issue of whether Merrimack had a duty to defend them in Goldberg's underlying action, (2) finding that Merrimack was estopped from asserting any policy defenses due to its breach of the duty to defend, and (3) finding that Merrimack engaged in unreasonable and vexatious conduct under section 155 of the Insurance Code. We address these arguments in turn.

¶ 80 1. Merrimack's Duty to Defend the Individual Plaintiffs

¶ 81 We first address Merrimack's argument that the circuit court erred by granting summary in favor of the Individual Plaintiffs on the issue of whether Merrimack had a duty to defend them in the Goldberg action. Merrimack contends that it properly presented extrinsic evidence showing that the Individual Plaintiffs were not directors or officers of Astor Plaza during the

policy period where they each testified in their depositions that they were not on the board in 2005 and were not elected to the board until March 2006. Merrimack contends these facts make it clear that the Individual Plaintiffs could not have committed a "Wrongful Act" as defined by the policy within in the policy period. Merrimack contends that consideration of evidence extrinsic to the complaint and the D&O endorsement would not have determined an issue critical to the outcome of the underlying claims. Merrimack also contends that Goldberg's third amended complaint is the only relevant complaint for the purposes of determining whether it had a duty to defend.

¶ 82 A circuit court's ruling on summary judgment is reviewed *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992). Summary judgment is appropriate 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 2014).

¶ 83 To determine whether an insurer has a duty to defend, a court must look to the allegations of the underlying complaint and compare those allegations to the relevant portions of the insurance policy. *Outboard Marine*, 154 Ill. 2d at 107-08. If the underlying complaint alleges facts that fall or potentially fall within the policy's coverage, the insurer's duty to defend arises, (*id.* at 108), even if the allegations in the underlying complaint are groundless, false, or fraudulent. *General Agents Insurance Co. of America, Inc. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 155 (2005). The insured bears the initial burden of showing that a claim falls or potentially falls within the coverage of an insurance policy, and the burden then shifts to the insurer to demonstrate whether coverage is precluded by a policy limitation or exclusion. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453-54 (2009).

¶ 84 An insurance policy is a contract, and thus the interpretation of an insurance policy is governed by the same guiding principles applied in interpreting other types of contracts. *Maremont Corp. v. Continental Casualty Co.*, 316 Ill. App. 3d 272, 276 (2001). We must ascertain the intent of the parties, which we do by construing the policy as a whole, taking into consideration the risk involved, the subject matter of the insurance, and the purpose of the policy. *Outboard Marine*, 154 Ill. 2d at 108. Where the terms of a policy are unambiguous, we give those terms their plain and ordinary meaning. *Id.* However, if the policy's terms are susceptible to more than one reasonable interpretation, the term is deemed ambiguous, and will be construed in favor of the insured and against the drafter. *Id.*

¶ 85 a. Consideration of Extrinsic Evidence

¶ 86 Merrimack asserts that when a court is entertaining a motion for summary judgment on the issue of an insurer's duty to defend, the court may consider evidence extrinsic to the underlying complaint and the insurance policy. Merrimack relies on *Pekin Insurance Co. v. Wilson*, 237 Ill. 2d 446 (2010), *American Economy Insurance Co. v. Holabird & Root*, 382 Ill. App. 3d 1017, and *Fidelity & Casualty Co. of New York v. Envirodyne Engineers, Inc.*, 122 Ill. App. 3d 301 (1983).

¶ 87 In *Wilson*, our supreme court concluded that in some circumstances, courts could look beyond the underlying complaint to determine an insurer's duty to defend. *Wilson* involved an underlying claim in which the insured was sued for assault, battery, and intentional infliction of emotional distress. The insurer denied coverage and sought a declaratory judgment that it had no duty to defend based on the policy's exclusion for intentional conduct. After the underlying complaint was amended, Wilson filed an answer and counterclaim in which he asserted that he was acting in self-defense. The policy exclusion contained an exception for the use of reasonable

force to protect persons or property. *Id.* at 451. The circuit court granted the insurer's motion for a judgment on the pleadings, finding that the insurer had no duty to defend. The appellate court reversed that judgment, finding that it was appropriate to consider Wilson's counterclaim in determining the duty to defend. Our supreme court agreed, finding that *Holabird & Root* and *Envirodyne Engineers* "set forth the proper considerations for a circuit court to use in deciding whether it is appropriate to examine evidence beyond that contained in the underlying complaint in determining the duty to defend." *Wilson*, 237 Ill. 2d at 462. Specifically, *Wilson* approved of the finding that a court " 'may consider evidence beyond the underlying complaint if in doing so the circuit court does not determine an issue critical to the underlying action. *** The circuit court should be able to consider all the relevant facts contained in the pleadings, including a third-party complaint, to determine whether there is a duty to defend.' " *Wilson*, 237 Ill. 2d at 461 (quoting *Holabird & Root*, 382 Ill. App. 3d at 1024, 1031-32). Similarly, the court in *Envirodyne Engineers* found that, where an insurer files a declaratory judgment action:

> "[I]t may properly challenge the existence of [the duty to defend] by offering evidence to prove that the insured's actions fell within the limitations of one of the policy's exclusions. The only time such evidence should not be permitted in is when it tends to determine an issue critical to the determination of the underlying lawsuit ***. If a crucial issue will not be determined, we see no reason why the party seeking a declaration of rights should not have the prerogative to present evidence that is accorded generally to a party during a motion for summary judgment in a declaratory proceeding. To require the circuit court to look solely to the complaint in the underlying action to determine coverage would make the declaratory proceeding little more than a useless exercise possessing no attendant benefit and would greatly diminish a declaratory actions's

purpose of settling and fixing the rights of the parties." (Internal citations omitted.) *Envirodyne Engineers*, 122 Ill. App. 3d at 304.

¶ 88 The crucial concern is whether the consideration of facts outside of the "eight corners" of the underlying pleadings and applicable policy might determine an issue critical to the determination of the underlying suit. Here, Merrimack contends we must consider whether extrinsic evidence would determine an issue critical to Goldberg's third amended complaint, since that was the operative complaint at the time the parties moved for summary judgment regarding Merrimack's duty to defend. Astor Plaza and the Individual Plaintiffs disagree, arguing that (1) Merrimack never raised this argument in the circuit court, (2) an insurer's duty to defend is based on the conduct alleged in an underlying complaint as opposed to the legal theory set forth in the underlying complaint, and (3) Merrimack had already breached its duty to defend by the time Goldberg filed her third amended complaint, and Merrimack was therefore estopped from denying coverage.

¶ 89 We find that the circuit court did not err in refusing to consider extrinsic evidence in determining whether Merrimack had a duty to defend. Goldberg's original and first amended complaints alleged in part that the Individual Plaintiffs, while members of Astor Plaza's board, ignored her requests to complete repairs to common elements that she believed were Astor Plaza's responsibility and failed to provide proper notice of board meetings or access to minutes of those meetings. Whether the Individual Plaintiffs were in fact members of the board at that time was a crucial issue that Goldberg would have to prove in order to prevail against the Individual Plaintiffs. In her second and third amended complaints, Goldberg alleged that the Individual Plaintiffs engaged in conduct related to their role on the board, including failing to keep and maintain minutes of Board meetings as far back as 2004, and failing to uniformly

enforce Astor Plaza's rules on a variety of topics, which were also complained of in the original and first amended complaints. In order to prevail on all of her claims in the underlying action, Goldberg would need to prove that the Individual Plaintiffs were members of the board in 2005. While Merrimack contends that Goldberg's second and third amended complaints seek relief against the Individual Plaintiffs only as individuals and not as members of the board, the key question is whether the factual allegations of the underlying complaint potentially give rise to coverage under the insurance policy. *Outboard Marine*, 154 Ill. 2d at 108. Goldberg alleged the Individual Plaintiffs engaged in certain conduct while on Astor Plaza's board and that conduct formed a basis for liability. Therefore, we cannot say that the circuit court was required to consider extrinsic evidence as to when or whether the Individual Plaintiffs were elected to the board in order to determine whether there was a duty to defend them against Goldberg's claims, since Goldberg's allegations fell within or potentially within the coverage of the D&O endorsement, and resolving whether they were board members would have required determining a critical issue in the underlying action.

