2015 IL App (2d) 140662-U
No. 2-14-0662
Order filed June 25, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

ALEA LONDON LIMITED, n/k/a Catalina London Limited, Plaintiff and Counterdefendant-Appellee, v. RHINO CONSTRUCTION AND EXCAVATING COMPANY, INC., Defendant and Counterplaintiff-Appellee (Eric Johnson, Defendant-Appellee; and Sundance Saloon, LLC; Sundance Investments, LLC; Creative Soundz, Inc.; Arthur Lake; David Fricke; Extreme Sound and Lighting, LLC; Highway 50, Inc.; Stage Work Projects, Inc.; and Charles Chevalier, Defendants).	)	Appeal from the Circuit Court of Lake County. No. 09-MR-530 Honorable Margaret J. Mullen, Judge, Presiding.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Plaintiff and Counterdefendant-Appellant, v. RHINO CONSTRUCTION AND	)	Appeal from the Circuit Court of Lake County. No. 09-MR-1647

EXCAVATING COMPANY, INC.,	)	
	)	
Defendant and Counterplaintiff-Appellee	)	Honorable
	)	Margaret J. Mullen,
(Eric Johnson, Defendant-Appellee).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

¶ 1 *Held*: The judgment of the trial court against an insurer following a bench trial was affirmed. The underlying default judgment against the insured was not void. The question of whether the insurer was entitled to a setoff due to the injured party's settlement with tortfeasors other than the insured should be addressed in subsequent enforcement proceedings. The insurer was not entitled to a setoff for amounts that the injured party received in settling with another insurer. The determination that the insurer was estopped from relying on the "other insurance" clause in its policy was not against the manifest weight of the evidence. The insurer forfeited its argument that the injured party was required to prove that the default judgment against the insured was reasonable.

¶ 2 Eric Johnson (Johnson) was injured in 2006 while working on a construction project known as the Sundance Saloon. He filed a lawsuit against numerous defendants, including Rhino Construction and Excavating Company, Inc. (Rhino). In August 2010, Johnson settled with certain defendants other than Rhino. On October 26, 2010, Johnson obtained a $900,000 default judgment against Rhino. In these consolidated declaratory judgment actions, two insurers—Alea London Limited, now known as Catalina London Limited (Alea), and American Family Mutual Insurance Company (American Family)—sought declarations that they were not obligated to defend or indemnify Rhino with respect to Johnson's lawsuit. Alea and Rhino ultimately settled with Johnson, and the matter proceeded to a bench trial on the issue of American Family's obligations to Rhino. The trial court entered judgment against American Family in the amount of $900,000, plus post-judgment interest commencing on October 26, 2010. American Family appeals from that judgment. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Arthur Lake (Lake) owned the Sundance Saloon in Waukegan, Illinois, which was undergoing construction. Rhino and Liberty Bell Electric Company (Liberty Bell) each performed work at the project. Alea issued a commercial general liability policy to Rhino for the period of October 26, 2005, to October 26, 2006. That policy contained an "other insurance" clause specifying the circumstances under which the Alea policy would be considered to be excess rather than primary insurance.

¶ 5 American Family issued a commercial general liability policy to Liberty Bell for the period of August 6, 2005, to August 6, 2006. That policy contained an "other insurance" clause that was similar to the clause in the Alea policy. American Family admitted during the course of this litigation, in response to requests to admit facts, that the Marina Stanojevic Agency (Stanojevic) (1) was its agent in the years 2005 through 2008; (2) had authority to bind insurance coverage on behalf of American Family in 2005 and 2006; and (3) had authority on behalf of American Family to offer insurance coverage to members of the public, including Liberty Bell. On January 10, 2006, Stanojevic issued a certificate of insurance identifying Rhino as an additional insured under the Liberty Bell policy. However, American Family never issued an endorsement to the policy reflecting that Rhino was an additional insured. Nor did American Family inform Rhino that it was not an additional insured.

¶ 6 On March 13, 2006, Johnson, who was an employee of Liberty Bell, was injured at the Sundance Saloon project. On November 6, 2007, he filed a lawsuit docketed as No. 07-L-885 (the underlying action) against six defendants, including Rhino, to recover for personal injuries. Johnson was represented in the underlying action by Bogdan Martinovich of the law firm of Ray & Glick, Ltd. In the complaint, Johnson prayed for damages "in a dollar amount sufficient to

satisfy the jurisdictional limits of the law division of this court and such additional amounts as the jury and the court shall deem proper and additionally costs of same." Rhino was served with that complaint on December 4, 2007.

¶ 7 In March 2008, Johnson filed an amended complaint adding several new defendants, including Charles Chevalier (Chevalier), who was Rhino's president. Johnson's amended complaint contained the same prayer for relief as the original complaint. On April 16, 2008, one of the defendants in the underlying action, Sundance Investments, LLC, filed a third-party complaint for contribution against Liberty Bell. On June 30, 2008, Liberty Bell notified American Family of the underlying action.

¶ 8 On April 7, 2009, Alea filed a declaratory judgment action seeking a declaration that it did not owe a duty to defend or indemnify Rhino in the underlying action. That case was docketed as No. 09-MR-530.

¶ 9 American Family insists that it first learned in August 2009 that Stanojevic had issued a certificate of insurance naming Rhino as an additional insured on the Liberty Bell policy. Rhino formally tendered the defense of the underlying action to American Family on September 4, 2009. On November 4, 2009, American Family filed a declaratory judgment action, docketed as No. 09-MR-1647, seeking a declaration that it did not owe a duty to defend Rhino in the underlying action. Discovery was apparently ongoing in the underlying action when American Family filed its declaratory judgment action.

¶ 10 Johnson subsequently settled with all defendants in the underlying action other than Rhino and Chevalier. On August 26, 2010, the court in the underlying action found that the settlement was made in good faith pursuant to the Joint Tortfeasor Contribution Act (Contribution Act) (740 ILCS 100/0.01 *et seq.* (West 2012)). The record does not indicate the

amount or terms of that settlement.

