2016 IL App (1st) 150862-U

THIRD DIVISION
May 11, 2016

No. 1-15-0862

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MACEO RAINEY,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois.
	)	
v.	)	No. 11 CH9884
	)	
INDIANA INSURANCE CO.	)	Honorable
	)	Franklin Ulysses Valderrama
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court improperly entered summary judgment, finding the insurer was required to pay for the insured to hire independent counsel, where the insurer defended the insured without a reservation of rights, and no conflict of interest existed in the underlying action.

¶ 2 This appeal arises from an action filed by Maceo Rainey against his insurer, Indiana Insurance Company (Indiana), seeking a declaration that Indiana breached its obligation to defend him in the underlying action by refusing to pay for counsel of Rainey's choice. In that action, Fred Jacobeit, former teacher and coach, sued Principal Rainey and their employer, Rich

Township High School District 227 Board of Education (Rich), for allegedly terminating his employment as an assistant coach due to his race, age and disability. Indiana hired counsel to defend Rich and Rainey, but Rainey insisted that Indiana was required to pay for his choice of independent counsel due to a conflict of interest. Rainey argued that he and Rich had diametrically-opposed strategies in the underlying action. Ultimately, the circuit court entered summary judgment against Indiana, finding a conflict existed that gave rise to Rainey's right to retain his own counsel at Indiana's expense. On appeal, Indiana asserts that the circuit court erred because no conflict of interest existed. Indiana further argues the court erred by awarding damages under section 155 of the Illinois Insurance Code (the Code) (215 ILCS 5/155 (West 2012)) because Indiana's conduct reflected a *bona fide* dispute, not vexatiousness. We reverse and remand for further proceedings.

¶ 3 I. BRIEFS ON APPEAL

¶ 4 As a threshold matter, both parties' briefs are deficient in several respects. Their statements of facts are at times misleading and fail to cite the record. See Ill. S. Ct. R. 341(h) (6), (i) (eff. Jan. 1, 2016). Indiana improperly cites the appendix, rather than the record itself. Additionally, both parties' arguments fail to support certain legal propositions with citations to pertinent legal authority. See Ill. S. Ct. R. 341(h) (7), (i) (eff. Jan. 1, 2016). "[A] reviewing court is not a repository into which the appellant can dump the burden of research." *County of McHenry v. Thoma*, 317 Ill. App. 3d 892, 893 (2000). Furthermore, litigants disregard these requirements at their own peril. See *e.g.*, *Hall v. Naper Gold Hospitality LLC*, 2012 IL App (3d) 111151, ¶ 9 (observing that a court may strike an improper statement of facts or dismiss the appeal due to an incomplete statement of facts). Accordingly, we urge counsel to revisit these requirements before filing another brief in this court.

¶ 5 II. BACKGROUND

¶ 6 A. Underlying Action

¶ 7 Jacobeit is a Caucasian male with Syringomyelia, which requires him to walk with a cane. According to Jacobeit, Rich hired him as a teacher in 1978, and for 30 years, Rich hired Jacobeit to coach at least one sport every year. When Jacobeit applied to be the girls' basketball coach in 2007, Rich hired someone else, a non-disabled, African-American woman under age 40. According to Jacobeit, Rich said the candidate was more "energetic" and better for the school's "diverse" community, which was largely African-American. Rich denied saying this. In October 2007, Principal Rainey authorized athletic director Will Dwyer to inform Jacobeit that he was hired as the assistant girls' basketball coach. While Rich admitted that Dwyer advised Rainey that the hiring committee had recommended Jacobeit, Rich denied that Rainey authorized Dwyer to inform Jacobeit that he was hired; rather, hiring an employee required Rich's approval.

¶ 8 Jacobeit also alleged that he began working as an assistant coach on October 29, 2007, but was told he would not be paid until January. In November, Rainey signed a "recommendation for hire" form but never presented it to Rich for final approval. That same month, Dwyer informed Jacobeit that Rainey decided to rescind Jacobeit's offer. Jacobeit alleged that he was not given a reason at that time and that Rich knew of Rainey's decision. Rich denied that Rainey had even been hired, however. Additionally, Rich denied that it knew of Rainey's employment decision. Jacobeit subsequently received a check for the work he performed.

