

Nos. 1-13-2419 & 1-14-3669
Consolidated

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1)

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

UNITED NATIONAL INSURANCE COMPANY,)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
v.)	Cook County
FAURE BROTHERS CORPORATION,)	No. 08 CH 13595
Defendant-Appellant.)	Honorable
	Sophia H. Hall,
	Judge Presiding

JUSTICE HARRIS delivered the judgment of the court.
Justices Connors and Cunningham concurred in the judgment.

ORDER

¶ 1 **Held:** We reverse the entry of judgment in favor of United National Insurance Company on the basis that Faure Brothers was held to an improper burden of proof. Accordingly, we remand for further proceedings consistent with this order.

¶ 2 This case involves a chemical created by Air Products & Chemical, Inc, which was mislabeled and shipped by Gateway Warehouse Company, a division of defendant-appellant, Faure Brothers and the resulting insurance claim. Gateway shipped the misidentified Air Products chemical to Henkel Corp., an adhesive manufacturer. Henkel used the misidentified chemical in its adhesive product and shipped it to manufacturers who used the adhesive product to assemble various medical devices. The medical device producers discovered their products were not bonding properly, and notified Henkle. Subsequently, Air Products brought a claim against Faure Brothers for the settlement amount it had to pay to Henkle and the medical device manufacturers. Faure Brothers settled with Air Products, and then made a claim with, defendant-appellee, United National Insurance Company, Faure's insurance carrier. United National denied the claim and brought a declaratory judgment action seeking a ruling that it had neither the duty to defend or indemnify Faure for the incident.

¶ 3 The trial court originally granted summary judgment in favor of United National on the basis that it had no duty to defend Faure Brothers in the underlying matter. On appeal, we reversed the grant of summary judgment, and found United National did have a duty to defend based on the language of the policy written to Faure Brothers. After remanding the matter back to the circuit court, a trial was held on whether United National had a duty to indemnify. At trial, the circuit court placed the burden of proof on Faure to demonstrate that the underlying claim fell within coverage. After Faure put on its case in chief, United National brought a motion for judgment, which the trial court granted.

¶ 4 Before this court, Faure Brothers raises the following issues: (1) whether the circuit court erred in placing the burden of proof on Faure to demonstrate its claim was entitled to indemnification under the insurance policy; (2) whether the third-party affidavits attached to

United National's motions for summary judgment were both judicial and party admissions; (3) whether the circuit court erred in excluding records offered under Rule 803(6) of the Illinois Rules of Evidence; (4) whether the circuit court erred in excluding Faure's claim file on the basis of hearsay; (5) whether the trial court erred in entering discovery sanctions against Faure; (6) whether the circuit court erred in excluding evidence relevant to Faure's affirmative defenses of estoppel and waiver; and (7) whether the circuit court erred in ruling that United National's failure to dispute Faure's statement of undisputed facts was not an admission of those facts.

¶ 5 On review we determine that the trial court erred by placing an improper burden of proof on Faure Brothers. We do not address any other issue raised on review. The case is remanded for further proceedings consistent with this order.

¶ 6 JURISDICTION

¶ 7 The trial court entered judgment in favor of the plaintiff-appellee on October 23, 2014. Defendant-appellant filed its Notice of Appeal on November 24, 2014. Accordingly, this court has jurisdiction over this matter pursuant to Article VI, Section 6 of the Illinois Constitution, and Illinois Supreme Court Rules 301 and 303. Ill. Const. 1970, art. VI, §6; Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); Ill. S. Ct. R. 303 (eff. Jan. 1, 2015).

¶ 8 BACKGROUND

¶ 9 Our Background recites facts limited for the determination of the controlling issue presented in this case. Plaintiff-appellee, United National Insurance Company (hereinafter United National) issued a commercial general liability policy to Faure Brothers Corporation (hereinafter Faure). In March 2008, Gateway Warehouse Company, Inc. (hereinafter Gateway), a division of Faure, was sued by one of its customers, Air Products & Chemicals, Inc. (hereinafter Air Products). According to the Air Products complaint, an employee of Gateway

allegedly placed a wrong label on a chemical container of Air Products before shipping it to one of Air Products' customers, Henkel Corporation (hereinafter Henkel). Henkel used the misidentified chemical in the formulation of its adhesive product and sold the adhesive to two of its customers: Becton, Dickinson and Company Medical Services (hereinafter BD Medical) and Smiths Medical ASD, Inc. (hereinafter Smiths Medical). Both BD Medical and Smiths Medical used the adhesive product in the assembly of their medical devices. The error was discovered before the medical devices reached the consumer and the affected products were successfully recalled.