¶ 11 Johnson thereafter moved to default Rhino in the underlying action. A copy of that motion was mailed to Chevalier in his capacity as owner and agent of Rhino. Neither the notice of motion nor the motion itself indicated that any new or additional relief would be sought against Rhino. On September 9, 2010, the court entered an order finding Rhino in default and setting the matter for prove-up of damages on October 26, 2010. American Family asks us to take judicial notice of certified copies of a notice of filing and proof of service in the underlying action, which reflect that Johnson mailed Rhino a copy of the court's September 9, 2010, order. We agree to take notice of these public records. See *In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1059 (2009). On October 26, 2010, following the prove-up on damages, the court entered a default judgment against Rhino in the amount of $900,000.

¶ 12 Attorney Martinovich thereafter represented both Johnson and Rhino in the declaratory judgment actions. Counsel produced documents, which were filed under seal, addressing his conflict of interest. On October 27, 2011, Alea's and American Family's declaratory judgment actions were consolidated.

¶ 13 On April 24, 2012, Alea filed its fourth amended complaint for declaratory judgment. As it pertains to this appeal, count V alleged that Rhino was an additional insured under American Family's policy. Relying on the "other insurance" clause in its own policy, Alea alleged that its policy was excess and that the American Family policy was primary.

¶ 14 On July 26, 2012, Rhino filed its first amended countercomplaint against Alea and American Family. As it pertains to this appeal, Rhino alleged in count I that it was an additional insured under Liberty Bell's policy with American Family due to the certificate of insurance that Stanojevic issued on January 10, 2006. Rhino also alleged that American Family had notice of

Johnson's injury on the day of the accident and was notified of the underlying action on June 30, 2008. The countercomplaint alleged that American Family failed to inform Rhino both that it was denying coverage and that it did not consider Rhino to be an additional insured. Rhino demanded judgment against American Family in the amount of $900,000, plus post-judgment interest from the date of the default judgment.

¶ 15 Rhino, Johnson, and Alea entered into a settlement agreement in August 2013. Alea agreed to pay Johnson, "for itself and on behalf of Rhino," $300,000. In turn, Johnson assigned to Alea up to $300,000 of any recovery he might realize from American Family. According to the settlement agreement, "[a]lthough said assignment by Johnson to Alea shall not exceed the right to recover more than $300,000, said assignment to Alea is effective and collectible up to $300,000 regardless of the amount Johnson recovers from American Family." Nevertheless, Alea's payment was "not contingent upon any recovery by Johnson from American Family," and Alea would recover nothing from Johnson pursuant to the assignment if Johnson did not recover from American Family. Rhino, Johnson, and Alea agreed to dismiss their claims against each other, except for count V of Alea's fourth amended complaint, which, as noted above, alleged that Rhino was an additional insured under American Family's policy and that such policy was primary.

¶ 16 On September 13, 2013, American Family filed its second amended complaint for declaratory judgment, alleging that it owed no duty to defend or indemnify Rhino. Counts I and V alleged that Rhino was never added as an additional insured under the policy. Counts II and VI alleged that Rhino's notice to American Family was untimely and improper. Counts III and VII alleged that, although no endorsement was added to the American Family policy listing Rhino as an additional insured, had the policy been so endorsed, Johnson's amended complaint

would not have invoked coverage under that endorsement. Counts IV and VIII alleged that American Family's policy was "excess to any other policy of insurance applicable to Rhino as either a named insured or additional insured." Count IX alleged that Rhino "violated the Common Policy Conditions by transferring its rights under the American Family policy under the [settlement agreement] within [*sic*] American Family's written consent." Count X alleged that "Rhino has assumed liability by executing the [settlement agreement]." Finally, count XI alleged that Rhino impaired American Family's rights of recovery by entering into the settlement agreement.

¶ 17 Prior to trial, the court granted Rhino's motion for judgment on the pleadings as to counts III, VII, IX, and X of American Family's second amended complaint. That ruling is not at issue in this appeal. As their affirmative defense, Rhino and Johnson alleged that American Family should be estopped from raising policy defenses, because it did not file a declaratory judgment action within a reasonable time of receiving notice of the underlying action.

¶ 18 The matter proceeded to a bench trial on November 4 and 5, 2013. On February 28, 2014, the court issued a comprehensive written order containing findings of fact and conclusions of law. The court found that "[p]rior to Johnson's injury, Rhino and the Sundance Saloon owner, Art Lake, asked Liberty Bell to obtain a certificate of insurance adding Rhino as an additional insured on the [American Family] policy, and Liberty Bell agreed." The court found that on January 10, 2006, Stanojevic, who was "American Family's captive agent with express authority to bind coverage on behalf of American Family," issued a certificate of insurance to Rhino identifying it as an additional insured on the American Family policy. The court determined that "[b]ecause Stanojevic had binding authority, an entity to which an additional insured certificate was issued became an additional insured unless American Family's home office

revoked or rescinded that status." According to the court, "American Family did not revoke or rescind Rhino's status as an additional insured under the [American Family] Policy."

¶ 19 Moreover, the court found that "Liberty Bell notified American Family through Stanojevic of Johnson's accident on March 13, 2006," the day of the incident. Additionally, Liberty Bell notified American Family of the underlying action on June 30, 2008. According to the court, "[i]n July 2008, American Family investigated whether any of the parties named in the [underlying action], including Rhino, were additional insureds under the [American Family] Policy." The court found that Rhino's president, Chevalier, was unsophisticated and had reasonably relied on Lake to respond to the suit against Rhino.

¶ 20 As to conclusions of law, the court determined that Rhino was an additional insured under the American Family policy and was "entitled to the same rights and benefits" as Liberty Bell. The court also concluded that American Family had timely actual notice of both Johnson's injury and the underlying action against Rhino such that the "duty to defend was triggered in July 2008." Furthermore, the court held that American Family breached its duty to defend Rhino, reasoning: "That its internal administrative or communication issues caused it to fail to appreciate its duty to its insured does not make its failure to defend any less a breach." The court determined that filing a declaratory judgment action one year and four months after receiving notice of the underlying action was not timely. Accordingly, the court concluded that American Family was estopped from relying on its policy defenses, including the "other insurance" clause. Absent estoppel, the court found that the "other insurance" clauses in the American Family and Alea policies were "effectively identical" and incompatible so that liability would have to be prorated.