¶ 90 Furthermore, at no point in the proceedings below did Merrimack argue that the circuit court should only consider the third amended complaint in its analysis of whether extrinsic evidence might resolve an issue critical to the determination of the underlying suit. In their April 20, 2011, motion for summary judgment, Mohen, Cochran, and Krishnamurthi argued that Merrimack owed them a duty to defend because each version of Goldberg's underlying complaint fell within or potentially within the coverage of Merrimack's policy. Merrimack cites no relevant authority to support its position that Goldberg's third amended complaint is the operative complaint to consider in determining whether Merrimack had a duty to defend, or that we should only consider the third amended complaint in our review of whether the circuit court's

consideration of extrinsic evidence might have resolved an issue critical to the determination of the underlying suit.

¶ 91 Merrimack cites *Steadfast Insurance Co. v. Caremark Rx, Inc.*, 359 Ill. App. 3d 749, 761 (2005) for the proposition that only the actual complaint, not some hypothetical version of it, is to be considered when determining whether an insurer has a duty to defend. Merrimack's argument is premised on the concept of "pleading over," which embodies the rule that when a party files an amended complaint that does not incorporate the allegations set forth in a prior pleading, the prior pleading's allegations are no longer at issue. See *Foxcroft Townhome Owners Ass'n v. Hoffman Rosner Corp.*, 96 Ill. 2d 150, 154 (1983). We find Merrimack's argument unpersuasive.

¶ 92 In *Steadfast*, the insured argued that a particular count in the underlying complaint potentially fell within coverage because it did not distinguish between intentional and negligent conduct, and thus potentially fell outside the policy's exclusion for intentional conduct. *Steadfast*, 359 Ill. App. 3d at 761. We rejected that argument, since the entire complaint was predicated on a theory of intentional conduct, and therefore we determined that it is the " 'actual complaint, not some hypothetical version, that must be considered.' " *Id.* (quoting *Connecticut Indemnity Co. v. DER Travel Service, Inc.*, 328 F.3d 347, 305-51 (7th Cir. 2003). *Steadfast* simply does not support Merrimack's argument that we must only consider Goldberg's third amended complaint. Furthermore, *Foxcroft* involved the "well-established principle that a party who files an amended pleading waives any objection to the circuit court's ruling on the former complaints." *Foxcroft*, 96 Ill. 2d at 154 (1983) Here, the simple fact is we are confronted with a situation where Astor Plaza and the Individual Plaintiffs assert that the allegations of the underlying complaint, as well as subsequent amended complaints, triggered Merrimack's duty to

defend. We do not believe that we should turn a blind eye to the allegations in the initial and amended complaints against Astor Plaza and the Individual Plaintiffs for which a defense was sought. We therefore reject Merrimack's position that only Goldberg's third amended complaint should be considered in determining whether Merrimack had a duty to defend the underlying action, or that we should only consider the third amended complaint in our analysis of whether the circuit court's consideration of extrinsic evidence might have resolved an issue critical to the determination of the underlying suit.

¶ 93 Merrimack further argues that even if the circuit court was not obligated to consider extrinsic evidence at summary judgment, the circuit court should have reconsidered its prior summary judgment decisions regarding Merrimack's duty to defend in light of the trial testimony regarding when the Individual Plaintiffs were elected to the board. Merrimack contends that the trial testimony indisputably showed that the Individual Plaintiffs were not on the board at any time in 2005, that no board existed in 2005, and that the Individual Plaintiffs were not elected to the board until March 2006, which was outside the policy term.

¶ 94 But Merrimack never requested the circuit court to reconsider its prior summary judgment rulings in light of the trial testimony. Additionally, Merrimack advances no legal support for its position on appeal that the trial testimony would properly be considered in determining Merrimack's duty to defend, and advances no argument that the circuit court was under a duty to *sua sponte* reconsider its previous duty to defend rulings. Merrimack has therefore forfeited its argument that the circuit court should have reconsidered its summary judgment duty to defend rulings after trial. Ill. S. Ct. R. 341(h)(7) (eff. Jan. 1, 2016).

¶ 95 We find that the circuit court did not err in refusing to consider extrinsic evidence regarding when the Individual Plaintiffs were formally elected to the board when deciding at summary judgment that Merrimack owed a duty to defend under the D&O endorsement.

¶ 96 2. Estoppel

¶ 97 Merrimack next argues that the circuit court erred in finding that it was estopped from asserting any policy defenses to coverage. Merrimack contends that it never denied coverage for Goldberg's first, second, or third amended complaints, and that even if it did deny coverage, it had no duty to defend because Goldberg's complaints did not allege any "Wrongful Act" under the D&O endorsement, or assert any claim that sought money damages.

¶ 98 In general, an insurer that takes the position that a complaint potentially alleging coverage is not covered under an insurance policy may not simply refuse to defend the insured. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150 (1999). The insurer may either defend under a reservation of right, or seek a declaration that there is no coverage. *Id.* Failing to take either of these steps will result in the insurer being estopped from asserting any policy defenses to coverage if it is later determined that the insurer wrongfully denied coverage. *Id.* at 150-51. To determine whether estoppel applies, we must consider whether Merrimack had a duty to defend and whether it breached that duty. *Id.* at 151.

¶ 99 A. "Wrongful Acts"

¶ 100 Merrimack contends that it had no duty to defend the Individual Plaintiffs because Goldberg's original and first amended complaint did not allege a "Wrongful Act" that occurred during the policy period, and that none of Goldberg's claims sought monetary damages. Merrimack argues that even though Goldberg alleged that her attorney raised concerns at the November 2005 meeting, it was not until 2006 that the Board took any action that resulted in

Goldberg's claims. Furthermore, Merrimack contends that the original and first amended complaint only sought declaratory and injunctive relief, and thus did not involve a claim for money damages. We disagree.

¶ 101 As described more fully above, an insurer has a duty to defend if the allegations in the underlying complaint fall within or potentially within the coverage of the policy. *Outboard Marine*, 154 Ill. 2d at 108. Here, Goldberg's original complaint alleged that on October 8, 2005, her attorney sent a letter to Astor Plaza's board expressing concerns with the condominium building and how it was being run, including problems with the building's windows and balconies, as well as a lack of notice as to board meetings and minutes. While Merrimack argues that it was not until March 2006 that Astor Plaza held a formal election for the Board, and that it was not until September and November of 2006 that the Board approved the renovation and financing plans, Merrimack overlooks Goldberg's allegations that Astor Plaza and the Individual Plaintiffs, acting as board members, had failed to provide notice of board meetings and access to meeting minutes prior to October 2005, and had failed to complete and pay for repairs to common elements for which Astor Plaza was allegedly responsible. These alleged acts fall within the policy period of December 2004 to December 2005. Merrimack does not argue that failing to provide notice of meetings or failing to complete and pay for repairs falls outside of the definition of "Wrongful Act" under the terms of the D&O endorsement. We therefore find that Goldberg's original and first amended complaint alleged "Wrongful Acts" that occurred with the policy period.