¶ 9 According to Jacobeit, Rainey later said that Rich "wanted to keep the position open for a certified staff member," notwithstanding that Jacobeit had been a certified member for 30 years. Jacobeit also alleged that later still, Rainey, an African-American, said that Rich rescinded the job because Jacobeit was racially insensitive to African-American boys whom he coached in an

unrelated incident that occurred two years prior. Rich denied that Rainey made this statement. As to the prior incident, Jacobeit alleged he was accused of giving a student a "black tar baby" gift but Jacobeit denied this and Rainey never investigated the accusation. Rich investigated, however, and did not discipline Jacobeit.

¶ 10 Moreover, Jacobeit filed a complaint in the United States District Court for the Northern District of Illinois (No. 09-cv-1924) in 2009. On July 2, 2009, he filed his first-amended, four-count complaint against Rich and Rainey, alleging that they declined to hire him as a coach and subsequently terminated his position as an assistant coach due to his race, age and disability. Specifically, Jacobeit alleged that (1) Rich and Rainey violated the Civil Rights Act of 1964(42 U.S.C. §§ 1981, 1983); (2) Rich violated the Age Discrimination in Employment Act of 1967 (29 U.S.C. §§ 621 *et seq.* (2008)); (3) Rich violated the Americans with Disabilities Act of 1990 (42 U.S.C. §§ 12101 *et seq.* (2008)); and (4) Rich and Rainey violated Jacobeit's right to due process. We note that neither the original nor the amended complaint sought punitive damages.

¶ 11 B. Rainey's Defense

¶ 12 At Rich's request, Indiana hired Rich's general counsel, Scariano, Himes & Petrarca, Chtd. (Scariano), to represent Rich and Rainey. In its letter agreeing to provide a defense, Indiana stated, "[b]y providing a defense to this matter, please understand that Indiana Insurance does not waive any of its rights under the policy, or give rise to any estoppel to raise those rights." Despite the general nature of this caveat, the policy itself excluded coverage for intentional injuries, and punitive damages.

¶ 13 Rich's answer to Jacobeit's amended complaint denied that that he was dismissed due to discriminatory practices; instead, it had appropriate, non-discriminatory reasons for its employment decisions related to Jacobeit. In addition, Rich and Rainey moved to dismiss the

action, specifically arguing that both counts against Rainey should be dismissed because there was no evidence that race, age or disability impacted Jacobeit's employment. The motion further argued that Rainey was entitled to qualified immunity. On November 25, 2009, Judge James F. Holderman granted the motion in part. All claims remained pending against Rich while only count IV, as well as part of count I, remained pending against Rainey in his individual capacity.

¶ 14 At some point, Rainey lost his position as principal and, instead, became the principal of the alternative school program. Teachers celebrated Rainey's change of employment at a gathering in St. John, Indiana in June 2010. They burned Rainey's photograph in effigy and allegedly displayed a noose.

¶ 15 In October 2010, Rainey informed Rich's superintendant, Dr. Donna Simpson Leak, that Scariano had serious conflicts of interest and thus, he wanted Rich to retain Rainey's own choice of counsel, Jerome Davis, to defend him in the Jacobeit suit. Additionally, Scariano informed Davis that the firm would not withdraw as counsel unless Rich directed it to do so. Michael Hetzel, senior claims analyst at Indiana, informed Davis that Rainey could retain whomever he wanted but Indiana would not pay for it. Hetzel also informed Davis that Indiana was pleased with Scariano's work and saw no conflict. By November, however, Hetzel stated he was "uncomfortable" with Scariano representing Rainey because Scariano was representing Rich regarding the St. John incident. Indiana then hired attorney Jeff Taylor, from Spesia & Ayers, to defend Rainey and Rich in the Jacobeit case. Rainey refused Taylor's counsel, however, unsuccessfully insisting that Indiana pay for Davis to defend him. Rainey proceeded *pro se* for most of the Jacobeit litigation.

¶ 16 C. Present Action

¶ 17 On March 16, 2011, Rainey filed a complaint against Rich and Indiana, seeking a declaration that both were required to pay for his independent counsel. The circuit court dismissed the complaint without prejudice. Meanwhile, Rainey's employment with Rich ended. Rainey then filed an amended complaint against Indiana alone, which the court again dismissed without prejudice. Eventually, Rainey filed his third-amended complaint on August 6, 2012. This complaint, like its predecessors, explicitly alleged that Indiana undertook Rainey's defense "without any reservation of rights." This complaint added, however, an additional inconsistent allegation that "[p]unitive damages are excluded from coverage under a reservation of rights issued by Indiana when it accepted Rainey's defense."