¶ 21 Accordingly, on February 28, 2014, the court entered judgment against American

Family in the amount of $900,000, plus post-judgment interest commencing on the date of the default judgment against Rhino. The court added that "American Family is not entitled to a set-off of the $300,000 paid by Alea to Johnson because Johnson must reimburse Alea in an equal amount from his recovery from American Family."

¶ 22 On June 5, 2014, the court denied American Family's posttrial motion. American Family timely appeals.

¶ 23 II. ANALYSIS

¶ 24 In its notice of appeal, American Family indicated its intent to raise arguments that Rhino was not an additional insured, that the notice to American Family was untimely, and that "estoppel does not bar American Family from raising policy defenses including its 'other insurance' clause." However, in its appellant's brief, American Family does not contest the trial court's finding that Rhino was entitled to the same rights and benefits as Liberty Bell. Nor does American Family dispute that it received timely actual notice both of Johnson's injury and the underlying action. Furthermore, although American Family asserted numerous policy defenses in its second amended complaint, the only defense that it invokes on appeal is the "other insurance" clause.

¶ 25 Rather than presenting the arguments identified in the notice of appeal, American Family raises a number of arguments that it did not raise in the trial court. It first argues that its liability is limited to $50,000, because Johnson obtained the default judgment against Rhino in violation of section 2-604 of the Code of Civil Procedure (Code) (735 ILCS 5/2-604 (West 2012)) and Illinois Supreme Court Rule 105 (eff. Jan. 1, 1989). In the event that we agree with that argument, American Family requests that we order a limited remand to determine the amount that Johnson received in settling the underlying action. American Family then raises several

alterative arguments, including that its liability should be reduced both by the amount of Johnson's settlement in the underlying action and the amount of Johnson's and Rhino's settlement with Alea. Also in the alternative, American Family argues that the trial court erroneously estopped it from invoking its "other insurance" clause and that Johnson failed to prove that the default judgment against Rhino was reasonable.

¶ 26 (1) American Family's Liability is Not Limited to $50,000

¶ 27 American Family first argues that its liability is limited to $50,000—the minimum amount necessary to bring an action in the law division of the circuit courts—because Johnson obtained the default judgment against Rhino in violation of section 2-604 of the Code and Supreme Court Rule 105. Specifically, American Family contends that Johnson's original and amended complaints in the underlying action sought damages only in the amount of $50,000. According to American Family, Johnson was required to provide additional notice to Rhino that he sought relief in excess of $50,000. American Family argues that because Johnson did not provide the requisite notice to Rhino, the default judgment in the underlying action was void to the extent that it exceeded $50,000. Therefore, it argues, Rhino is legally obligated to pay Johnson only $50,000, and the judgment against American Family should be reduced to $50,000.

¶ 28 American Family did not raise this argument in the trial court. Nevertheless, a void judgment may be challenged at any time, even collaterally. *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 103 (2002). Therefore, we must consider whether the default judgment against Rhino was void to the extent that it exceeded $50,000. We hold that it was not.

¶ 29 Section 2-604 of the Code provides, in relevant portion:

> "Every count in every complaint and counterclaim shall contain specific prayers for the relief to which the pleader deems himself or herself entitled except that in actions

> for injury to the person, no ad damnum may be pleaded except to the minimum extent necessary to comply with the circuit rules of assignment where the claim is filed. *** In actions for injury to the person, any complaint filed which contains an ad damnum, except to the minimum extent necessary to comply with the circuit rules of assignment where the claim is filed, shall, on motion of a defendant or on the court's own motion, be dismissed without prejudice. Except in case of default, the prayer for relief does not limit the relief obtainable, but where other relief is sought the court shall, by proper orders, and upon terms that may be just, protect the adverse party against prejudice by reason of surprise. In case of default, if relief is sought, whether by amendment, counterclaim, or otherwise, beyond that prayed in the pleading to which the party is in default, notice shall be given the defaulted party as provided by rule." 735 ILCS 5/2-604 (West 2012).

Supreme Court Rule 105(a) establishes that a defaulted party is entitled to notice of "new or additional relief, whether by amendment, counterclaim, or otherwise," that is sought against the party. The rule provides:

> "The notice shall be captioned and numbered in the case and directed to the party. It shall state that a pleading seeking new or additional relief against him has been filed and that a judgment by default may be taken against him for the new or additional relief unless he files an answer or otherwise files an appearance in the office of the clerk of the court within 30 days after service, receipt by certified or registered mail, or the first publication of the notice, as the case may be, exclusive of the day of service, receipt or first publication. Except in case of publication, a copy of the new or amended pleading

shall be attached to the notice, unless excused by the court for good cause shown on *ex parte* application." Ill. S. Ct. R. 105(a) (eff. Jan. 1, 1989).

"A party has the right to assume that relief granted on default will not exceed or substantially differ from that asked for in the complaint, and thus the notice requirements of Rule 105 are designed to prevent litigants from obtaining new or additional relief without first giving a defaulted party a renewed opportunity to appear and defend." *Eckel v. Bynum*, 240 Ill. App. 3d 867, 877 (1992).

¶ 30 Consistent with section 2-604 of the Code, Johnson's original and amended complaints prayed for relief against Rhino "in a dollar amount sufficient to satisfy the jurisdictional limits of the law division of this court and such additional amounts as the jury and the court shall deem proper and additionally costs of same." The minimum amount in controversy for a law division case such as the underlying action is $50,000. See General Administrative Order on Recordkeeping in the Circuit Courts (eff. Jan. 1, 2013). Johnson's request was therefore sufficient to put Rhino on notice that he sought relief in excess of $50,000, and it was not materially different from the prayer for relief at issue in *Kaput v. Hoey*, 124 Ill. 2d 370, 382 (1988) ("Clearly, a request for damages 'in excess of $15,000' provides notice that more than $15,000 is being sought.").