¶ 102 B. "Insureds"

¶ 103 Merrimack argues that Goldberg's second and third amended complaints sought relief against the Individual Plaintiffs in their individual capacities rather than as members of the

board, and therefore did not seek relief against an "Insured" as defined by the D&O endorsement. But as we explained above, to determine whether an underlying complaint falls within or potentially within the coverage of an insurance policy, we look to the factual allegations of the underlying complaint, which are to be construed liberally, (*General Agents*, 215 Ill. 2d at 155), not the underlying plaintiff's legal theories (*Lyons v. State Farm Fire & Casualty Co.*, 349 Ill. App. 3d 404, 407 (2004)). Goldberg's second and third amended complaints alleged that the Individual Plaintiffs engaged in conduct related to their role on the board, including that they failed to keep and maintain minutes of board meetings as far back as 2004, and failed to uniformly enforce Astor Plaza's rules on a variety of topics during the policy period. In other words, Goldberg may have styled her claims against the Individual Plaintiffs as against them "individually," but the conduct she alleged that gave rise to her claims was conduct performed by the Individual Plaintiffs in their capacity as board members, and thus fell within or potentially within the D&O endorsement's coverage. The trial court was correct in finding Goldberg's second and third amended complaints alleged facts that potentially fell within the coverage of Merrimack's policy and that there was a corresponding duty to defend.

¶ 104 C. Monetary Damages

¶ 105 Merrimack also argues that it had no duty to defend the Individual Plaintiffs because Goldberg's original and first amended complaints sought only injunctive and declaratory relief and did not seek money damages. The D&O endorsement provides that Merrimack would "pay those sums that the 'Insured' becomes legally obligated to pay as damages," and further provided that "this insurance does not apply to claims *** [f]or anything other than money damages." The D&O endorsement does not define "damages" or "money damages."

¶ 106 "To the popular mind *** 'damages' connotes money one must expend to remedy an injury for which he or she is responsible, irrespective of whether that expenditure is compelled by a court of law in the form of compensatory damages or by a court of equity in the form of compliance with mandatory injunctions." *Outboard Marine*, 154 Ill. 2d at 116. "In the absence of policy language to the contrary, the language 'suit seeking damages' will be construed to include suits seeking either or both compensatory damages and equitable relief." *Central Illinois Light Co. v. Home Insurance Co.*, 213 Ill. 2d 141, 160 (2004).

¶ 107 Merrimack simply concludes that none of the relief Goldberg sought amounts to "money damages" under the policy, and cites *Crawford Laboratories, Inc. v. St. Paul Insurance Co. of Illinois,* 306 Ill. App. 3d 538 (1999) in support of its argument that a complaint seeking injunctive relief is not a suit seeking "damages." But *Crawford* is distinguishable. There, a paint manufacturer and distributor was sued in California under a statutory cause of action for placing toxic chemicals into the steam of commerce without giving proper notification under California law. *Crawford,* 306 Ill. App. 3d at 540. The suit alleged that individuals had been exposed to those chemicals and suffered irreparable harm. *Id.* The underlying plaintiffs sought as damages civil penalties under the statute, an injunction, restitution, and attorney fees and costs. *Id.* Crawford tendered defense of the suit to its insurer under a commercial general liability policy. *Id.* The insurer denied coverage on the basis that the underlying action did not seek damages and did not seek damages for bodily injury within the coverage of the policy. *Id.* Crawford sought a declaration as to coverage, and the circuit court found in favor of the insurer. *Id.* We affirmed, finding that the statute giving rise to the underlying claim provided no remedy for bodily injury, and therefore the underlying suit did not seek damages for bodily injury. *Id.* at 542. We also rejected the insured's argument that the underlying action alleged bodily injury, since we found

that the core of the underlying action sought damages for a statutory violation, and the alleged physical injuries to individuals was offered as evidence of the results caused by the statutory violation. *Id.* at 542-43.

¶ 108 Here, Goldberg's underlying complaints sought in part to compel Astor Plaza to perform and pay for repairs to the limited common elements that were required under the governing documents of Astor Plaza, and that the repairs had not been completed because of the board's intransigence. It stands to reason that any judgment compelling Astor Plaza and the board to perform repairs would require spending money to comply. Although the D&O endorsement provides that the policy does not cover claims for anything other than money damages, for the purposes of determining whether Merrimack had a duty to defend, we find that Goldberg's underlying complaints potentially implicated money damages that fell within the policy.

¶ 109 D. Breach

¶ 110 Finally, Merrimack contends that even if it had a duty to defend against any of Goldberg's underlying complaints, there is no evidence that it breached that duty, and therefore the estoppel doctrine does not apply. It argues that it did not cause any unreasonable delay in providing a coverage opinion after it received Goldberg's original complaint. It further argues that Astor Plaza and the Individual Plaintiffs filed their original declaratory judgment action less than six weeks after tendering Goldberg's second amended complaint. Merrimack concludes that its conduct did not "force" Astor Plaza and the Individual Plaintiffs to file a declaratory judgment action.

¶ 111 Merrimack's arguments are contrary to well-settled law. In *Ehlco*, our supreme court made it clear that estoppel applies where an insurer breaches its duty to defend. *Ehlco*, 186 Ill. 2d at 150. The court observed that estoppel is not appropriate where "the insurer had no duty to

defend, or if the insurer's duty to defend was not properly triggered," such as "where the insurer was given no opportunity to defend; where there was no insurance policy in existence; and where, when the policy and the complaint are compared, there clearly was no coverage or potential for coverage." *Id.* at 151.

¶ 112 As we discussed above, Merrimack breached its duty to defend, as the facts alleged in Goldberg's underlying complaints potentially fell within the coverage of the D&O endorsement. Merrimack simply refused to defend Astor Plaza and the Individual Plaintiffs, and did not act promptly to secure a declaration that it had no duty to defend. And Merrimack waited until January 5, 2009, nearly two years after denying coverage for Goldberg's original complaint, to seek a declaration (by way of a counterclaim) that it had no duty to defend under the policy. That was an unreasonable delay in seeking a declaration as to coverage. See *Korte Construction Co. v. American States Insurance*, 322 Ill. App. 3d 451, 458 (2001) (finding that an insurer that denied duty to defend, did not defend under reservation of rights, failed to seek a declaration as to its duty to defend and "did absolutely nothing," causing the insured to file its own declaratory judgment action 12 months after being sued in the underlying action was estopped from raising any policy defenses to coverage).

¶ 113 In sum, the circuit court correctly determined that Merrimack had a duty to defend the Individual Plaintiffs, that Merrimack breached that duty, and that Merrimack was estopped from asserting any policy defenses regarding coverage as to the Individual Plaintiffs.

¶ 114 3. Section 155

¶ 115 Lastly, Merrimack argues that the circuit court abused its discretion in finding that Merrimack violated section 155 of the Insurance Code. First, it contends that there was a *bona fide* dispute over coverage, and the circuit court expressly acknowledged that Merrimack

raised "good-faith arguments" regarding whether coverage existed, and therefore there was no basis for the circuit court to find that Merrimack violated section 155. Second, Merrimack argues that, under the totality of the circumstances, there is no support for a finding that its conduct was vexatious and unreasonable for the purposes of section 155.