¶ 18 Count I alleged that Indiana breached its duty to defend him through independent counsel and count II alleged that Indiana was equitably estopped from denying its obligation to provide an independent defense because Indiana induced him to permit its control of his defense for two years, even though Indiana knew Scariano had a conflict of interest. Additionally, count III alleged that Jacobeit sought punitive damages from him, requiring Rainey to show he fired Jacobeit at Rich's direction. Thus, a conflict of interest existed. Furthermore, Indiana breached its duty to defend because it did not advise him of the conflict, authorize him to retain independent counsel, or seek a declaration of Indiana’s obligations. As a result, Indiana was required to pay for his independent counsel and was estopped from asserting contractual defenses.

¶ 19 In response, Indiana essentially professed a lack of sufficient knowledge regarding many of the complaint's allegations, including allegations regarding its own employees. In addition, the circuit court found many of Indiana's responses were insufficient and the corresponding allegations were admitted. Accordingly, Indiana was deemed to admit, among other things, that Scariano advised Rich in a campaign of harassment and retaliation against Rainey for his public

criticism of Rich and conducted a survey of Rich teachers to assess the school's "climate" as a pretext for demoting and then firing Rainey. Indiana was also deemed to admit that Scariano advised Rich in its decision to forcibly remove Rainey from his office as well as its later decision to terminate his employment.[1] Furthermore, Rich was deemed to admit that police officers told Rainey their investigation of the St. John incident was stymied by Scariano instructing others not to cooperate. Indiana did not admit, however, that a conflict of interest existed as to the Jacobeit case.

¶ 20 Subsequently, on November 14, 2012, Judge John J. Tharp Jr. dismissed the federal action in light of a settlement agreement reached between Rich and Jacobeit. Pursuant to the agreement, Jacobeit dismiss all claims against Rich and Rainey with prejudice. Judge Tharp stated, "[r]ather than welcoming the dismissal of the claims against him, Rainey objects to Jacobeit's motion on the grounds that dismissal will prejudice his rights." Specifically, Rainey argued that the settlement could negatively impact his case against Indiana. Judge Tharp found, however, that "[w]hatever the source of Rainey's reimbursement rights, a favorable result in this case ***, has no bearing on the validity of Rainey's argument that [Rich's] insurer had an obligation to provide separate counsel to Rainey along the way." See also *Nandorf, Inc. v. CNA Insurance Companies*, 134 Ill. App. 3d 134, 139 (1985) (finding that an outcome favorable to the insured will not justify exercising hindsight to negate the existence of a conflict of interest). The court further found "dismissal of the claims against him should not affect any right or claim he may have for reimbursement of the costs he has already incurred."

¶ 21 In June 2013, Rainey moved for summary judgment on counts I and III, arguing that a conflict existed between him on the one hand, and Rich and Indiana on the other. We note that

[1] The climate report is not included in our record on appeal.

Rainey's specific theory or theories as to the source(s) of the conflict changed several times over the course of proceedings. In addition, Rainey attached several deposition transcripts to his motion in support of his contention that the defenses of Rainey and Rich were diametrically opposed. At times, the deposition testimony of Rich's board members suggested that it would have been inappropriate for the "black tar baby" allegations to foreclose Jacobeit's employment as an assistant coach. Furthermore, a climate report commissioned by Rich concluded, "there's a high-level of racial tension in the building." Also attached was an affidavit executed by Rainey, alleging he told Rich's counsel that "I was not interested in settling the case because I was eager to go to trial and tell my side of what happened." The affidavit further stated, "I told Mr. Taylor that I had explosive testimony and Rich would not be happy when I revealed what I knew." Despite Rainey's desire to tell his side, we reiterate that Rainey was not the plaintiff, apparently never filed his own claim in that action, and was not required to pay anything in the settlement. Furthermore, Rainey attached a status report filed in the federal case in July 2012, which stated that Jacobeit was seeking punitive damages against Rainey.