¶ 10 In its complaint, Air Products sought reimbursement from Faure for the settlement amounts it paid to Henkel, BD Medical, and Smiths Medical as a result of Gateway's mislabeling of Air Products' chemical. Faure settled with Air Products and Air Products dismissed its lawsuit. Thereafter, Faure requested its insurer, United National, reimburse Faure for the sums it paid to settle the underlying matter.

¶ 11 In April 2008, United National sued for a declaration that it owed no duty to defend or indemnify Faure in the underlying action under the terms of the commercial general liability insurance policy it had issued. In April 2009, Faure brought a counterclaim for declaratory judgment that United National had to indemnify Faure for the Air Products claim.

¶ 12 After the expiration of the final discovery deadline, the parties filed cross motions for summary judgment. On June 9, 2010, the circuit court granted judgment in favor of United National and against Faure finding that United National did not have a duty to defend Faure in the underlying action. Faure appealed the circuit court's decision and this Court exercised jurisdiction to hear the appeal under Illinois Supreme Court Rule 304(a). In reversing summary judgment in favor of United National and ordering summary judgment be entered in Faure's

favor on the duty to defend, this court stated, "[a]fter liberally construing the allegations of the complaint in favor of Faure Brothers, we find the allegations either fall within or potentially within coverage." *United National Insurance Co., v. Faure Brothers Corp.*, 409 Ill. App. 3d 711, 720 (2011). This court then remanded the matter back to the circuit court for a determination as to whether United National had a duty to indemnify.

¶ 13 Upon remand, on October 4, 2013, the circuit court entered an order allowing the parties to file a memorandum of law regarding the allocation of the burden of proof as to whether Faure's claim fell within coverage under the insurance policy. The parties submitted briefs on the issue. Approximately one month later, the circuit court ruled that Faure had the burden of proof as to whether the claim fell within the terms of the policy.

¶ 14 The trial commenced on July 24, 2014. The trial court required Faure to put its case in chief on first. Per the court's previous ruling, Faure was required to prove the following: (1) that Gateway's mislabeling actually occurred; (2) that Gateway mislabeled a particular chemical; (3) who from Gateway mislabeled the chemical and when the chemical was mislabeled; (4) that the mislabeling was the cause of any damages alleged in the underlying suit; (5) that the allegedly mislabeled products were the products sent to Henkel; and (6) that the inclusion of the chemical that Gateway shipped was the reason Henkel's adhesive was defective.

¶ 15 At the conclusion of Faure's evidence, United National tendered a written motion for entry of judgment in its favor. United National argued that Faure had failed to support its burden of proof to demonstrate that the mislabeling had actually occurred; the circumstances surrounding the purported mislabeling and that the purported mislabeling was the cause of the damages alleged in the underlying suit.

¶ 16 The circuit court allowed Faure to file a written response to United National's motion for entry of judgment. On October 23, 2014, the circuit court entered an order granting United National's motion for judgment.

¶ 17 Faure timely filed a Notice of Appeal on November 24, 2014.

¶ 18 ANALYSIS

¶ 19 Faure raises the following issues on appeal: (1) whether the circuit court erred in placing the burden of proof on Faure to demonstrate its claim was entitled to indemnification under the insurance policy; (2) whether the third-party affidavits attached to United National's motions for summary judgment were both judicial and party admissions; (3) whether the circuit court erred in excluding records offered under Rule 803(6) of the Illinois Rules of Evidence; (4) whether the circuit court erred in excluding Faure's claim file on the basis of hearsay; (5) whether the trial court erred in entering discovery sanctions against Faure; (6) whether the circuit court erred in excluding evidence relevant to Faure's affirmative defenses of estoppel and waiver; and (7) whether the circuit court erred in ruling United National's failure to dispute Faure's statement of undisputed facts was not an admission of those facts. As here after set forth, we need only address whether the circuit court correctly placed a burden of proof on Faure to establish its entitlement to indemnification.