¶ 31 American Family nevertheless contends that the default judgment was void to the extent that it exceeded $50,000. The distinction between a void judgment and one that is merely voidable is of critical import, because if the default judgment against Rhino was only voidable, American Family's instant challenge is untimely and procedurally improper. See 735 ILCS 5/2-1401(b),(c) (West 2012) (challenge to a voidable judgment must be made in the same proceeding and within two years of the judgment). "A void judgment is one entered by a court without

jurisdiction." *LVNV Funding, LLC, v. Trice*, 2015 IL 116129, ¶ 39. In contrast, "[a] voidable judgment *** is one entered erroneously by a court having jurisdiction and is not subject to collateral attack." *In re Marriage of Mitchell*, 181 Ill. 2d 169, 174 (1998).

¶ 32 In asserting that the default judgment was void to the extent that it exceeded $50,000, American Family questions the trial court's subject matter jurisdiction and "inherent power" to render the judgment, citing *Ford Motor Credit Co. v. Sperry*, 214 Ill. 2d 371 (2005). In *Ford Motor Credit Co.*, our supreme court said that "[a] void order or judgment is, generally, one entered by a court without jurisdiction of the subject matter or the parties, or by a court that lacks the inherent power to make or enter the order involved." *Ford Motor Credit Co.*, 214 Ill. 2d at 379-80. However, recently our supreme court addressed "that portion of *Ford Motor* which defines a void judgment in a civil lawsuit, in part, as one entered by a circuit court which lacks 'inherent power.' " *LVNV Funding, LLC*, 2015 IL 116129, ¶ 42. It clarified that in civil cases not involving an administrative tribunal or administrative review, "[t]here is no third type of jurisdiction known as the 'inherent power' to render a judgment." *LVNV Funding, LLC*, 2015 IL 116129, ¶ 39.

¶ 33 After oral argument was held in this case, American Family filed a motion for supplemental briefing on the issue of whether the supreme court's decision in *LVNV Funding* should be applied retroactively to this appeal. We denied the motion in a minute order because, as we now take the opportunity to explain, supplemental briefing on this issue is unnecessary. *LVNV Funding* clearly applies to this appeal.

¶ 34 Generally, supreme court decisions apply retroactively to cases pending at the time the decisions are announced, including cases pending on direct review in the appellate court. *Heastie v. Roberts*, 226 Ill. 2d 515, 535 (2007). However, a court may decline to give a decision

retroactive effect when the decision establishes a new principle of law, either by overruling clear past precedent on which the litigants relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. *Heastie*, 226 Ill. 2d at 535-36. " 'If either of these criteria is met, the question of prospective or retroactive application will be answered by considering whether, given the purpose and prior history of the rule, its operation will be retarded or promoted by prospective or retroactive application and whether prospective application is mandated by a balance of equities.' " *Heastie*, 226 Ill. 2d at 536 (quoting *Bogseth v. Emmanuel*, 166 Ill. 2d 507, 515 (1995)).

¶ 35 Here, it is apparent from the reasoning of the opinion itself that *LVNV Funding* did not announce a new principle of law. In that case, the court rejected the portion of *Ford Motor Credit Co.* that defined a void judgment, in part, as one entered by a circuit court that lacks "inherent power." *LVNV Funding, LLC*, 2015 IL 116129, ¶ 42. In doing so, the court explained that, in *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514 (2001), and *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325 (2002), it had rejected the idea that "inherent power" forms a part of a circuit court's jurisdiction. *LVNV Funding, LLC*, 2015 IL 116129, ¶¶ 29-36. It further explained that, when it defined jurisdiction in *Ford Motor Credit Co.* as the "inherent power" to enter a judgment, it did so without explaining how its definition could be reconciled with *Steinbrecher* or *Belleville Toyota*. *LVNV Funding, LLC*, 2015 IL 116129, ¶ 41. Therefore, when it stated that it "rejected" the "inherent power" aspect of *Ford Motor Credit Co.*'s definition of jurisdiction, the court was not overruling clear past precedent or deciding an issue of first impression. Rather, it reaffirmed its well-established precedent—specifically, *Steinbrecher* and *Belleville Toyota*. Accordingly, *LVNV Funding* applies to the present case.

¶ 36 Clearly, the trial court in Johnson's underlying action did not lack subject matter

jurisdiction. Subject matter jurisdiction "refers to the power of a court to hear and determine cases of the general class to which the proceeding in question belongs." *Belleville Toyota, Inc.*, 199 Ill. 2d at 334. It is beyond dispute that the circuit courts of this state have the power to hear and determine personal injury actions.

¶ 37 Furthermore, the trial court in the underlying action obtained personal jurisdiction over Rhino when it was served with Johnson's complaint in December 2007. See *State Bank of Lake Zurich v. Thill*, 113 Ill. 2d 294, 308 (1986) ("Absent a general appearance, personal jurisdiction can be acquired only by service of process in the manner directed by statute. [Citations.] The Code of Civil Procedure authorizes the service of process either by summons [citations] or by publication and mailing [citation]."). There is no dispute that the trial court in the underlying action had personal jurisdiction over Rhino at all relevant times. Accordingly, because the trial court had jurisdiction over both the subject matter and the parties, the order awarding the default judgment against Rhino was merely voidable, not void, and American Family's instant challenge is untimely and procedurally improper.

¶ 38 American Family relies on *Safety-Kleen Corp. v. Canadian Universal Insurance Co., Ltd.*, 258 Ill. App. 3d 298 (1994), and *Dils v. City of Chicago*, 62 Ill. App. 3d 474 (1978), to support its argument that the default judgment against Rhino was void to the extent that it exceeded $50,000. Those cases are readily distinguishable and of little assistance, because they did not address the statutory restriction on *ad damnum* clauses in personal injury cases.

¶ 39 The parties also discuss *Kaput*. However, that case is distinguishable, and its analysis is not helpful, because it arose in the context of the dismissal of a timely-filed petition pursuant to section 2-1401 of the Code after an evidentiary hearing. *Kaput*, 124 Ill. 2d at 375-76. Although the defendant in *Kaput* presented his argument in terms of "voidness," the supreme court did not

attempt to distinguish between void and voidable judgments. *Kaput*, 124 Ill. 2d at 380-82. While the court suggested that there might be circumstances in which a default judgment in a personal injury case would be "invalid," it did not say that such judgment would be void. *Kaput*, 124 Ill. 2d at 382. Furthermore, owing to the procedural posture of the case (dismissal of a section 2-1401 petition after an evidentiary hearing), the court's analysis was rooted in equity. See *Kaput*, 124 Ill. 2d at 382.