¶ 116 The circuit court rendered its judgment following a bench trial, and therefore made findings of fact and weighed the evidence before reaching its decision. We defer to those factual findings unless they are contrary to the manifest weight of the evidence. *Cook ex rel. Cook v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 51. Factual findings are against the manifest weight of the evidence when the opposite conclusion is clearly evident, or the finding is arbitrary, unreasonable, or not based on the evidence. *Id.* A circuit court's finding that an insurer violated section 155 of the Insurance Code is reviewed for an abuse of discretion. *Ehlco*, 186 Ill. 2d at 160 (citing *Keller v. State Farm Insurance Co.*, 180 Ill. App. 3d 539, 554-55 (1989)). The circuit court abuses its discretion "only where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the [circuit] court's view." *Certain Underwriters at Lloyd's, London v. Abbott Laboratories*, 2014 IL App (1st) 132020, ¶ 68.

¶ 117 Section 155 of the Insurance Code provides that:

> "(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: *** " 215 ILCS 5/155(1) (West 2014).

¶ 118 The plain language of section 155 "directs that in a cause of action where there remains 'in issue' either the liability of a company on an insurance policy or the amount of loss to be paid under a policy or an unreasonable delay in 'settling a claim,' a court may award a monetary remedy to an insured" as described in the statute. (Emphasis omitted.) *Neiman v. Economy Preferred Insurance Co.*, 357 Ill. App. 3d 786, 794 (2005). Section 155 provides "an extracontractual remedy to policyholders whose insurer's refusal to recognize liability and pay a claim under a policy is vexatious and unreasonable." *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 520 (1996). In deciding whether an insurer's conduct is vexatious and unreasonable, we consider the totality of the circumstances, including the insurer's attitude, whether the insured was forced to sue to recover, and whether the insured was deprived of the use of his property." *Statewide Insurance Co. v. Houston General Insurance Co.*, 397 Ill. App. 3d 410, 426 (2009). "If a *bona fide* coverage dispute exists, an insurer's delay in settling a claim will not be deemed vexatious or unreasonable for purposes of section 155 sanctions." *Id.*

¶ 119 The circuit court's February 27, 2015, written order contained numerous findings of fact, including that Merrimack (1) denied coverage for Goldberg's original complaint on the basis that it did not seek money damages or allege a covered "Wrongful Act," (2) did not update its coverage position after it received Goldberg's second amended complaint, (3) forced Astor Plaza and the Individual Plaintiffs to file a declaratory judgment action, (4) raised good faith arguments in support of its coverage position, but did not change its actual position in light of the circuit court's May 28, 2010, order that Merrimack had a duty to defend Loder, or the May 8, 2014, order finding a duty to defend Mohen, Cochran, and Krishnamurthi, and (5) refused to participate in a settlement conference after the May 28, 2010, order.

¶ 120 Merrimack argues that its conduct did not force Astor Plaza and the Individual Plaintiffs to file a declaratory judgment action. It contends that no additional information was submitted in response to its denial of coverage for Goldberg's original complaint. It further argues that it was entitled to a reasonable amount of time to evaluate its coverage position after it received the tender of Goldberg's second amended complaint, and that Astor Plaza and the Individual Plaintiffs' declaratory judgment action was initially filed just six weeks after Merrimack received Goldberg's second amended complaint. Furthermore, Merrimack argues that the circuit court originally granted summary judgment in favor of Merrimack finding that it had no duty to defend Mohen, Cochran, and Krishnamurthi, and that it was entitled to rely on that decision.

¶ 121 We find that the circuit court's finding that Merrimack's conduct forced Astor Plaza and the Individual Plaintiffs to file a declaratory judgment action is not against the manifest weight of the evidence. Merrimack initially denied coverage for Goldberg's original complaint, and simply stood on that denial rather than pursuing a declaratory judgment action. Astor Plaza and the Individual Plaintiffs tendered Goldberg's second amended complaint to Merrimack, and after six weeks of waiting for Merrimack to update its coverage position, filed their initial declaratory judgment action. Merrimack came forward with no facts at trial to explain the six week delay, offered no evidence that it communicated with Astor Plaza and the Individual Plaintiffs during those six weeks, and offered no evidence that it was in the process of preparing its own declaratory judgment action. We cannot say that the circuit court's determination that Astor Plaza and the Individual Plaintiffs were forced to file a declaratory judgment action is arbitrary, unreasonable, or not based on the evidence.

¶ 122 Furthermore, we cannot say that the circuit court abused its discretion in finding that the totality of the circumstances weighed in favor of a finding that Merrimack's conduct was

vexatious and unreasonable. Merrimack cannot avoid the fact that, despite having been tendered Goldberg's original complaint in December 2006, it neither provided a defense nor sought a declaration regarding its duties under the policy until it filed its counterclaim in May 2009. Even then, Merrimack only sought a declaration that it had no duty to defend Astor Plaza and Loder. After the circuit court found in May 2010 that Merrimack had a duty to defend Loder, Merrimack did not defend Loder, and did not undertake a defense of Mohen, Cochran, and Krishnamurthi. It is true that in September 2011, the circuit court denied Mohen, Cochran, and Krishnamurthi's motion for partial summary judgment regarding whether Merrimack owed them a duty to defend. But after the circuit court reconsidered that order and entered summary judgment in favor of Mohen, Cochran, and Krishnamurthi in May 2014, Merrimack still did not provide them with a defense. And the record reflects that Merrimack refused to participate in a mediation in 2010 and was sanctioned for failing to have a representative appear in person at a mediation in 2014. The circuit court also considered evidence from the Individual Plaintiffs that Merrimack's refusal to pay defense costs created financial hardships for the unit owners. Based on the foregoing, we simply cannot say that the circuit court's finding that Merrimack's conduct towards the Individual Plaintiffs was vexatious and unreasonable was an abuse of discretion. We find no basis for disturbing the circuit court's ruling that Merrimack's conduct was vexatious and unreasonable, and therefore affirm the circuit court's judgment.

¶ 123 B. Individual Plaintiffs' Cross-Appeal

¶ 124 The Individual Plaintiffs cross appeal, arguing that the circuit court erred by (1) awarding them a single statutory award of $60,000 pursuant to section 155 of the Insurance Code as opposed to four individual $60,000 awards, (2) awarding them attorney fees at their agreed-to hourly rate rather than the market rate their attorneys customarily charged, and (3) granting

Merrimack a set-off based on a settlement with a different party. We address these arguments in turn.

¶ 125 1. Section 155

¶ 126 First, the Individual Plaintiffs argue that the circuit court erred by awarding them a single statutory award of $60,000 pursuant to section 155 of the Insurance Code as opposed to four separate $60,000 awards (one for each individual plaintiff) or $240,000. They contend that allowing a recovery of $60,000 per party is consistent with the purpose of section 155, which is to discourage an insurer from using its superior financial position at the insured's expense. They further argue that capping an insurer's liability under section 155 at $60,000 "would lead to inconvenient and unjust results in conflict with [s]ection 155's purpose."

