2017 IL App (1st) 160009-U

SECOND DIVISION
May 16, 2017

No. 1-16-0009



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| NORBERT MAY, Individually and behalf of class of similarly situated individuals,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>DIRECT AUTO INSURANCE COMPANY,<br><br>Defendants-Appellees. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Cook County<br><br>No. 14 CH 11482<br><br>The Honorable Peter Flynn, Judge Presiding. |

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

## ORDER

*Held:* The circuit court properly dismissed plaintiff's section 154 claim for damages for failing to state a cause of action. The portions of plaintiff's appeal seeking reversal of the circuit court's dismissal of the class allegations in his breach of contract claim, and reversal of the order denying him leave to file an amended class complaint, are moot where, during the pendency of this appeal, a final judgment was entered on his individual claim. The circuit court erred in dismissing plaintiff's section 155 claim for fees, costs, and penalties to the extent that he could pursue a section 155 claim in connection with his individual breach of contract claim.

¶ 1 BACKGROUND

¶ 2 In June 2011, Direct Auto Insurance Company issued Norbert May an automobile insurance policy that covered both personal injury and property damage (the policy), with May listed as the named insured. The policy was in effect on August 2, 2012, when May's son

William was involved in a collision in Indiana while driving May's automobile. As a result of the collision, numerous claims were made against the policy, and William was named as a defendant in a personal injury action brought in Indiana state court (the Indiana action).

¶ 3 Direct Auto initially denied coverage. In February 2013, it filed a declaratory judgment action in Cook County (the declaratory judgment action) seeking a declaration that William was an "undisclosed regular operator" under the policy, that the policy was "null and void," that there was no coverage for the accident under the policy including any duty to defend or indemnify, and that May, William, and the two plaintiffs in the Indiana action were owed no monies under the policy. May answered the complaint, and his prayer for relief asked that attorney fees and costs be assessed against Direct Auto.

¶ 4 The parties filed cross-motions for summary judgment. May's motion for summary judgment argued that section 154 of the Illinois Insurance Code (Insurance Code) (215 ILCS 5/154 (West 2014)) prohibits an insurer from rescinding a policy that had been in effect for one year or one policy period, whichever is less, based on any misrepresentation in the application for insurance, and that Direct Auto was prohibited from denying coverage where May's policy had been in effect for at least a full policy period. Both May's motion for summary judgment and his response to Direct Auto's motion for summary judgment requested that the circuit court "[assess] all costs and fees necessary to the defense of this lawsuit against [Direct Auto]." Neither May's motion for summary judgment nor his response to Direct Auto's motion for summary judgment expressly referenced section 155 of the Insurance Code (215 ILCS 5/155 (West 2014)), nor did May assert in the declaratory judgment action that Direct Auto's declaratory judgment action itself, or its claim handling, was vexatious or unreasonable.

¶ 5 In February 2014, prior to the circuit court ruling on the cross-motions for summary judgment, Direct Auto voluntarily dismissed its declaratory judgment complaint. The dismissal order states: "Plaintiff voluntarily dismisses the complaint and stipulates that it will not cancel, rescind or deny coverage under [the policy] based upon any information contained in any policy application or renewals as to Norbert May and William May." May did not pursue any claim for attorney fees in the declaratory judgment action. Our review of the record shows that Direct Auto thereafter continued its defense obligations and duty to indemnify, if any, under the terms of the policy.

¶ 6 In September 2014, May, individually and on behalf of a class of other similarly situated individuals, filed a four-count amended complaint against Direct Auto. May generally alleged that Direct Auto's business strategy was to offer lower insurance premiums "targeted" at individuals with low to moderate incomes with the intention of filing declaratory judgment actions challenging any claims made, knowing that the insureds could not afford to defend themselves. Direct Auto's standard auto policy provided that it "shall not be rescinded after the policy has been in effect for one year or one policy term, whichever is less." May alleged that Direct Auto had a practice of denying coverage based on alleged material misrepresentations in the policy applications, regardless of how long the policy had been in effect. He alleged that Direct Auto refused to pay covered losses based on "meritless claims of misrepresentation in policy applications," and knowingly filed meritless declaratory judgment actions containing factual and legal misrepresentations with knowledge that insureds could not afford to defend against the actions. Count I alleged a class claim for violations of the Illinois Consumer Fraud and Deceptive Practices Act (815 ILCS 505/1 (West 2014)). Count II asserted a class claim alleging that Direct Auto violated section 154 of the Insurance Code (215 ILCS 5/154 (West