¶ 40 Unlike the defendant in *Kaput*, American Family did not file a timely petition to vacate the default judgment. Therefore, the threshold issue in the present case is whether the judgment was void. That is a purely legal issue that does not invoke equitable considerations. See *Warren County Soil and Water Conservation District v. Walters*, 2015 IL 117783, ¶ 47-48. As noted above, that legal issue has been answered by cases decided after *Kaput*, which distinguish between void and voidable judgments based on the presence or absence of personal and subject matter jurisdiction.

¶ 41 Consequently, the default judgment against Rhino in the underlying action was not void. Because American Family did not file a section 2-1401 petition within two years of the judgment, it cannot challenge the amount of the judgment at this juncture.

¶ 42 (2) Request for a Limited Remand to Determine the Amount that Johnson Received in Settling the Underlying Action

¶ 43 American Family next asks us to order a limited remand to determine the amount that Johnson received in settling the underlying action. This argument appears to be tied to the first argument, which we have already rejected. Specifically, American Family argues: "If this Court accepts American Family's above argument that the $900,000 judgment against it should be reduced to $50,000, if Johnson's settlement of his underlying case was for more than $50,000,

and if Johnson was paid before the underlying default judgment against Rhino was entered in October of 2010, then American Family's $50,000 liability to Rhino and Johnson was extinguished by Johnson's prior settlement with the other defendants in excess of that amount."

¶ 44 We reject this argument inasmuch as it is premised on the argument that the default judgment was void to the extent that it exceeded $50,000. However, as we explain below, the question of whether American Family is entitled to a setoff for amounts that Johnson received in settling the underlying action should be addressed in subsequent enforcement proceedings.

¶ 45 (3) Remand for a Hearing on Setoff

¶ 46 American Family presents its remaining arguments as alternatives in case we disagree that its liability is limited to $50,000. It argues that its liability should be reduced by the amount of Johnson's settlement in the underlying action, acknowledging that "[t]he amount of Johnson's settlement and the date he was paid are not contained in the record on appeal." American Family asks us to vacate the $900,000 judgment against it and "remand with directions to determine the amount of the settlement and the date Johnson was paid." According to American Family, "[o]nce that has been determined, the circuit court should be directed to recalculate the amount of the judgment against American Family and any accrued interest thereon."

¶ 47 We interpret this as a request for setoff. Indeed, in its reply brief, American Family invokes section 2(c) of the Contribution Act, which provides:

> "When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant,

> or in the amount of the consideration actually paid for it, whichever is greater." 740 ILCS 100/2(c) (West 2012).

¶ 48 The appellees contend that American Family forfeited this argument by failing to raise it below. We disagree. In *Thornton v. Garcini*, 237 Ill. 2d 100 (2010), the supreme court explained the multiple meanings of "setoff" as follows:

> "The term 'setoff' is used in two distinct ways. In one sense, a setoff refers to the situations when a defendant has a distinct cause of action against the same plaintiff who filed suit against him and is subsumed procedurally under the concept of counterclaim. [Citations.] Applying this meaning, a setoff may refer to a situation when the defendant claims that the *plaintiff* has done something that results in a reduction in the defendant's damages. When a defendant pursues this type of setoff, the claim must be raised in the pleadings. [Citation.]
>
> In another sense, however, the term 'setoff' may refer to a defendant's request for a reduction of the damage award because a *third party* has already compensated the plaintiff for the same injury. This occurs, for example, when a codefendant who would be liable for contribution settles with the plaintiff. This type of setoff may be raised at any time." (Emphasis in original and internal quotation marks omitted.) *Thornton*, 237 Ill. 2d at 113.

American Family's request for a reduction in damages implicates the second category of setoff. Pursuant to *Thornton*, such request "constitutes an enforcement action rather than a counterclaim" and "may be raised at any time." *Thornton*, 237 Ill. 2d at 113; see also *Star Charters v. Figueroa*, 192 Ill. 2d 47, 48 (2000) ("a defendant's request for setoff to reflect amounts paid by settling defendants seeks not to *modify*, but rather to *satisfy*, the judgment

entered by the trial court" (emphasis in original)). Therefore, the request was not forfeited by the failure to raise it below.

¶ 49 We must also reject Rhino's and Johnson's reliance on *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984), which states: "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." Where, as here, an issue was not raised before the trial court, *Foutch* is inapplicable.

¶ 50 The record reflects that on August 26, 2010, the court in the underlying action found that a settlement between Johnson and numerous defendants other than Rhino was made in good faith pursuant to the Contribution Act. However, the record does not indicate the amount or terms of that settlement. Rhino and Johnson suggest that it is speculative to assume that the settlement compensated Johnson for the same injury as the default judgment against Rhino. See *Pasquale v. Speed Products Engineering*, 166 Ill. 2d 337, 368-69 (1995) ("Under section 2(c), while a nonsettling tortfeasor might seek to utilize the entire amount of a prior settlement as a setoff, the only amounts that may normally be applied are those which compensated for the same injury or wrongful death for which the tortfeasor was ultimately found liable.").

¶ 51 The instant request for setoff affects the enforcement of both the monetary judgment against American Family in this proceeding and the judgment against Rhino in the underlying action. Under these circumstances, we believe that the question of setoff would more properly be addressed in subsequent enforcement proceedings rather than by remanding to the trial court at this juncture. We note that pursuant to Illinois Supreme Court Rule 369(b) (eff. July 1, 1982), following the issuance of our mandate affirming the trial court's judgment, "enforcement of the

judgment may be had and other proceedings may be conducted as if no appeal had been taken." We express no opinion as to whether American Family is entitled to a setoff due to Johnson's settlement in the underlying action, and we do not intend for our decision to preclude the parties from addressing that issue in subsequent enforcement proceedings.