¶ 22 Meanwhile, Indiana moved to dismiss Rainey's third-amended complaint as moot under section 2-619 due to the settlement of the underlying action. In August 2013, Indiana also filed a response to Rainey's summary judgment motion, again arguing that he was not entitled to counsel of his choice because there was no conflict and Indiana defended Rainey without a reservation of rights. At no time did Indiana file cross-motion for summary judgment.

¶ 23 In November, the circuit court denied Rainey's motion for summary judgment, and apparently denied Indiana's motion to dismiss as well. First, the court found that the settlement of the Jacobeit suit, which occurred after Rainey filed the declaratory action, "cannot operate as a shield against any liability for a breach of a duty to defend." With that said, the court rejected

Rainey's contention that there were conflicts between himself, Rich and Indiana. The court found, among other things, that no conflict existed absent a reservation of rights, as Indiana would be liable for any judgment entered against Rainey.

¶ 24 Rainey then filed a motion for reconsideration. Despite contrary allegations in his pleadings, Rainey argued that Indiana was not providing coverage for all loss sustained by Rainey because Indiana had reserved exclusions in its insurance policy, which included punitive damages, and, thus, would not provide coverage for any award of punitive damages. He also alleged that Jacobeit sought punitive damages in excess of $1.3 million and intended to seek an unspecified amount of damages for emotional distress, which Indiana could avoid paying if Rainey intentionally caused them. Curiously, Rainey then stated that "Indiana's defense without a reservation of rights did not resolve the conflict between the parties because Indiana did not indemnify plaintiff against punitive damages." Rainey repeated that the defenses of Rich and Rainey were diametrically opposed: "To assert a defense of qualified immunity or to avoid punitive damages, Plaintiff had to show that he faithfully carried out the policy of the District; however, to avoid liability, the District had to negate that defense by showing that Plaintiff was not executing its policy."

¶ 25 Indiana responded that Jacobeit's complaint did not seek punitive damages and, in any event, Indiana did not reserve its right to deny coverage on any ground. Thus, no argument made on Rich's behalf would require Rainey to pay an award entered against him. Furthermore, several consistent defenses were available, including showing that any employment decision was based on appropriate, rather than discriminatory, reasons.

¶ 26 On April 1, 2014, the circuit court reconsidered its decision and entered summary judgment in Rainey’s favor. The court found a conflict of interest existed because "[w]hile

Indiana *** may have asserted some defenses on behalf of Rich *** that would not take Rainey outside of the policy coverage, it could not have asserted certain defenses such as qualified immunity for one insured without harming the other." In addition, the court found the status report showed that Jacobeit would seek punitive damages, creating a conflict of interest. "While Indiana *** agreed to pay any compensatory damages, Indiana *** did not agree to, nor could it agree to pay any punitive damages on behalf of Rainey." Indiana breached its duty by failing to appropriately respond to the conflict. The court subsequently denied Indiana's motion to reconsider.

¶ 27 Rainey also filed a petition for attorney fees, costs and statutory damages under section 155 of the Code, arguing that Indiana's conduct in refusing to pay for independent counsel or seek a declaration of its obligations was vexatious and unreasonable. In response, Indiana argued that Rainey failed to plead section 155 damages in his complaint and that a *bona fide* dispute precluded section 155 damages. The court initially denied Rainey's petition but granted him leave to file a fourth-amended complaint seeking damages under section 155, which the court granted. The court awarded him $232,925.51 in attorney fees and costs, as well as a $60,000 penalty pursuant to section 155(b). Rainey then voluntarily dismissed count II, the only remaining count.

¶ 28 II. ANALYSIS

¶ 29 A. Conflict of Interest

¶ 30 On appeal, Indiana asserts that the circuit court erroneously entered summary judgment in Rainey's favor because no conflict of interest existed and Indiana defended Rainey without a reservation of rights. Although Rainey's characterization of the conflict's source varied from time to time, the circuit court found there was no genuine issue of material fact in that Rainey's

interest diametrically opposed that of Rich and Indiana. Summary judgment is appropriate where the pleadings, admissions, exhibits and affidavits show no genuine issue of material fact exists so that the movant is entitled to judgment as a matter of law. *Continental Western Insurance Co. v. Knox County EMS, Inc*., 2016 IL App (1st) 143083, ¶ 33. We review the circuit court's judgment *de novo*. *Robert R. McCormick Foundation v. Arthur J. Gallagher Risk Management Services, Inc.*, 2016 IL App (2d) 150303, ¶ 9.