¶ 127 The Individual Plaintiffs' argument requires us to interpret section 155 of the Insurance Code. The construction of a statute is a question of law that we review *de novo. DeLuna v. Burciaga*, 223 Ill. 2d 49, 59 (2006). Our objective when construing the meaning of a statute is to ascertain and give effect to the intent of the legislature. *Id.* "The plain language of a statute is the most reliable indication of the legislature's objectives in enacting that particular law [citation], and when the language of the statute is clear, it must be applied as written without resort to aids or tools of interpretation." *Id.*

¶ 128 Section 155 of the Insurance Code provides that:

> "(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." (Emphasis added.) 215 ILCS 5/155(1) (West 2014).

¶ 129 The plain language of the statute unambiguously provides that where the circuit court finds that the insurer's conduct was vexatious and unreasonable, the circuit court has the discretion to award attorney fees, costs, and "*an amount not to exceed any one of the following amounts*[.]" (Emphasis added.) 215 ILCS 5/155(1) (West 2014). This is an express limitation on the circuit court's ability to award a statutory penalty. Here, the Individual Plaintiffs filed a single section 155 claim against Merrimack based on their assertion that Merrimack's conduct was vexatious and unreasonable by denying them a defense under the D&O endorsement. The circuit court exercised its discretion in determining that a penalty was warranted and correctly determined that, based on the plain and unequivocal language of the statute, $60,000 was the maximum penalty allowed under section 155(1)(b) of the Insurance Code. 215 ILCS 5/155(1)(b) (West 2014).

¶ 130 The Individual Plaintiffs rely on *Pickering v. Owens-Corning Fiberglass, Corp.*, 265 Ill. App. 3d 806 (1994) to support their argument that each individual plaintiff must be treated as presenting a separate and distinct claim, and therefore each individual plaintiff is entitled to fair

consideration for their own case as if it were a separate lawsuit. Their reliance on *Pickering* is misplaced. *Pickering* did not involve section 155 of the Insurance Code. Instead, *Pickering* involved four separate cases involving four separate plaintiffs, each seeking to recover damages for employment-related injuries allegedly caused by the defendant's manufacture and distribution of insulation products that contained asbestos. The circuit court consolidated the cases and denied the defendant's subsequent motion to sever. The consolidated cases were then tried before a single jury. The circuit court instructed the jury that:

> "[T]he rights of each plaintiff were separate and distinct, that each plaintiff was entitled to a fair consideration of his own case, that each case was to be decided as if it were a separate lawsuit, and that each case much be governed by the instructions applicable to that case." *Pickering*, 265 Ill. App. 3d at 812.

The jury found in favor of the plaintiffs and awarded them compensatory and punitive damages. On appeal, the defendant argued that it was prejudiced by the circuit court's consolidation of the cases and the denial of its motion to sever because the jury heard testimony related to punitive damages, which are not available in wrongful death cases, which the defendant claimed improperly inflated the wrongful death compensatory damages award. *Id.* The defendant also claimed that the punitive damages award violated its substantive due process rights. *Id*. at 827. We affirmed, finding that the circuit court had carefully considered the consolidation of the cases and that the defendant suffered no prejudice, (*id.* at 813), and that the punitive damages award did not violate defendant's right to substantive due process (*id.* at 827).

¶ 131 *Pickering* bears no resemblance to the situation here and does not establish any rule or procedure regarding whether multiple plaintiffs who present a single claim against a common defendant are entitled to separate statutory awards for vexatious conduct. We reject the

Individual Plaintiffs' argument that when multiple plaintiffs bring a single claim in a single count for a single injury against a defendant pursuant to section 155, they have effectively brought individual "actions" that would entitle them to separate statutory awards under section 155.

¶ 132 Finally, the Individual Plaintiffs offer no authority for their position that even if they were entitled to individual awards, that they were each entitled to $60,000. The circuit court has discretion to determine an appropriate statutory penalty under section 155 of the Insurance Code. *Ehlco*, 186 Ill. 2d at 160. The Individual Plaintiffs have presented us with no argument that the circuit court would have abused its discretion if it had granted them each a $15,000 statutory penalty, for a total award of $60,000. We conclude that the circuit court did not err in granting the Individual Plaintiffs a single statutory penalty of $60,000 pursuant section 155(1)(b) of the Insurance Code.

¶ 133 2. Calculation of Attorney Fees

¶ 134 Next, the Individual Plaintiffs argue that the circuit court abused its discretion in awarding them attorney fees incurred by the Joyce firm at the agree-to rate rather than at the market rate established by the evidence. They argue that "the relevant hourly rate for determining the reasonableness of an attorney fee award [is] the market rate, even if the client was billed at a lower rate," and they contend that the circuit court applied the wrong standard when it failed to follow our supreme court's decision in *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 2013 IL 110505.

¶ 135 The Individual Plaintiffs argue that we should review the circuit court's attorney fee award for an abuse of discretion. It is important to remember, however, that the Individual Plaintiffs are seeking review of the trial court's award of attorney fees as a measure of damages following a bench trial based on the circuit court's findings of fact and conclusions of law.

Therefore, our standard of review is whether the trial court's judgment is against the manifest weight of the evidence. *Carey v. American Family Brokerage, Inc.*, 391 Ill. App. 3d 273, 277 (2009). "To reverse a finding of damages, a reviewing court must find that the trial judge ignored the evidence or that the measure of damages was erroneous as a matter of law." *Id.*

¶ 136 Here, the circuit court heard testimony from Aufmann that there was an express agreement that the Joyce firm would represent Astor Plaza and the Individual Plaintiffs as a single client in the underlying suit at a reduced hourly rate. Aufmann testified that he agreed to a reduced hourly rate because Astor Plaza and the Individual Plaintiffs were under financial strain—they already owed Keough & Moody around $200,000, and Astor Plaza's insurers were refusing to pay. He testified that the reduced rate was contingent on prompt payment. Although he was not promptly paid, he did not increase the hourly rate because "I wasn't going to ask my office manager to go back and change a bunch of invoices and change whatever she was doing in a situation where there was no payments [*sic*] being made at all. It was just something that I didn't want to bother with." He then testified that he "calculated what the fees as of today would be at the—at my standard hourly rates." Based on this testimony, the circuit court found that the Joyce firm had expressly agreed to represent the Individual Plaintiffs at a reduced hourly rate. The Individual Plaintiffs make no argument that this finding is against the manifest weight of the evidence. Instead, they argue that the circuit court applied the wrong legal standard because our supreme court in *Palm* held that the reasonableness of attorney fees must be calculated at the market rate. *Palm is distinguishable and not helpful in this regard.*

¶ 137 In *Palm*, a unit owner sued the condominium association under a city ordinance, which provided that a prevailing party could recover "reasonable attorney fees." 2013 IL 110505, ¶ 46. Palm had agreed to pay his attorney $200 per hour, but petitioned the circuit court to award him

$300 per hour. His attorney submitted an affidavit that the prevailing market rate for similar services was $300 per hour, which the condominium association did not dispute. The circuit court granted Palm attorney fees at the market rate. The appellate court affirmed, finding that the circuit court did not abuse its discretion in awarding attorney fees at the market rate. *Palm v. 2800 Lake Shore Drive Condominium Ass'n*, 401 Ill. App. 3d 868, 879-80 (2010).

¶ 138 Our supreme court affirmed, finding that the use of the phrase "reasonable attorney fees" in federal statutes "has generally been interpreted to require the use of the prevailing market rate in calculating a fee award." *Palm*, 2013 IL 110505, ¶ 51 (citing *Wisconsin v. Hotline Industries, Inc.*, 236 F.3d 363, 366 (7th Cir. 2000)). The court concluded that the ordinance's "use of the phrase 'reasonable attorney fees' indicates an intent to allow recovery based on the prevailing market rate for the attorney's services." *Palm*, 2013 IL 110505, ¶ 51.