¶ 52 (4) American Family's Liability is Not Reduced by the Amount of the Alea Settlement

¶ 53 American Family next argues that "Rhino's settlement with Alea and Rhino's judgment against American Family constitutes an impermissible double recovery." It asks us to vacate the judgment against it, remand the matter to the trial court to determine when Alea paid Johnson, and direct the court to recalculate the amount of the judgment. Once again, we construe this as a request for setoff, which, pursuant to *Thornton*, may be raised at any time. *Thornton*, 237 Ill. 2d at 113 ("[T]he term 'setoff' may refer to a defendant's request for a reduction of the damage award because a *third party* has already compensated the plaintiff for the same injury. *** This type of setoff may be raised at any time." (Emphasis in original)). Additionally, we note that the trial court specifically found that "American Family is not entitled to a set-off of the $300,000 paid by Alea to Johnson because Johnson must reimburse Alea in an equal amount from his recovery from American Family." "The determination of whether a defendant is entitled to a setoff is a question of law and, therefore, subject to *de novo* review." *Thornton*, 237 Ill. 2d at 115-16.

¶ 54 American Family relies exclusively on *Federal Insurance Co. v. Binney & Smith, Inc.*, 393 Ill. App. 3d 277 (2009). In that case, a class action lawsuit was filed against Binney & Smith, Inc. (Binney) alleging that it manufactured Crayola crayons containing asbestos fibers. *Federal Insurance Co.*, 393 Ill. App. 3d at 280. Federal Insurance Company (Federal), one of Binney's insurers, subsequently filed a declaratory judgment action seeking a declaration that it

owed no duty to defend or indemnify Binney in the class action litigation. *Federal Insurance Co.*, 393 Ill. App. 3d at 281. Binney filed a counterclaim against Federal for breach of contract and filed a third-party complaint against Royal Insurance Company of America (Royal) requesting defense and indemnification in the class action litigation. *Federal Insurance Co.*, 393 Ill. App. 3d at 281-82. Binney settled with the class action plaintiffs and also settled with Royal for an unknown amount. *Federal Insurance Co.*, 393 Ill. App. 3d at 281-82. Federal's declaratory judgment action proceeded to a bench trial, and the court found in Binney's favor. *Federal Insurance Co.*, 393 Ill. App. 3d at 282.

¶ 55 One of Federal's arguments on appeal was that the trial court erred in declining to "reduce Binney's judgment to account for money already recovered by Binney from Royal." *Federal Insurance Co.*, 393 Ill. App. 3d at 295. The court emphasized that " '[f]or one injury there should only be one recovery irrespective of the availability of multiple remedies and actions.' " *Federal Insurance Co.*, 393 Ill. App. 3d at 296 (quoting *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 422 (2002)). Specifically, the court noted, " 'the purpose of damages is to place the nonbreaching party in a position that he or she would have been in had the contract been performed, *not to provide the nonbreaching party with a windfall recovery*.' " (Emphasis in original.) *Federal Insurance Co.*, 393 Ill. App. 3d at 296 (quoting *Jones v. Hryn Development, Inc.*, 334 Ill. App. 3d 413, 418 (2002)). The court concluded that it was "clear the Royal settlement compensated Binney for the same harm or injury, namely, the [class action litigation], upon which it seeks damages here," and that the "[f]ailure to account for the Royal settlement has the potential of providing Binney with a windfall." *Federal Insurance Co.*, 393 Ill. App. 3d at 296. Accordingly, the court remanded the matter to the trial court with

instructions to review the settlement with Royal and make findings as to whether there was an impermissible double recovery. *Federal Insurance Co.*, 393 Ill. App. 3d at 296.

¶ 56 The appellees respond that *Federal Insurance Co*. is distinguishable, because the terms of the Alea settlement are known to this court and indicate that there will be no double recovery. The appellees emphasize that Johnson assigned to Alea up to $300,000 of any recovery that he may receive from American Family. Therefore, they argue, Johnson will not recover more than $900,000 in connection with the default judgment against Rhino.

¶ 57 In its reply brief, American Family acknowledges that the settlement in *Federal Insurance Co.* did not include a similar assignment clause. However, it submits, without citing any authority, that this "makes no difference" and that "[a]ll that matters is that [Alea] paid Rhino [*sic*] $300,000 to settle its coverage lawsuit." American Family contends that "[w]hat Johnson thereafter does with the recovery he ultimately realizes does not alter the fact his recovery against American Family is reduced by $300,000."

¶ 58 We certainly agree with the proposition in *Federal Insurance Co*. that a party should not receive a double recovery for its injuries. However, that case sheds no light on whether Johnson will in fact receive a double recovery here. In light of the plain language of the settlement agreement, it is apparent that Johnson will not receive a double recovery. Johnson settled with Alea for $300,000 and in turn assigned to Alea "up to $300,000 of any recovery [he] realizes from American Family." Therefore, in no event will Johnson receive from Alea and American Family, collectively, more than the amount of the $900,000 default judgment, plus appropriate interest. The trial court properly refused to apply the Alea settlement as a setoff.

¶ 59 (5) The Trial Court did not Erroneously Estop American Family from Invoking its "Other Insurance" Clause

¶ 60 American Family next argues that the trial court erroneously estopped it from invoking its "other insurance" clause as a defense, contending that it filed its declaratory judgment action within a reasonable time. We construe this as a challenge to the sufficiency of the evidence supporting the judgment, and we review the issue under the manifest-weight-of-the-evidence standard. See *IMC Global v. Continental Insurance Co.*, 378 Ill. App. 3d 797, 810 (2007) (trial court's finding after a bench trial that insurer was not estopped from asserting a late-notice defense was not against the manifest weight of the evidence). "A judgment is against the manifest weight of the evidence only where the opposite conclusion is clearly evident or where the factual findings upon which it is based are unreasonable, arbitrary, or not based on the evidence." *IMC Global*, 378 Ill. App. 3d at 804.

¶ 61 "The general rule of estoppel provides that an insurer which takes the position that a complaint potentially alleging coverage is not covered under a policy that includes a duty to defend may not simply refuse to defend the insured." *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150 (1999). Instead, the insurer must either defend the action under a reservation of rights or file a declaratory judgment action seeking a determination that there is no coverage. *Ehlco Liquidating Trust*, 186 Ill. 2d at 150. An insurer that wrongfully denies coverage and fails to take either of these steps is estopped from relying on policy defenses. *Ehlco Liquidating Trust*, 186 Ill. 2d at 150-51. The parties in the present case dispute whether American Family timely filed its declaratory judgment action so as to avoid the application of estoppel.