¶ 31 The duty to defend and the duty to indemnify are corresponding, albeit separate and distinct. *Waste Management, Inc. v. Int'l Surplus Lines Ins. Co.*, 144 Ill. 2d 178, 203 (1991). An insurer's duty to defend is broader than its duty to pay. *Nandorf, Inc.*, 134 Ill. App. 3d at 136. The duty to defend also includes, however, the right to assume control of the litigation. *Id*. This right permits insurers to protect their financial interest in the litigation's outcome and minimize unwarranted liability claims. *Waste Management, Inc.*, 144 Ill. 2d at 203. Similarly, that right allows the insurer to safeguard the proper disbursement of large sums of money involved. *Nandorf, Inc.*, 134 Ill. App. 3d at 136.

¶ 32 Generally, the determination of whether an insurer has a duty to defend an insured requires examining the complaint's allegations. *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187, 193 (1976). If the complaint alleges facts that are potentially within the policy's coverage, the duty is triggered. *Id*. When policy coverage is in question, an insurer may defend the suit under a reservation of right or seek a declaratory judgment defining the insurer's obligations. *Pekin Insurance Co. v. Home Insurance Co.*, 134 Ill. App. 3d 31, 34-35 (1985). An insurer who undertakes an insured's defense without a reservation of rights will be estopped from denying coverage if doing so would result in prejudice. *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 19.

¶ 33 An insurer cannot defend under a reservation of rights, however, where a conflict of interest exists. *Murphy v. Urso*, 88 Ill. 2d 444, 457 (1981). Instead, the insurer must relinquish control of the defense and, instead, pay for its insured to hire independent counsel. *Williams v. American Country Insurance Co.*, 359 Ill. App. 3d 128, 137-38 (2005). Alternatively, the insurer can fully disclose the conflict and obtain the insured's consent to be defended by the insurer's chosen counsel. *Nandorf, Inc.*, 134 Ill. App. 3d at 137. "A ruling that required an insured to be defended by what amounted to his enemy in the litigation would be foolish." *Murphy*, 88 Ill. 2d at 455.

¶ 34 A conflict exists if, in comparing the complaint's allegations to the insurance policy's terms, the insurer's interests would be furthered by providing the insured a less than vigorous defense to the allegations. *Country Mutual Insurance Co. v. Olsak*, 391 Ill. App. 3d 295, 302 (2009). With that said, "the conflict must rise to a level from which it appears that the insurer may not vigorously defend a claim lodged against its insured." *Illinois Municipal League Risk Management Ass'n v. Seibert*, 223 Ill. App. 3d 864, 872 (1992).

¶ 35 Courts have recognized two instances in which a conflict of interest is so great as to require the insurer to pay for outside counsel. *Pekin Insurance Co.*, 134 Ill. App. 3d at 35. The first instance arises when proof of certain facts would transfer liability from the insurer to the insured. *Id*. Attorneys' interest in protecting the insurer who hired them is more compelling than their interest in protecting the insured, notwithstanding their fiduciary duty to both clients and regardless of whether a chosen strategy coincides with insured's best interest. *Nandorf, Inc.*, 134 Ill. App. 3d at 137. The second instance arises where a conflict of interests exists between two insureds covered by the same insurer. *Pekin Insurance Co.*, 134 Ill. App. 3d at 35. This may

occur where two insureds' "interests in how the underlying suit [is] to be defended [are] diametrically opposed." *Williams*, 359 Ill. App. 3d at 138. Furthermore, interests are diametrically opposed where an insurer "could not choose a defense strategy in the underlying action without harming" one of its two insureds. See *Id.* at 139.

¶ 36 We find that neither Rich nor Indiana were Rainey's enemies in the underlying litigation. First, Rainey failed to demonstrate that he and Rich possessed diametrically opposed defenses. Rainey argues that the defenses were opposed because "Rich could avoid liability by showing that [Rainey's] decision to withdraw the recommendation to hire was not based on its policy or directives," whereas Rainey "could avoid liability by showing that his decision to rescind the recommendation for hire was based on Rich's policy and directives, not racial discrimination." Notwithstanding Rainey's contention, he has failed to cite legal authority in support of his assertion that these defenses were appropriate and available. Ill. S. Ct. R. 341(h) (7) (eff. July 1, 2008). Accordingly, this argument is forfeited. See *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23. Furthermore, Rainey conveniently disregards that Rich took a position favorable to him.