2014)), and count III asserted a class claim for breach of contract, with both counts essentially asserting a practice of denying coverage after its policies had been in effect for more than one year or one policy period, and by filing meritless declaratory judgment actions seeking to void those policies. May sought damages, costs, and attorney fees. Count IV alleged an individual claim by May pursuant to section 155 of the Insurance Code (215 ILCS 5/155 (West 2014)), for attorney fees, costs, and other penalties due to Direct Auto's "vexatious and/or unreasonable delay of payments" in unilaterally rescinding May's policy, denying coverage, and a filing declaratory judgment action based on alleged misrepresentations after the policy was in effect for more than one year or one policy period.

¶ 7 Direct Auto filed a combined motion to dismiss the amended complaint pursuant to section 2-619.1 of the Code of Civil Procedure (Code) (735 ILCS 2-619.1 (West 2014)). Direct Auto sought dismissal of counts I, II, and IV pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)), arguing that that May failed to state causes of action either under the Illinois Consumer Fraud and Deceptive Practices Act (count I) or section 155 of the Insurance Code (count IV), and that Illinois does not recognize a private right of action for alleged violations of section 154 of the Insurance Code (count II). Direct Auto also sought dismissal of counts II, III, and IV on the basis of *res judicata* (735 ILCS 2-619(a)(4) (West 2014)), arguing that those claims could have been raised in the declaratory judgment action. Finally, Direct Auto sought dismissal of counts I through IV pursuant to section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2014)) on the basis that May neither suffered nor alleged any recoverable damages.

¶ 8 On July 2, 2015, while Direct Auto's motion to dismiss the amended complaint was pending, May filed a second amended complaint, followed by a motion on July 13 for leave to file the second amended complaint. The proposed second amended complaint restated counts I

throughIV of the amended complaint, and proposed three additional class claims for breach of contract, consumer fraud, and violations of section 154 of the Insurance Code, all predicated on Direct Auto's alleged failure to pay the actual cash value of his vehicle after an accurate appraisal. May alleged that Direct Auto determined that his vehicle was a total loss following the collision, and that the value of May's vehicle was $3000. He further alleged that Direct Auto claimed that it was entitled to a setoff based on unrelated pre-loss damage.

¶ 9 On August 20, 2015, after hearing oral argument, the circuit court issued an oral ruling. The circuit court found that count I's consumer fraud claim was preempted by section 155 of the Insurance Code, since count I essentially alleged a breach of contract claim. See *Cook v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 31. The circuit court dismissed count II, finding that May failed to state a "cognizable cause of action" under section 154 of the Insurance Code. The circuit court dismissed the class action breach of contract claims in count III, reasoning that a breach of contract claim should be adjudicated between the parties to a contract. The circuit court did not, however, dismiss May's individual breach of contract claim against Direct Auto, since "it may be that the failure to pay Mr. May the $3,000 which represents the actual cash value of his vehicle, did breach the contract." In dismissing May's individual claim for an alleged violation of section 155 of the Insurance Code in count IV, the circuit court found that May's amended complaint essentially asserted that the declaratory judgment action was improperly filed, which is specifically covered by Illinois Supreme Court Rule 137, and that Rule 137 prohibits filing a Rule 137 claim in a separate action. The circuit court relied on *Kinzer v. Fidelity & Deposit Co. of Maryland*, 273 Ill. App. 3d 211 (1995) and *Peerless Enterprise, Inc. v. Kruse*, 317 Ill. App. 3d 133 (2000) in finding that "if a [s]ection 155 claim is really about the bogus filing of a the declaratory judgment suit, it has to be brought as part of the declaratory