¶ 62 It is settled that "[w]here an insurer waits to bring its declaratory judgment action until after the underlying action has been resolved by a judgment or a settlement, the insurer's declaratory judgment action is untimely as a matter of law." *Ehlco Liquidating Trust*, 186 Ill. 2d

at 157. The supreme court has also held that "[a]n insurer will not be estopped from denying coverage merely because the underlying case proceeds to judgment before the declaratory judgment action is resolved." *State Farm Fire & Casualty Co. v. Martin*, 186 Ill. 2d 367, 374 (1999). However, apart from this, "[o]ur supreme court has not created a definitive framework for determining what constitutes a timely filed action." *State Automobile Mutual Insurance Co. v. Kingsport Development, LLC*, 364 Ill. App. 3d 946, 959 (2006).

¶ 63 This court has embraced the "reasonable time" test, which "focuse[s] on whether the insurer filed its action within a reasonable time of being notified of the underlying suit." *Kingsport*, 364 Ill. App. 3d at 960. We explained:

> "The estoppel doctrine is meant to enforce the duty to defend. [Citation.] Tests that require *only* that an insurer file a declaratory judgment action before the underlying suit is resolved or a trial or settlement is imminent contravene this goal, as they potentially give an insurer free license to abandon its insured until the underlying case is almost complete or well underway. In other words, such approaches offer no incentive to the insurer to resolve coverage issues as soon as possible. In contrast, the 'reasonable time' test is a more flexible approach that allows the court to decide each case according to its own facts and circumstances [citation] and encourages the prompt filing of declaratory judgment actions." (Emphasis in original.) *Kingsport*, 364 Ill. App. 3d at 960.

Nevertheless, "the status of the underlying suit can still be *a* factor in determining whether the insurer timely filed the declaratory judgment action." (Emphasis in original.) *Kingsport*, 364 Ill. App. 3d at 960.

¶ 64 American Family argues that it filed its declaratory judgment action within a reasonable time. As part of this argument, it suggests that other parties in this litigation conspired against it.

Specifically, it "submits that Rhino was not a serious target defendant, but instead was part of a concerted plan to set up a coverage action against American Family." According to American Family, "Rhino was an essentially judgment proof defendant," and "Rhino, Johnson and Rhino [*sic*] banded together to hang the default judgment on American Family." American Family likewise argues that "Rhino's assets were never in true jeopardy," urging that this should be taken into consideration in determining whether the declaratory judgment action was timely.

¶ 65 We will not consider American Family's conspiracy argument, which is a theory that was not raised in the trial court. See *Nelson v. Aurora Equipment Co.*, 391 Ill. App 3d 1036, 1038 (2009) ("We must consider whether a duty arises within the context of the cause of action actually pleaded, not whether some other theory of liability not pleaded would dictate a different result. Plaintiffs cannot raise a new theory for the first time on appeal."); *People ex rel. T-Mobile USA, Inc. v. Village of Hawthorn Woods*, 2012 IL App (2d) 110192, ¶ 39 ("Issues not raised in the trial court are forfeited on appeal."). It is true that forfeiture limits the parties, not this court. *People ex rel. T-Mobile USA, Inc.*, 2012 IL App (2d) 110192, ¶ 39. Nevertheless, we decline to overlook the forfeiture here, because doing so would be manifestly unfair to the appellees, who did not have an opportunity to present evidence to rebut allegations of conspiracy.

¶ 66 Apart from this newly raised conspiracy theory, American Family no longer disputes that Stanojevic had authority to add Rhino as an additional insured under the policy. Nor does it dispute that Rhino is entitled to the same rights and benefits as Liberty Bell, the named insured. Furthermore, American Family does not challenge the finding that it had timely actual notice both of Johnson's injury and the underlying action. It also appears to accept that its duty to defend was triggered in July 2008, when, according to the trial court, it "investigated whether

any of the parties named in the [underlying action], including Rhino, were additional insureds." Indeed, American Family appears to recognize that it waited 16 months after its duty to defend was triggered to file a declaratory judgment action.

¶ 67 Nevertheless, American Family emphasizes that discovery in the underlying action was ongoing when the declaratory judgment action was filed. It also emphasizes that it filed suit only three months after it learned that its local agent had issued a certificate of insurance naming Rhino as an additional insured and two months after Rhino tendered the defense to American Family.

¶ 68 The court's finding that American Family did not file suit within a reasonable time was not against the manifest weight of the evidence. As previously noted, under the "reasonable time" test, the focus is "on whether the insurer filed its action within a reasonable time of being notified of the underlying suit." *Kingsport*, 364 Ill. App. 3d at 960. However, even under this test, "the status of the underlying suit can still be *a* factor in determining whether the insurer timely filed the declaratory judgment action." (Emphasis in original.) *Kingsport*, 364 Ill. App. 3d at 960. It is true that the underlying action was still pending when American Family filed its declaratory judgment action in November 2009. Indeed, Johnson settled with numerous defendants in the underlying action in August 2010, and the default judgment against Rhino was not entered until October 2010. We believe that the trial court properly took this into consideration.

¶ 69 However, the court was also entitled to consider American Family's lengthy delay in filing suit. Even in the absence of a formal tender of defense, its duty to defend was triggered when it received "actual notice" of the underlying action in July 2008. *Ehlco Liquidating Trust*, 186 Ill. 2d at 143; see also *Cincinnati Cos. v. West American Insurance Co.*, 183 Ill. 2d 317, 329

(1998) ("actual notice" means "notice sufficient to permit the insurer to locate and defend the lawsuit" (internal quotation marks omitted)). American Family attempts to deflect attention from its delay in filing suit by claiming that it was ignorant of its agent's actions. This argument is unavailing. In the words of the trial court: "That [American Family's] internal administrative or communication issues caused it to fail to appreciate its duty to its insured does not make its failure to defend any less a breach." Under these circumstances, the trial court could have reasonably attributed more weight to American Family's delay in filing the declaratory judgment action than to the fact that the underlying action was still pending when the declaratory judgment action was filed. We cannot say that the opposite conclusion is clearly evident or that the court's finding is unreasonable, arbitrary, or not based on the evidence.