¶ 20 First we address the standard of review applicable to this case. We note that neither party correctly addresses the applicable standard of review. This case proceeded to a bench trial, and after Faure put on its case in chief, United National moved for judgment in its favor. While its motion does not identify under what section of the Illinois Code of Civil Procedure the motion is brought, it must have been brought pursuant to Section 2-1110, which pertains to motions in non-jury cases. 735 ILCS 5/2-1110 (West 2012).

¶ 21 In a bench trial, the trial court, rather than a jury, is the trier of fact, and when granting a motion pursuant to Section 2-1110 (735 ILCS 5/2-1110 (West 2012)) for a judgment in the defendant's favor at the close of the plaintiff's case, the court might well resolve conflicts in the evidence and assess the credibility of witnesses, depending on the reason why the court grants the motion. If the court grants the defendant's motion for a judgment at the conclusion of the plaintiff's case, the court will do so for either of two reasons: (1) the plaintiff failed to present at least some evidence on each element of the *prima facie* case, or (2) the plaintiff failed to carry the ultimate burden of proof. *In re Estate of Etherton*, 284 Ill. App. 3d 64, 68 (1996).

¶ 22 Thus, if the defendant moves for judgment at the close of the plaintiff's evidence in a bench trial, the trial court must perform an analysis consisting of two phases. In the first phase, the court does not weigh the evidence as of yet but merely considers whether the plaintiff has adduced at least some evidence in support of each element of the *prima facie* case. In other words, the court determines, as a matter of law, whether the plaintiff has presented at least some evidence on every element of the cause of action. *Walsh/II in One Joint Venture III v. Metropolitan Water Reclamation District of Greater Chicago*, 389 Ill. App. 3d 138, 145 (2009); *Baker v. Jewel Food Stores, Inc.*, 355 Ill. App. 3d 62, 66 (2005). If the plaintiff has made out a *prima facie* case (by presenting at least some evidence on each element), the court then should proceed to the second phase of the analysis, in which the court weighs all the evidence. *Walsh/II*, 389 Ill. App. 3d at 145; *Baker*, 355 Ill. App. 3d at 66.

¶ 23 If the trial court terminates the bench trial by granting the defendant's motion for judgment at the close of the plaintiff's evidence, our standard of review will depend on the reason why the court granted the motion, *i.e.*, the phase in which the court granted the motion, the first phase or the second phase. If the court granted the motion in the first phase of its analysis,

finding a total lack of evidence on one or more of the elements of the *prima facie* case, our standard of review is *de novo* (*Minch v. George*, 395 Ill. App. 3d 390, 397 (2009); *Walsh/II*, 389 Ill. App. 3d at 145; *Baker*, 355 Ill. App. 3d at 66); for the trial court was in no better position than we are to determine the mere presence or absence of evidence. See *Kokinis v. Kotrich*, 81 Ill. 2d 151, 155 (1980) (“the trial judge must first determine, as a legal matter, whether the plaintiff has made out a *prima facie* case”); *Woods v. Cole*, 181 Ill. 2d 512, 516 (1998) (a reviewing court reviews questions of law *de novo*). If, however, the trial court granted the motion in the second phase of the analysis, by weighing the evidence and assessing the credibility of witnesses, we ask whether the ruling is against the manifest weight of the evidence. *Kokinis*, 81 Ill. 2d at 154.

¶ 24 Here, the order entering judgment does not specify the reason for the trial court's entry of judgment in United National's favor, but a review of United National's motion demonstrates that its argument related solely to Faure's failure to prove a *prima facie* case. Since the trial court granted United National's motion based on its argument that Faure had not made out a *prima facie* case, the trial court must have granted United National's motion in the first phase of its analysis.

¶ 25 Accordingly, our review is *de novo*.