judgment suit." The circuit court found that count IV should have "been pursued in the dec[laratory judgment] action and not in this action." The written order entered on August 20, 2015, states: "Defendant's motion to dismiss is granted, with exception of count III (breach of contract) as to plaintiff's collision claim only, for the reasons stated on the record. The court declines to rule on the plaintiff's motion for leave to file the second amended complaint ***." On September 24, 2015, Direct Auto made an oral motion for a finding pursuant to Rule 304(a), and the circuit court ordered a briefing schedule.

¶ 10 On November 4, 2015, May filed a motion to withdraw his second amended complaint (which he had never been granted leave to file) and asked for leave to file a third amended complaint. The proposed third amended complaint contained three counts. Count I asserted May's individual breach of contract claim, which contained similar factual allegations as those set forth in the proposed second amended complaint. Count II was styled "Class Action" and proposed two classes. The first class was described as "Class A, Total Loss Vehicles," in which May purported to represent a class of Direct Auto policyholders who made first-party claims on vehicles determined to be a total loss who recovered less than the actual cash value of their vehicle due to Direct Auto claiming a set-off. The second class was described as "Class B, Rescission After First Policy Period," and purported to represent a class of policyholders that had been denied coverage more than one policy period after the issuance of their policy based on a material representation in the application for insurance.

¶ 11 On December 4, 2015, the circuit court denied May's motion for leave to file his third amended complaint. Also on December 4, 2015, the circuit court's written order states that "except to the individual claim of [May] in count III with respect to the physical damage claim of $3000, all other claims of the plaintiff in counts 1 thru 4 of the amended complaint are

dismissed with prejudice. With respect to the claims dismissed with prejudice ***, the court pursuant to S. Ct. Rule 304(a) hereby expressly finds that there is no just reason to delay appeal or enforcement hereof." The circuit court transferred May's surviving claim in count III to the presiding judge for the purpose of transferring the claim to the First Municipal District. On December 30, 2015, May filed his notice appeal.

¶ 12 On December 14, 2016, Direct Auto filed a motion in this court requesting that we take judicial notice that a final judgment had been entered on May's individual breach of contract claim. May's claim had been submitted to mandatory arbitration and May failed to appear at the arbitration in response to Direct Auto's notice pursuant to Supreme Court Rule 237. The arbitrators found in favor of Direct Auto, and the circuit court granted Direct Auto's motion to bar May from rejecting the arbitration award. Judgment was entered in favor of Direct Auto, and May's motion to reconsider was denied. May did not appeal the circuit court's orders entering judgment in favor of Direct Auto and denying his motion to reconsider. Direct Auto's motion was taken with the case.

¶ 13 ANALYSIS

¶ 14 At the outset, we note that May's notice of appeal identifies the order or judgment appealed from as the order of, "December 3, 2015, that denied [May] leave to file [May's] Third Amended Complaint and dismissed Counts I, II, and III of [May's] Amended Complaint, with prejudice." In a footnote to his statement of jurisdiction, May explains that the notice of appeal "referred to the final order of December 3, [*sic*] 2016 based on the erroneous handwritten date on the Order of December 3, 2015. To be clear, and going forward, the final order was dated December 4, 2015." We understand that both May's notice of appeal and the footnote to his statement of jurisdiction contain scrivener's errors with respect to the date of the order being

appealed, which the circuit court entered on December 4, 2015. These errors do not affect our jurisdiction, and we therefore turn to the merits of May's arguments on appeal.

¶ 15 On appeal, May argues that the circuit court erred in dismissing counts I, II, and IV of the amended complaint, that the circuit court erred in dismissing the class allegations of the amended complaint, and that the circuit court abused its discretion in denying him leave to file a third amended complaint. We address May's arguments in turn.