¶ 139 Here, the Individual Plaintiffs were not seeking "reasonable attorney fees" pursuant to a statute. Plaintiffs seek damages for a contractual breach of the duty to defend. The circuit court awarded damages against Merrimack for a breach of its duty to defend the Individual Plaintiffs in the underlying suit. The circuit court's judgment reflected the damages incurred in the form of attorney fees that Astor Plaza and Individual Plaintiffs incurred and were billed pursuant to their agreement with the Joyce firm. The Individual Plaintiffs cite no authority to support their argument that the circuit court was required to calculate the damages award based on the market rate where, under these circumstances, a lower agreed to hourly rate was incurred. The circuit court determined that the best measurement of attorney fees portion of damages was Aufmann's testimony as to what he actually agreed to charge and did charge his clients. Aufmann testified that he did not revise his fee when he failed to be paid timely. Furthermore, there was evidence that some payments at the reduced rate were made and accepted by the Joyce firm. Therefore, the

circuit court could reasonably conclude that the agreed-upon rate was a reasonable basis for calculation of damages. The circuit court's finding was not against the manifest weight of the evidence.

¶ 140 3. Whether Merrimack Was Entitled to a Set-off

¶ 141 Finally, the Individual Plaintiffs argue that the circuit court erred in granting Merrimack a $200,000 set-off against the judgment on count I based on Astor Plaza and the Individual Plaintiffs' settlement with Travelers. They contend that the settlement with Travelers "compensated for a shortfall that was not duplicative of the defense fees awarded against Merrimack," but instead "compensated Astor Plaza for two items that were either not awarded, or that were not recoverable against Merrimack, namely (1) the attorney fees at the Joyce firm's standard rate which the [circuit] court refused to award, and (2) to the attorney fees incurred in prosecuting the case against Travelers." The Individual Plaintiffs argue that "the Travelers settlement was allocated to make up the difference" between the "$261,603.89 shortfall" between what they requested using a market rate and what they received as damages using the agreed upon hourly rate relative to the Joyce firm's fees.

¶ 142 We review a circuit court's decision to apply a setoff *de novo*. *Thornton v. Garcini*, 237 Ill. 2d 100, 115-16 (2010).

¶ 143 The record reflects that, in the circuit court, Merrimack requested that a $200,000 settlement between "the plaintiffs" and Travelers be applied as a set-off against any judgment entered against Merrimack for defense fees and costs incurred in connection with the underlying litigation. Astor Plaza and the Individual Plaintiffs responded by arguing that Merrimack was not entitled to benefit from the Travelers settlement as a set-off because Travelers compensated Astor Plaza and the Individual Plaintiffs "for amounts that were not recoverable against

Merrimack, and/or were not awarded to the Individual Plaintiffs." Astor Plaza and the Individual Plaintiffs argued that a creditor is permitted to apply payments from a debtor to any account the creditor chooses if there are no instructions from the debtor as to how to apply the payments. They contended that they applied the Travelers settlement "to the amounts which this [c]ourt specifically refused to award to the Individual Plaintiffs in this case, which were greater than the amount of the Travelers settlement." They also noted that the terms of the settlement with Travelers were confidential. Merrimack was not a party to the settlement agreement.

¶ 144 We find that the trial court did not err in granting Merrimack a set-off of the Travelers' settlement. Although the parties largely fail to explain the nature of Travelers policy and the scope of its coverage, the Individual Plaintiffs do not dispute that the settlement with Travelers compensated them for the failure to provide a defense in the underlying suit, which is the same injury for which they sought a damage recovery against Merrimack. Illinois law is clear that "[f]or one injury there should only be one recovery irrespective of the availability of multiple remedies and actions." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 422 (2002). Regardless of whether the Individual Plaintiffs had the right of recovery against multiple insurers under multiple insurance policies, they sought the singular relief of compensation for damages suffered in the form the attorney fees incurred in the defense of the underlying suit due to Merrimack's breach of its defense obligations under the D&O endorsement.

¶ 145 The Individual Plaintiffs do not challenge the circuit court's finding that "the legal services rendered to Astor Plaza and the Individual Plaintiffs in defense during the Goldberg Litigation were intertwined," and that the Keough & Moody and the Joyce law firms "did not incur additional fees as a result of their representation of Astor Plaza rather than the Individual Plaintiffs in the Goldberg Litigation." Therefore, after the bench trial, the circuit court

determined the total amount of attorney fees incurred by Astor Plaza and the Individual Plaintiffs in the defense of the underlying suit was $716,378.71 and entered a judgment against Merrimack. Of that $716,378.71, $492,022.45 was the fees charged by the Joyce firm. The Individual Plaintiffs claim that the circuit court's judgment resulted in a "shortfall" of $261,603.89: the difference between applying the market hourly rate for the Joyce firm's services ($753,626.34) and the agreed-to hourly rate actually billed for those services ($492,022.45). They argue that because the Travelers settlement was less than this "shortfall," they could allocate the Travelers settlement to the "shortfall" in order to recover the reasonable attorney fees to which they believe they are entitled. But we have already determined that the circuit court's calculation of damages related to the Joyce firm's fees was legally correct. The Individual Plaintiffs are therefore not entitled to claim the alleged "shortfall" between the market rate and the agreed-to rate of the Joyce firm to increase their damage award.

¶ 146 Furthermore, the Individual Plaintiffs cite no authority in this court, and cited no authority in the circuit court, to support their argument that they can allocate the Travelers settlement to claimed damages to which the circuit court found they were not entitled. They are entitled to a single satisfaction of the judgment they obtained. The Travelers settlement compensated the Individual Plaintiffs for damages in the form of attorney fees for defending the underlying suit. The circuit court therefore properly determined that Merrimack was entitled to a set-off of the Travelers settlement against the Individual Plaintiffs' damages judgment against Merrimack.

¶ 147 Finally, the Individual Plaintiffs argue that they should be entitled to allocate a portion of the Travelers settlement to attorney fees incurred in prosecuting their claims against Travelers. They contend that "at least $51,800 of Travelers'[s] settlement compensated Plaintiffs for

attorney fees which the circuit court did not award against Merrimack under Section 155." This argument appears to be based on the fee petition filed by the Individual Plaintiffs' attorneys after the circuit court granted them attorney fees pursuant to section 155. In the fee petition, counsel asserted that "Plaintiffs incurred in connection with [the declaratory judgment action] *** ($307,644.59), minus the amounts related solely to claims against other parties ($51,807.32), plus the $82,525.18 which this [c]ourt excluded from its award on the basis that the fees were related to the coverage case ***." We find, however, that the Individual Plaintiffs have failed to demonstrate on appeal that they argued in the circuit court that $51,807.32 had been allocated from the Travelers settlement and applied to their section 155 claim. Because they raise this argument for the first time on appeal, we find that they have forfeited their claim. Ill. S. Ct. R. 341(h)(7).