¶ 37 First and foremost, Rich alleged and argued that neither it nor Rainey made discriminatory employment decisions with respect to Jacobeit. Additionally, Rich argued that Rainey was not a final decision maker. While Rainey argues that Rich's purpose for the latter defense was to shift liability to him, he takes Rich's argument out of context. Rich stated below that if an official is not a final decision maker and he violates, rather than implements school policy, the official is responsible, not the school district. Rich went on to state, however, that Rainey had not violated policy. At no point did Rich itself agree that Rainey acted improperly, notwithstanding that the deposition testimony of certain board members speculated that it would have been wrong for the insureds to rely on the "black tar baby" incident in making employment

decisions. *Cf. Murphy*, 88 Ill. 2d at 452-53 (finding diametrically-opposed interests where, if the insured-employee was found to be negligent it would behoove him to show he acted within the scope of employment but it would behoove the employer to show that he did not); *Williams*, 359 Ill. App. 3d at 139 (similar).

¶ 38 Here, Indiana could and did choose a defense strategy for one insured without harming the other. *Cf. Country Mutual Insurance Co.*, 391 Ill. App. 3d at 304 (finding the insured's interests were diametrically opposed where the insurer could not choose a defense strategy in the underlying action without harming one of the insureds). Furthermore, we observe that where an insurer has agreed to pay the judgment against either insured, it will generally be in the insurer's best interest to present consistent and vigorous defenses on behalf of both insureds.

¶ 39 To the extent Rainey argues that Jacobeit's request for punitive damages created a conflict, Jacobeit's amended complaint did not seek punitive damages. See *Illinois Municipal League Risk Management Ass'n*, 223 Ill. App. 3d at 870 (observing that "because no punitive damages were alleged at that time, Seibert could not have relied on this information in deciding to retain his own counsel"). Additionally, Rainey cites no authority for the proposition that we can, and should, look past the complaint to a status report to determine that Jacobeit was seeking punitive damages.[2] See *National Casualty Co. v. Forge Industrial Staffing*, 567 F. 3d 871, 875-76 (7th Cir. 2009) (finding the mere possibility that punitive damages may be sought in later litigation did not create an actual conflict of interest); see also *Nandorf, Inc.*, 134 Ill. App. 3d at 140 (finding that independent counsel was not required every time punitive damages are sought). Because Jacobeit had not formally requested punitive damages, the threat of a claim for punitive damages did not put Rainey and Indiana at odds.

[2] We similarly reject Rainey's assertion that we must consider the climate report absent any citation to legal authority in support thereof.

¶ 40 Despite Rainey's inconsistent contentions, we also accept his original concession that Indiana defended him without a reservation of rights.[3] Indiana's letter agreeing to defend Rainey stated that Indiana did "not waive any of its rights under the policy," but Indiana did not specifically reserve the right to deny any particular type of coverage under any particular provision. *American Family Insurance Co. v. Westfield Insurance Co.*, 2011 IL App (4th) 110088, ¶ 22 (observing that a reservation of rights must specifically identify the policy defense that ultimately may be asserted; bare notice is insufficient). We also note that Indiana had no reason to explicitly reserve the right to deny coverage for punitive damages, as no punitive damages were alleged in Jacobeit's complaint. *Cf. Maryland Casualty Co.*, 64 Ill. 2d at 198 (observing that it would be in the insurer's best interest for the trier of fact to find the insured acted intentionally, which would relieve the insurer of liability); *Mobil Oil Corp. v. Maryland Casualty Co.*, 288 Ill. App. 3d 743, 756 (1997) (finding, where the claimants sought punitive damages, that counsel hired by the insurer had a conflict of interest because the insurer denied that it was required to pay any punitive damages awarded); *Nandorf, Inc.*, 134 Ill. App. 3d at 135, 138 (finding that while the insurer's interests would be served by an award of minimal compensatory damages and substantial punitive damages, which it reserved the right not to pay, the insured had an interest in reducing any punitive damages awarded). Having agreed to defend Rainey without reserving its rights or seeking a declaratory judgment that Rainey was not covered, Indiana could not have declined to pay any judgment against him. See *Maryland*

[3] The circuit court suggested that public policy would not allow an insurer to pay an award of punitive damages against its insured even if the insurer waived the right to exclude them. See *Crawford Laboratories, Inc. v. St. Paul Insurance Co. of Illinois*, 306 Ill. App. 3d 538, 544 (1999) (observing that public policy prohibits insurance against punitive damages liability). Neither party has developed a legal argument in that regard.