¶ 16 Regarding the dismissal of count I (consumer fraud), although May's brief nominally claims that the circuit court erred in dismissing count I, he advances no argument to support this claim. He has therefore forfeited any argument with respect to the circuit court's dismissal of count I. Ill. S. Ct. R. 341(h)(7) (eff. Jan 1, 2016) ("Points not argued are waived[.]"). The dismissal of count I is affirmed.

¶ 17 May argues that the circuit court erred in dismissing count II (violation of section 154 of the Insurance Code) of the amended complaint for failing to "state a cognizable cause of action." In count II, May attempted to assert a freestanding claim for damages under section 154 of the Insurance Code individually and on behalf of a class. He argues that, under the plain language of section 154, insurers have an obligation to not rescind a policy that has been in effect for one year or one policy term, whichever is less, and he argues that Direct Auto breached this obligation. He therefore concludes that he can bring a claim under section 154 as a separate cause of action. The entirety of plaintiff's argument consists of a recitation of the terms of section 154 and a conclusory statement that a failure to abide with the terms of the statute gives rise to a private cause of action. May's argument appears to be that section 154 expressly provides for a private right of action.

¶ 18 The plain language of the statute is the best indicator of the legislature's intent. *Allstate Insurance Co. v. Menards, Inc.*, 202 Ill. 2d 586, 591 (2002). When the statute's language is clear, it will be given effect without resort to other aids of statutory construction. *Petersen v. Wallach*, 198 Ill. 2d 439, 445 (2002). Section 154 provides, in relevant part, that:

> "No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. With respect to a policy of insurance as defined in subsection (a) *** of Section 143.13 [which defines a policy of automobile insurance] ***, a policy or policy renewal shall not be rescinded after the policy has been in effect for one year or one policy term, whichever is less." 215 ILCS 5/154 (West 2014).

¶ 19 Based on the plain language of the statute, it is clear that the legislature did not intend to grant a private right to seek damages for a violation of section 154, and May offers no meaningful argument to the contrary. The statute prohibits certain conduct by an insurer that may be raised by an insured where relevant; however, the section contains no penalty provision or other express statement suggesting that a violation provides an insured with a statutory cause of action. As the circuit court correctly observed, "something which violates [s]ection 154 can give rise to a cause of action, but not because it's a violation of [s]ection 154." Furthermore, May advanced no argument in the circuit court, and advances no argument in this court, that section

154 of the Insurance Code contains an implied private right of action. May does pursue this argument for the first time in his reply brief, but "[p]oints not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7). May has therefore forfeited this argument, and we decline to address the argument on its merits. Because section 154 of the Illinois Insurance Code does not expressly provide for a private right of action, the circuit court properly dismissed count II of May's amended complaint.

¶ 20 Next, we consider May's argument that the circuit court erred in dismissing the amended complaint's class allegations. May does not specify which class allegations were improperly dismissed. As noted above, May forfeited any argument regarding the dismissal of count I, which purported to be a class claim for consumer fraud, and we found that the circuit court properly dismissed count II, which also purported to be a class claim. Plaintiff's argument seems to be that the circuit court was required to rule on his pending motion for class certification before it ruled on the adequacy of the complaint. We fail to see the logic in this argument. Clearly, if there is no viable cause of action, there is no claim for a class to bring. Once the complaint was dismissed there was no reason to determine whether class certification was appropriate. Because count I and count II were properly dismissed, the class allegations also fail and we need not consider this argument. We affirm the dismissal of all class allegations contained in the amended complaint.

¶ 21 In considering May's argument regarding the class allegations in the breach of contract claim in count III, May argues that the circuit court erred in denying him leave to file a third amended complaint alleging individual and class claims for breach of contract. We now consider Direct Auto's motion requesting that we take judicial notice of the final judgment entered in the circuit court on May's surviving individual claim in count III. After the circuit court dismissed

the amended complaint with prejudice, except for May's individual breach of contract claim, and denied May leave to file his third amended complaint, May's individual breach of contract claim was sent to arbitration. May failed to appear and the arbitrators found in favor of Direct Auto. The circuit court granted Direct Auto's subsequent motion to bar May from rejecting the arbitration award and denied May's motion to stay as moot. On October 16, 2016, the circuit court denied May's motion to reconsider its order barring rejection of the arbitration award. May did not appeal the circuit court's orders. Therefore, a final judgment has been entered on May's individual breach of contract claim alleged in count III.