¶ 70 American Family attempts to analogize the matter to *Employers Reinsurance Corp. v. E. Miller Insurance Agency, Inc.*, 332 Ill. App. 3d 326 (2002). In that case, Employers Reinsurance Corporation (ERC) issued an insurance policy to E. Miller Insurance Agency, Inc., Edward Miller, Jr., and Edward Miller, Sr. (collectively, the Millers). *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 328-29. The Millers were sued in an underlying action for consumer fraud, breach of fiduciary duties, and breach of contract. *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 329-30. They were each served between January and November 1996, but they did not forward the complaint to ERC. *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 330. Upon receiving a copy of the complaint from a third party in March 1996, ERC requested documents from the Millers on multiple occasions and notified them that it was investigating the matter under a reservation of rights due to the lack of prompt notice. *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 330. The Millers did not provide the requested information to ERC, and ERC denied coverage on June 10, 1996. *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 330. In

November 1996, an insurance agent forwarded ERC a copy of an amended complaint, and ERC reiterated that it had denied coverage. *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 330-31.

¶ 71 On March 3, 1997, a third party notified ERC that default orders had been entered against the Millers and that the matter would proceed to prove-up of damages. *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 331. Shortly thereafter, the Millers contacted ERC for the first time, and ERC again denied coverage. *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 331. On June 10, 1997, ERC filed a declaratory judgment action alleging that it owed no duty to defend or indemnify the Millers, citing policy defenses as well as the absence of prompt notice and cooperation. *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 331-32. The trial court entered judgment on the pleadings against ERC, finding that it was estopped from asserting coverage defenses and that the declaratory judgment action was untimely as a matter of law. *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 333.

¶ 72 The appellate court reversed and granted summary judgment in favor of ERC. The court held that the Millers' failure to cooperate with ERC's investigation excused ERC from its duties such that it "should not have been estopped from asserting coverage defenses." *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 340. Despite having already held that estoppel was inappropriate, the court nevertheless proceeded to determine that ERC timely filed its declaratory judgment action. The court emphasized that the Millers "never even gave ERC an opportunity to participate" in the underlying litigation, noting that they remained "entirely inactive in the case" and failed to respond to ERC's "persistent attempts to retrieve information." *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 341. Additionally, although ERC filed its declaratory judgment action 15 months after it received notice of the underlying action, the court noted that ERC "waited *one week* after the [Millers] notified it of the litigation to remind them that it

previously had denied coverage." (Emphasis in original.) *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 341. The court found that this one week was reasonable "[i]n light of the fact that the case had been proceeding for nearly 14 months and that ERC had twice reminded the [Millers] of its intent to deny coverage." *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 341. Moreover, the court noted that the underlying litigation was still pending as of the time of the appeal. *Employers Reinsurance Corp.*, 332 Ill. App. 3d at 341.

¶ 73 *Employers Reinsurance Corp.* is distinguishable from the case at bar for several reasons. As an initial matter, the present case comes before us following a bench trial, not judgment on the pleadings, so the deferential manifest-weight-of-the-evidence standard of review applies instead of the *de novo* standard. Additionally, critical to the decision in *Employers Reinsurance Corp.* was the fact that the insureds repeatedly failed to cooperate with the insurer's investigation. Significantly, the court determined that this failure to cooperate deprived the insurer of the opportunity to participate in the litigation. See *Ehlco Liquidating Trust*, 186 Ill. 2d at 151 ("Application of the estoppel doctrine is not appropriate if the insurer had no duty to defend, or if the insurer's duty to defend was not properly triggered. These circumstances include where the insurer was given no opportunity to defend ***."). In the present case, although Rhino was inactive in the underlying action, it did not hinder any investigation. Therefore, unlike in *Employers Reinsurance Corp.*, we cannot say that Rhino deprived American Family of the opportunity to participate in the underlying action. Moreover, unlike the insurer in *Employers Reinsurance Corp.*, American Family had notice in July 2008 that Rhino had been sued by Johnson, but it did not immediately notify Rhino that it was denying coverage.

¶ 74 For these reasons, we hold that the finding that American Family did not file its declaratory judgment action within a reasonable time is not against the manifest weight of the

evidence. Accordingly, we need not address the parties' alternate arguments regarding the propriety of the trial court's ruling that, absent estoppel, liability would be prorated between American Family and Alea.

¶ 75 (6) American Family Forfeited its Argument that Johnson was Required to Prove that the Default Judgment was Reasonable

¶ 76 Finally, American Family argues that Johnson failed to prove that the default judgment was reasonable. It once again suggests that "Rhino was never in real jeopardy of being called upon to satisfy any judgment against it, because Johnson and Rhino acted in concert to set up a coverage case against American Family." According to American Family, "[t]he default judgment against Rhino therefore should be treated as the product of a *de facto* settlement between Johnson and Rhino." Relying on *Guillen v. Potomac Insurance Co. of Illinois*, 203 Ill. 2d 141 (2003), and *Stonecrafters, Inc. v. Wholesale Life Insurance Brokerage, Inc.*, 393 Ill. App. 3d 951 (2009), American Family suggests that it was incumbent on Johnson to make a preliminary showing that such "settlement" was reasonable. Absent a showing of reasonableness, American Family asserts that the default judgment is not binding against it.

¶ 77 This argument was not raised in the trial court and is subject to forfeiture. *People ex rel. T-Mobile USA, Inc.*, 2012 IL App (2d) 110192, ¶ 39; see also *Nelson*, 391 Ill. App. 3d at 1038 ("Plaintiffs cannot raise a new theory for the first time on appeal."). We decline to overlook the forfeiture, because doing so would be unfair to the appellees, who did not have an opportunity to present evidence of the circumstances surrounding the default judgment.

¶ 78 III. CONCLUSION

¶ 79 For the reasons stated, we affirm.

¶ 80 Affirmed.