Casualty Co., 64 Ill. 2d at 195. Thus, defending Rainey without a reservation of rights negated any conflict of interest.[4]

¶ 41 Nonetheless, Rainey states as follows:

> "It does not matter that the insurer will pay the claim, because the ethical duty to vigorously defend is not predicated on who pays if the insured loses. The goal of providing a vigorous defense is to make sure that the insured does not lose."

In determining whether an insurer will present a vigorous defense, we find it more appropriate to consider the insurer's incentive. It goes without saying that an insurer's primary incentive is to minimize the amount that it must pay in any lawsuit. Given that incentive, we have no doubt that an insurer will provide a vigorous defense for all insureds where the insurer alone will bear any award against them. We do not disagree with Rainey's contention that an insurer "cannot choose a strategy that harms one of its insureds," but, here, Rainey has not identified any other potential harm arising from Indiana's joint defense of Rich and Rainey against the claims raised in Jacobeit's complaint. Under these circumstances, we agree with Indiana's contention that the circuit court erroneously found a conflict of interest prevented it from controlling Rainey's defense.

¶ 42 Here, Rainey failed to demonstrate that he was entitled to judgment on count I. Absent a conflict of interest in the Jacobeit litigation, Indiana was not obligated to pay for independent counsel and did not breach its duty to defend by failing to do so. Because Rainey cannot show Indiana breached its duty, he cannot satisfy count III's contention that Indiana was estopped

[4] Rainey's suggestion that Indiana should have defended him under a reservation of rights is both incohesive and puzzling given Rainey's position that a conflict of interest existed. *Murphy*, 88 Ill. 2d at 457 (An insurer caught in a conflict of interest cannot defend under a reservation of rights.).

from denying its obligation to provide independent counsel as a result. Although Rainey's relationship with Rich may have been otherwise strained, a consistent defense remained viable in the Jacobeit action. Additionally, we categorically reject Rainey's assertion that Indiana abandoned his defense; Indiana merely provided Rainey with a defense that he did not accept. *Cf. Delatorre v. Safeway Insurance Co.*, 2013 IL App (1st) 120852, ¶¶ 7, 26 (where counsel provided by the insurer for the insured did nothing after filing an answer to the complaint, and the insured had not rejected counsel's representation, the insurer breached its duty to defend the insured); *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 147-48 (1999) (stating that an insurer which breaches its duty to defend an insured is estopped from raising policy defenses to coverage).

¶ 43 Finally, we reiterate that Indiana did not file a cross-motion for summary judgment in the circuit court. Accordingly, we cannot enter judgment on the merits in Indiana's favor at this juncture, notwithstanding our determination that the record shows no conflict of interest or breach of duty. See *Schnabel v. County of DuPage*, 101 Ill. App. 3d 553, 563 (1981). We can only reverse and remand for further proceedings consistent with this opinion.

¶ 44 B. Section 155 Damages

¶ 45 In light of our determination that Indiana was not required to pay for Rainey's choice of independent counsel, it follows that Indiana's conduct in declining to procure such counsel was neither vexatious nor unreasonable, as required by section 155 of the Code. 215 ILCS 5/155 (West 2012). In addition, Rainey has cited no law showing Indiana was required to commence a declaratory judgment action where it did not deny coverage and did not decline to provide Rainey a with defense. Accordingly, the circuit court erred in awarding damages under section 155 and we need not consider this contention further. See *Employers Insurance of Wausau*, 186

Ill. 2d at 160 (applying a *de novo* standard to review an award under section 155 where no evidentiary hearing occurred).

¶ 46 III. CONCLUSION

¶ 47 The circuit court erred in finding the pleadings and exhibits attached thereto showed a conflict of interest requiring Indiana to hire Rainey's counsel of choice. Thus, the court erroneously entered summary judgment in his favor. Additionally, the circuit court erroneously entered an award of damages under section 155 because Indiana's decision not to pay for independent counsel was neither vexatious nor unreasonable. Accordingly, we reverse and remand for further proceedings consistent with our decision.

¶ 48 Reversed and remanded.