¶ 22 Direct Auto's motion to take judicial notice of these final judgments is allowed. We find that the portions of May's appeal challenging the circuit court's dismissal of his class claims in count III of the amended complaint and the denial of leave to file an amended complaint are now moot. As a reviewing court we "decide only actual controversies in which the interests or rights of the parties to the litigation can be granted effectual relief." *HealthChicago, Inc. v. Touche, Ross & Co.*, 252 Ill. App. 3d 608, 610 (1993). "An appeal becomes moot when a court can no longer effect the relief originally sought by an appellant or when the substantial question involved in the circuit court no longer exists." *Id.* "When a case is rendered moot, a court's decision on the merits cannot afford either party relief and any decision thus reached is merely an advisory opinion." *Id.*

¶ 23 Because the circuit court entered judgment on May's individual claim contained in count III and May did not appeal, the judgment became final. Since May no longer possesses a valid claim against Direct Auto, he is not a proper party who could fairly and adequately protect the interest of the class he purports to represent. See *Wheatley v. Board of Education of Township High School District 205*, 99 Ill. 2d 481, 486-87 (1984). We are therefore unable to grant May

any relief from the circuit court's dismissal of class claims in count III of his amended complaint since he no longer has an individual breach of contract claim against Direct Auto. This precludes May acting as a class representative of similarly situated persons with breach of contract claims against Direct Auto. This also holds true for May's claims that the circuit court erred in denying him leave to file a third amended complaint, since the proposed complaint was predicated on May's individual breach of contract claim, and the two class claims for breach of contract against Direct Auto. We therefore dismiss as moot the portions of May's appeal seeking reversal of the circuit court's dismissal of the class allegations from count III of the amended complaint, and reversal of the circuit court's denial of leave to file a third amended complaint.

¶ 24 Finally, May argues that the circuit court erred in dismissing his section 155 claim asserted in count IV of the amended complaint. He argues that the plain language of section 155 permits him to bring a freestanding claim "in any action" for recovery of costs and attorney fees against Direct Auto "for its vexatious and unreasonable conduct in the underlying declaratory judgment action." May also argues the circuit court erred in ruling that Rule 137 "preempts" section 155 because section 155 "provides a substantive tort remedy that requires different proofs and provides a different measure of damages as compared to sanctions under Rule 137," and that section 155 "grants the right to substantive relief under the theory of tort law."

¶ 25 Section 155 states:

> "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 (West 2014).

¶ 26 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). "Section 155 was intended to make suits by policyholders more economically feasible and to punish insurers for vexatious and unreasonable conduct, *i.e.*, conduct that does not rise to the level of a well-established tort." *Burress-Taylor v. American Security Insurance Co.*, 2012 IL App (1st) 110554, ¶ 27 (citing *Cramer*, 174 Ill. 2d at 520-27; *Young v. Allstate Insurance Co.*, 351 Ill. App. 3d 151, 168 (2004)).

¶ 27 Illinois Supreme Court Rule 137 provides, in relevant part:

> "The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other document; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. *** If a pleading, motion, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a

> represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion or other document, including a reasonable attorney fee." Ill. S. Ct. R. 341(a) (eff. July 1, 2013).

¶ 28 Here, count IV of the amended complaint alleged that Direct Auto "caused a vexatious and/or unreasonable delay of payments, in violation of [s]ection 155 of the Illinois Insurance Code" by "denying coverage and unilaterally rescinding May's insurance policy based on misrepresentation after May's policy had been in effect for more than one year or one policy period with actual knowledge that its policy defense was meritless[,]" and by "pursuing a declaratory judgment action against May based on misrepresentation after May's policy had been in effect for more than one year or policy period with actual knowledge that its policy defense was meritless." May cites no authority in support of his argument that section 155 permits him, in this action, to seek attorney fees related to Direct Auto's conduct in the separate declaratory judgment action filed by Direct Auto pertaining to its coverage obligations under May's policy of insurance. May's failure to develop any argument to support his claim that he may pursue a section 155 claim in this action for conduct arising out of a prior proceeding in which he was a party results in forfeiture of this argument. Ill. S. Ct. R. 341(h)(7).