¶ 148 C. Astor Plaza's Consolidated Appeal

¶ 149 We next turn to Astor Plaza's consolidated appeal from the circuit court's judgment that Merrimack did not owe Astor Plaza any duty to defend or indemnify. Astor Plaza's overarching argument is that the circuit court erred in finding that Merrimack had no duty to defend Astor Plaza. Astor Plaza advances two arguments. First, Merrimack had an independent obligation under the D&O endorsement, separate from any duty to defend Astor Plaza or the Individual Plaintiffs, to pay all amounts that Astor Plaza was required or permitted to pay as indemnity to its directors and officers, even if Astor Plaza was not an "Insured" under the D&O endorsement. Second, Astor Plaza argues that it was entitled to a defense under the D&O endorsement because it was the "Named Insured."

¶ 150 The circuit court granted summary judgment in favor of Merrimack, finding that it had no duty to defend or indemnify Astor Plaza because Astor Plaza was not an "Insured" under the

D&O endorsement. Separately, after the bench trial, the circuit court granted Astor Plaza leave to file a third amended complaint to include a count VIII, which sought (1) a declaration that Merrimack had a contractual duty to reimburse Astor Plaza for "losses" incurred in connection with defending against Goldberg's action, including amounts that Astor Plaza was required or permitted to pay as indemnity to the Individual Plaintiffs, (2) an order finding that Merrimack breached that duty, (3) damages equal to the amount of defense fees and costs, and (4) an order awarding Astor Plaza damages as the Individual Plaintiffs' subrogee. The circuit court subsequently found that it erred in granting leave to amend because count VIII was an attempt to relitigate the question of whether Merrimack had a duty to defend Astor Plaza, and that did not conform to the proofs at trial, and therefore struck count VIII.

¶ 151 We review a circuit court's ruling on a motion for summary judgment *de novo*. *Outboard Marine*, 154 Ill. 2d at 102. We note, however, that Astor Plaza fails to set forth the standard of review applicable to the circuit court's order striking count VIII. The circuit court reconsidered its prior order granting Astor Plaza leave to file an amended pleading, and a circuit court's ruling on a motion to reconsider is generally reviewed for an abuse of discretion. *O'Shield v. Lakeside Bank*, 335 Ill. App. 3d 834, 837-38 (2002). Likewise, a circuit court's decision to grant or deny leave to file an amended pleading is reviewed for an abuse of discretion. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273-74 (1992). In its written order, the circuit court agreed with Merrimack that count VIII was an attempt to relitigate the issue of Astor Plaza's indemnity, and that Astor Plaza was effectively asking the circuit court to reconsider its March 22, 2011, ruling that Merrimack had no duty to defend or indemnify Astor Plaza based on a new legal theory. In striking count VIII, the circuit court reconsidered its order granting Astor Plaza leave to file an amended pleading, and then denied Astor Plaza leave to file an amended pleading

containing count VIII. We therefore construe the circuit court's ruling as one denying leave to amend, which we will review for an abuse of discretion. *Loyola Academy*, 146 Ill. 2d at 273-74.

¶ 152 1. Whether Merrimack Had a Separate Duty to Indemnify Astor Plaza

¶ 153 We first address Astor Plaza's argument that the D&O endorsement imposes a duty on Merrimack to reimburse Astor Plaza for any indemnity payments Astor Plaza made to its directors and officers. Astor Plaza contends that the "Insuring Agreements" in section I of the D&O endorsement provides that Merrimack "will pay those sums that the 'Insured' becomes legally obligated to pay as damages, in excess of the "Insured's" retention, because of any civil claims first made against the 'Insured' during the policy term, or during the Insured's Extended Discovery Period, arising out of any 'Wrongful Act' committed during the policy term." The D&O endorsement defines "loss" as "any amount which an 'Insured' is legally obligated to pay or for which the 'Named Insured' may be required or permitted to pay by law to pay as indemnity to an 'Insured', [*sic*] individually or collectedly, for which insurance is provided ***." Astor Plaza further relies on Section III of the D&O endorsement, which sets the limit of insurance. Specifically, Astor Plaza relies on paragraph B, which provides that "The Limit of Insurance stated as applicable to each 'Wrongful Act' is the most we will pay for all "loss" arising out of one 'Wrongful Act,' " and on paragraph C, which provides that "The Limit of Insurance stated as Aggregated Each Policy Year is,[3] subject to paragraph B above, the most we will pay for all covered 'loss' arising out of 'Wrongful Act' [*sic*] during each annual period beginning with the coverage inception date of this coverage part." Astor Plaza contends that, when read together, the foregoing provisions "imposed a contractual obligation on Merrimack to reimburse Astor Plaza for indemnification of its directors for their defense costs."

[3]"Aggregate Limit Each Policy Year" is defined in Section II as "the most we will pay for all 'losses' arising out of all 'Wrongful Acts' during the policy term."

¶ 154 Merrimack effectively concedes that the definition of "loss" in the D&O endorsement is an agreement that, if Astor Plaza indemnified its directors or officers for claims made against those directors and officers, "then Merrimack will reimburse [Astor Plaza] for the [indemnity] payments it made," provided that the payments were for a covered "loss." It is undisputed that Astor Plaza made payments toward the defense of the Individual Plaintiffs in the underlying litigation.

¶ 155 The plain language of the D&O endorsement's definition of "loss" provides that in the event that Astor Plaza was either "required or permitted" to indemnify an "Insured" for an amount covered by the D&O endorsement's "Insuring agreements," Merrimack would reimburse Astor Plaza. The purpose of this provision is clear: Merrimack cannot avoid its obligation to indemnify Astor Plaza's directors and officers simply because Astor Plaza indemnified its directors or officers. Regardless of whether indemnification is made in the first instance by Astor Plaza or Merrimack, Merrimack is still on the hook for the "loss." This is consistent with the D&O endorsement, which was designed to indemnify Astor Plaza's directors and officers (the "Insureds") for "sums that the 'Insured' becomes legally obligated to pay as damages" for a civil claim against the "Insured" made during the policy term.

¶ 156 Regardless of whether Merrimack is obligated to indemnify its "Insureds" under the D&O endorsement, or whether Merrimack is required to reimburse Astor Plaza for indemnity payments it made to the "Insureds," the result is the same: Merrimack is obligated under the D&O endorsement to pay the "Insured's" covered loss. In its February 27, 2015, order, the circuit court found that "Merrimack is obligated to pay for all reasonable [legal] services rendered at a reasonable rate for defense in the [underlying litigation,]" and determined that the total amount of attorney fees incurred in defending the Individual Plaintiffs was $716,378.71. In

the August 17, 2015, judgment order, the circuit court reduced the $716,378.71 amount by $200,000, which was the amount of a set-off from the Travelers settlement, and then added postjudgment interest for a total award of $538,454.01 on count I of Astor Plaza and the Individual Plaintiffs' complaint for declaratory judgment.

¶ 157 Astor Plaza cites no authority for the proposition that it is entitled to a separate judgment against Merrimack for reimbursement of its indemnity payments to the Individual Plaintiffs. Nor does Astor Plaza cite any authority that would allow Astor Plaza to recover more than what its directors and officers can recover in damages against Merrimack. Under the D&O endorsement, Astor Plaza's right to reimbursement from Merrimack is derivative of Merrimack's duty to indemnify Astor Plaza's officers and directors. The circuit court determined that the defense costs incurred by the attorneys representing the Individual Plaintiffs and Astor Plaza were intertwined, and that no additional defense costs were incurred as a result of the joint representation. The clear implication is that whatever damages in the nature of attorney fees that were incurred as a result of the breach of the duty to defend those damages were awarded to the Individual Plaintiffs. The circuit court ordered Merrimack to pay damages consisting of the attorney fees incurred by Astor Plaza's officers and directors as a result of the breach of its duty to defend. Astor Plaza may arguably be entitled to be reimbursed from that judgment amount, but has failed to demonstrate that it was entitled to its own separate judgment against Merrimack. Furthermore, in response to Merrimack's motion for summary judgment that it did not owe Astor Plaza a duty to defend, Astor Plaza took the position that Merrimack had a duty to defend and to indemnify Astor Plaza *for its own liability*. As we just discussed, Astor Plaza's right to reimbursement is derivative of Merrimack's duty to indemnify Astor Plaza's directors and

officers. Therefore, Astor Plaza's argument does not warrant reversal of the circuit court's March 22, 2011, order granting summary judgment in favor of Merrimack.