¶ 26 The only issue we address on review is whether the trial court erred in what it required Faure to prove to be entitled to indemnification under the insurance policy. Faure contends that United National, as plaintiff in the declaratory judgment action had the burden of proof. United National argues Faure, as the insured, had the obligation of first establishing that its claim fell within the coverage of the insurance policy. We determine that even though Faure is the defendant in this action, the trial court was correct in placing the burden of proof on Faure to

proceed first at trial, (see *Federal Ins. Co. v. Binney & Smith, Inc.*, 393 Ill. App. 3d 277, 279 (2009)) but that the trial court placed several wrong burdens on it.

¶ 27 The trial court correctly required Faure to proceed with its case in chief first and placed the burden on Faure to first demonstrate its claim was entitled to indemnification. In placing the burden on Faure, the trial court required Faure to show: (1) that Gateway's mislabeling actually occurred; (2) that Gateway mislabeled a particular chemical; (3) who from Gateway mislabeled the chemical and when the chemical was mislabeled; (4) that the mislabeling was the cause of any damages alleged in the underlying suit; (5) that the allegedly mislabeled products were the products sent to Henkel; and (6) that the inclusion of the chemical that Gateway shipped was the reason Henkel's adhesive was defective.

¶ 28 We find that the trial court erred when it required Faure to make such a showing. In this case Faure settled the Air Products claim after suit had been filed but before any judgment was rendered. "If an insured settles an underlying claim prior to verdict, it must show that it settled an otherwise covered loss in 'reasonable anticipation of liability.'" *Federal Ins. Co.*, 393 Ill. App. 3d at 282 citing *U.S. Gypsum Co. v. Admiral Ins. Co.*, 268 Ill. App. 3d 598, 625 (1994). In order to recover a settlement, the insured:

¶ 29 " ' need not establish actual liability to the party with whom it has settled "so long as a potential liability on the facts known to the [insured is] shown to exist, culminating in an amount reasonable in view of the size of possible recovery and degree of probability of claimants success against the insured." ' " *U.S. Gypsum Co.*, 268 Ill. App. 3d at 626-26 quoting *Luria Brothers & Co. v. Alliance Assurance Co.*, 780 F. 2d 1082, 1091 (7th Cir. 1986).

¶ 30 The determination of whether Faure's anticipation of liability was reasonable would turn on the "quality and quantity of proof" which Faure would expect to be offered against it in the underlying case. See *U.S. Gypsum Co.*, 268 Ill. App. 3d at 626. The burden of proving reasonableness falls on the insured both out of fairness, since the insured was the one who agreed

to the settlement, and out of practicality, since the insured will have better access to the facts bearing upon the reasonableness of the settlement. *Guillen ex rel. Guillen v. Potomac Insurance Co. of Illinois*, 203 Ill. 2d 141, 163 (2003). However, the insurers retain the right to rebut any preliminary showing of reasonableness with its own affirmative evidence bearing on the reasonableness of the settlement agreement. *Guillen*, 203 Ill. 2d at 163.

¶ 31 Based on this, we conclude that even though Faure was the defendant in this action, it was proper to have it proceed first, but the evidentiary burden Faure was required to prove was wrong. Accordingly, we reverse and remand for a new trial on whether Faure can prove the settlement it entered into was reasonable. Upon remand both parties should be allowed to conduct discovery to determine the reasonableness of the underlying settlement agreement. See Ill. S. Ct. R. 366(a)(5).

¶ 32 This being the second appellate review and the circuit court having erred as to the duty to defend, thereafter placing an incorrect and onerous burden of proof upon the insured, and a variety of several unresolved and disputed discovery orders that we have not determined, it is our opinion that in the interests of justice as well as the parties, this case should proceed before another circuit judge who has not ruled on the issues in this case.

¶ 33 **CONCLUSION**

¶ 34 For the foregoing reasons, the trial court's entry of judgment in favor of United National Insurance Company is reversed and the case is remanded to the presiding circuit judge, chancery division, for reassignment and for further proceedings consistent with this order.

¶ 35 Reversed and remanded for further proceedings.