¶ 29 Furthermore, May's contention that a section 155 claim is a separate tort claim is misguided. He solely relies on *Cult Awareness Network v. Church of Scientology*, 177 Ill. 2d 267 (1997) as a basis to argue that Rule 137 "was not meant to preempt our existing tort law," and that our supreme court "[made] it clear that there is no conflict between [section 155 and Rule 137]." In *Cult Awareness Network*, our supreme "summarily rejected" the defendant's argument that Rule 137 preempted the plaintiff's tort claim for malicious prosecution. 177 Ill. 2d 267, 279

(1997). *Cult Awareness Network* did not mention section 155 of the Insurance Code, and certainly does not stand for the proposition that a claim under section 155 is a separate tort. Nor does *Cult Awareness Network* provide any guidance as to whether Rule 137 preempts a section 155 claim. May also cites no authority in support of his vague statement that section 155 creates a "substantive tort remedy." Given the inadequacy of the plaintiff's argument and the state of this record we will not adopt May's position.

¶ 30 That is not to say, however, that May could not assert a section 155 claim in connection with having to bring his individual breach of contract claim. See, *e.g.*, *Cramer*, 174 Ill. 2d at 519 ("Ordinarily, a policyholder may bring a breach of contract action to recover the proceeds due under the policy. Pursuant to [section 155], a plaintiff may also recover reasonable attorney fees and other costs, as well as an additional sum that constitutes a penalty.") Based on our independent review of the amended complaint, we observe that count IV incorporated May's allegations from count I to include the allegations that Direct Auto "den[ied] insurance coverage and refus[ed] to pay for covered losses on the basis of meritless claims of misrepresentation in policy applications in connection with policies that had been in force for more than one year or more than one policy period." In light of the circuit court's ruling that May's individual breach of contract claim in count III survived, we believe that May alleged sufficient facts to state a claim under section 155 in connection with his individual breach contract claim in count III of the amended complaint.

¶ 31 Direct Auto argues, however, that May's entire section 155 claim was properly dismissed on the basis of *res judicata*. It argues that May actually raised the issue of attorney fees in his answer to the declaratory judgment complaint and in the briefing on the cross-motions for summary judgment. Alternatively, Direct Auto claims that May could have pursued a section

155 claim in the declaratory judgment action. Direct Auto contends that its voluntary dismissal of the declaratory judgment action operated as a final adjudication on the merits of its claims because it is, "more akin to an agreed settlement fully resolving all then-pending claims[.]"

¶ 32 It is well established that "[t]he doctrine of *res judicata* provides that a final judgment on the merits rendered by a court of competent jurisdiction bars any subsequent actions between the same parties or their privies on the same cause of action." *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996). For the doctrine to apply, three requirements must be met: "(1) there was a final judgment on the merits rendered by a court of competent jurisdiction; (2) there was an identity of cause of action; and (3) there was an identity of parties or their privies." *Id.* at 335. *Res judicata* extends to not only what was actually decided in the first action, but also to matters that could have been decided. *Id.*

¶ 33 Both Direct Auto and May participated in the declaratory judgment action, and thus there is no dispute that that the third element of *res judicata* is met. Neither party meaningfully addresses the "identity of cause of action" element. The law is clear that in considering this element, we apply the "transactional test," which provides that "separate claims will be considered the same cause of action *** if they arise from a single group of operative facts, regardless of whether they assert different theories of relief." *River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 311 (1998). Here, May's section 155 claim seeks damages related to Direct Auto's denial of coverage and attempt to rescind the policy, which formed the entire basis of Direct Auto's declaratory judgment action in the first place. We believe that the second element of *res judicata* is met here.