¶ 158 Nor can we say that the circuit court abused its discretion in denying Astor Plaza leave to file count VIII. Count VIII was predicated on Astor Plaza's legal theory that the D&O endorsement gave rise to an independent right to indemnity from Merrimack, rather than a derivative right to be reimbursed for indemnity payments made for covered claims. Astor Plaza has failed to substantiate its position that the D&O endorsement gave rise to a duty to indemnify Astor Plaza independent of the duty to indemnify the Individual Plaintiffs. The circuit court did not err in denying Astor Plaza leave to file an amended pleading.

¶ 159 2. Whether Merrimack Had a Duty Under the D&O Endorsement to Defend Astor Plaza

¶ 160 Next, Astor Plaza argues that the circuit court erred in granting summary judgment in favor of Merrimack because the D&O endorsement required Merrimack to defend not only Astor Plaza's directors and officers but also Astor Plaza. Astor Plaza argues the coverage of the D&O endorsement extends to "any 'suit', seeking damages alleging a 'Wrongful Act,' " and is therefore not limited to suits against an "Insured," but includes suits against the "Named Insured." It argues that the D&O endorsement was ambiguous because "it did not specifically exclude Astor Plaza from an entitlement to a defense." We disagree.

¶ 161 Astor Plaza's argument is contrary to well-settled principles regarding the interpretation of insurance policies. "An insurance policy is a contract, and the general rules governing the interpretation of other types of contracts also govern the interpretation of insurance policies." *Hobbs v. Hartford Insurance Co. of the Midwest*, 214 Ill. 2d 11, 17, (2005). When interpreting an insurance contract, our primary objective is to ascertain and give effect to the intention of the parties as expressed in the policy language. *Id.* Where the policy language is unambiguous, the

policy will be applied as written. *Id.* "Whether an ambiguity exists turns on whether the policy language is subject to more than one reasonable interpretation." *Id.* We will not strain to find an ambiguity where one does not exist. *Id.* " 'All the provisions of the insurance contract, rather than an isolated part, should be read together to interpret it and to determine whether an ambiguity exists.' " *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359, 371 (2007) (quoting *United States Fire Insurance Co. v. Schnackenberg*, 88 Ill. 2d 1, 5 (1981).

¶ 162 First, we look to the plain language of the policy to ascertain the intent of the parties. Section I of the D&O endorsement provides that Merrimack "will pay those sums that the 'Insured' becomes legally obligated to pay as damages *** because of any civil claims first made against the 'Insured' during the policy term, or during the Insured's Extended Discovery Period, arising out of any 'Wrongful Act' committed during the policy term." As we set forth above, "Insured" is defined in relevant part as "all Directors and Officers of the 'Named Insured[.]' " Furthermore, Section I provides that "No other obligation or liability to pay sums or perform acts or services is covered unless provided for under Supplementary Payments." Section I(C) sets forth the Supplementary Payments, and provides "We will have the rights and duty to defend any 'suit', seeking damages alleging a 'Wrongful Act' which is covered by this insurance."

¶ 163 Astor Plaza's interpretation of the policy ignores the term "covered by this insurance" in Section I(A). The coverage provided by the D&O endorsement in Section I(A) is limited to "those sums that the 'Insured' becomes legally obligated to pay as damages." The intent of the parties is clear: Merrimack would pay sums that the directors or officers became legally obligated to pay as a result of a suit seeking damages for a "Wrongful Act" brought against directors or officers. Merrimack agreed in Section I(C) to defend against such a suit and to pay

specified defense costs. As written, the D&O endorsement provides coverage to directors and officers of Astor Plaza, not to Astor Plaza itself. If the parties intended for Astor Plaza to be covered under the D&O endorsement, it would have included Astor Plaza as an "Insured" in Section I(A). But that is not what the policy provides. To accept Astor Plaza's argument would be to ignore the plain the language of the policy and read terms into the D&O endorsement that fundamentally alter the coverage provision. We cannot and will not do so, and find that the plain language of the D&O endorsement does not extend coverage to Astor Plaza.

¶ 164 Astor Plaza contends that the D&O endorsement was ambiguous "because it did not specifically exclude Astor Plaza from an entitlement to a defense." It points to sections of the Merrimack policy entitled "Businessowners Special Property Coverage Form," and "Businessowners Liability Coverage Form," both of which defined the word "you" as the "Named Insured." Astor Plaza then points back to the D&O endorsement's definition of "suit," which is defined to include "an arbitration proceeding alleging *** damages to which *you* must submit or submit with our consent." (Emphasis added.) Astor Plaza concludes that the use of "you" in the D&O endorsement's definition of "suit" is therefore a reference to the "Named Insured," and therefore there is an ambiguity as to whether the D&O's coverage provision was intended to cover both "Insureds" and the "Named Insured." We disagree.

¶ 165 We must adhere to the well-settled principle that we will not strain to find an ambiguity where one does not exist. Astor Plaza asks us to find the D&O endorsement's coverage provision is ambiguous because the definition of "you" contained in Businessowners Special Property Coverage Form and Businessowners Liability Coverage Form provisions of the policy was impliedly incorporated into the D&O endorsement's definition of "suit" such that the D&O coverage was expanded in order to provide coverage to the "Named Insured," despite the plain

language of the D&O endorsement that only applies to "Insureds." Astor Plaza's interpretation of the policy is unreasonable. Having considered the plain language of the D&O endorsement and reading its provisions in the proper context, we find that there is no ambiguity as to its coverage. We find that Merrimack did not owe Astor Plaza, the "Named Insured," a duty to defend or indemnify under the D&O endorsement, and the circuit court did not err in granting summary judgment in favor of Merrimack on this issue.

¶ 166 D. Goldberg's Consolidated Appeal

¶ 167 Finally, Goldberg joins Astor Plaza's appeal from the circuit court's March 22, 2011, and December 30, 2015, orders. She raises the same argument that Astor Plaza raised regarding whether Merrimack had a duty to defend and indemnify Astor Plaza. Goldberg advances no argument related to the circuit court's judgment with respect to the dismissal of her counterclaim, and as noted above, she never filed an amended counterclaim in this action. Therefore, it is not altogether clear that she has standing to advance any arguments on appeal, either on her own behalf or on behalf of Astor Plaza. Regardless, as explained above, the circuit court's judgment with respect to the finding that Merrimack had no duty to defend or indemnify Astor Plaza under the D&O endorsement is affirmed.

¶ 168 CONCLUSION

¶ 169 For all of the reasons set forth above, we affirm the judgment of the circuit court.

¶ 170 Appeal No. 1-15-2546 affirmed.

¶ 171 Appeal No. 1-16-0110 affirmed.