¶ 34 The dismissal order in the declaratory judgment action stated that "[Direct Auto] voluntarily dismisses the complaint and stipulates that it will not cancel, rescind, or deny

coverage under the policy *** based upon any information contained in any policy applications or renewals as to Norbert May or William May." In *Goodman v. Hanson*, 408 Ill. App. 33 285, 300 (2011), we found that a dismissal with prejudice pursuant to a settlement agreement did not constitute a final judgment on the merits for the purposes of *res judicata*, because "an agreed order is not a judicial determination of the parties' rights, but rather is a recordation of the agreement between the parties." *Kandalepas v. Economou*, 269 Ill. App. 3d 245, 252 (1994). Here, the voluntary dismissal order was not a judicial determination of the parties' rights, since the circuit court never granted or denied the relief sought by Direct Auto: a declaration that William was an undisclosed operator, that the policy was null and void, that there was no coverage under the policy and thus there was no duty to defend or indemnify, or that May and William were not entitled to any recovery under the policy. Instead, Direct Auto's voluntary dismissal amounts to a covenant that Direct Auto would not cancel, rescind, or deny coverage under the policy. There was no judicial determination as to whether Direct Auto *could* take any of those actions, and thus there was no final adjudication on the merits of the declaratory judgment action. We acknowledge that the record indicates that Direct Auto performed its contractual obligations of providing a defense and indemnification, if any, and that it did not rescind May's policy. Regardless, May could conceivably allege sufficient facts that Direct Auto's conduct in processing his claim, in filing the declaratory judgment action, and its conduct after the voluntary dismissal of the declaratory judgment action amounted to conduct for which section 155 provides a remedy. Therefore, we find that May's section 155 claim in count IV of his amended complaint was not barred by *res judicata*.

¶ 35 Direct Auto further argues that, to the extent that May's section 155 claim was actually a claim under Supreme Court Rule 137, May was required to bring his Rule 137 claim in the

declaratory judgment action. The circuit court characterized May's section 155 claim as essentially "an argument that the dec[claratory judgment] action was improperly filed," since the vexatious and unreasonable conduct he complained of was the filing of the declaratory judgment action. We disagree with the circuit court's characterization under the circumstances here, since any claim May might have that Direct Auto's handling of his individual breach of contract claim was unreasonable and vexatious falls squarely within section 155, which is broader than Rule 137. May's section 155 claim in connection with his individual breach of contract claim seeks relief for conduct that is distinct from his allegations that Direct Auto acted in an unreasonable or vexatious manner by bringing the declaratory judgment action in the first place. We do not, however, express any position on whether May's section 155 claim is meritorious.

¶ 36 We find that the circuit court erred to the extent that it dismissed pursuant to section 2-615 of the Code May's section 155 claim for attorney fees, costs, and other statutory damages in this action related to his individual breach of contract claim. We remand May's section 155 claim only, without expressing any opinion as to whether his claim is meritorious.

¶ 37 CONCLUSION

¶ 38 In sum, May raises no argument regarding the dismissal of count I of his amended complaint, and thus forfeited any claim of error. The circuit court properly dismissed count II of the amended complaint pursuant to section 2-615 because section 154 of the Insurance Code does not expressly provide a private right of action, and May forfeited any argument that it contains an implied right of action. May's arguments regarding the circuit court's dismissal of his class claims in count III of the amended complaint and the circuit court's denial of May's motion for leave to file a third amended complaint are moot in light of the final judgment entered on May's individual breach of contract claim. Finally, the circuit court erred by dismissing count

IV of May's amended complaint in its entirety, as May could bring a section 155 claim in connection with his individual breach of contract claim.

¶ 39 The judgment of the circuit court of Cook County is affirmed in part, reversed in part, and remanded for further proceedings consistent with this order.

¶ 40 Appeal dismissed in part, affirmed in part, reversed in part; remanded.