

2011 IL App (1st) 102680-U

No. 1-10-2680

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).

SIXTH DIVISION
December 23, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

STATEWIDE INSURANCE COMPANY, and)	Appeal from the
WESTFIELD INSURANCE COMPANY,)	Circuit Court of
)	Cook County
Plaintiffs-Appellees and Cross-Appellants,)	
)	
v.)	No. 03 CH 14719
)	
HOUSTON GENERAL INSURANCE COMPANY,)	Honorable
)	Kathleen M. Pantle,
Defendant-Appellant and Cross-Appellee.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Robert E. Gordon concurred in the judgment.
Justice Garcia dissented in part.

ORDER

¶ 1 *Held:* (1) Plaintiff and cross-appellant Westfield Insurance Company failed to establish that it was entitled to an award of attorney fees and costs pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2006)), which remedy extends to the party insured and policy assignee but not to third parties; and (2) the circuit court did not abuse its discretion when

it awarded plaintiff Statewide Insurance Company, the insured's policy assignee, section 155 attorney fees and costs incurred since the commencement of defendant's 2007 appeal.

¶ 2 Defendant Houston General Insurance Company (Houston General) appeals the portions of the circuit court's September 2010 order that awarded: (1) plaintiff and cross-appellant Westfield Insurance Company (Westfield) reimbursement for attorney fees and costs as part of its damages; and (2) plaintiff Statewide Insurance Company (Statewide) attorney fees and costs incurred since the commencement of defendant's first appeal in 2007. Houston General also complains that the circuit court failed to limit Statewide's award to only Statewide's identifiable fees and costs. According to Houston General, Statewide's section 155 award should be reversed and the matter remanded to the circuit court for a determination of only Statewide's identifiable fees and costs.

¶ 3 For the reasons that follow, we reverse the circuit court's award of section 155 fees and costs to Westfield, but we affirm, as modified, the circuit court's award of section 155 appellate fees and costs to Statewide. Remand for a determination of Statewide's fees and costs is not necessary because an accurate award is readily determinable from the record.

¶ 4 I. BACKGROUND

¶ 5 This matter, a declaratory judgment action involving an insurance coverage dispute among three insurance companies, comes before this court a second time. The underlying insurance coverage dispute arose from a construction site accident in 1997 and the ensuing litigation when the injured worker sued the general contractor in 1999. The general contractor was insured by Statewide but also was named as an additional insured on two subcontractors'

insurance policies with Westfield and Houston General. The general contractor gave Statewide notice of the lawsuit but tendered its defense of the lawsuit to Westfield and Houston General.

¶ 6 In 2001, Westfield filed a declaratory judgment action and sought a finding that it did not owe the general contractor a duty to defend or indemnify the general contractor. Specifically, Westfield claimed that the general contractor violated the conditions of insurance by giving Westfield late notice of the accident and lawsuit.

¶ 7 In 2001 and again in 2003, Houston General refused to defend and indemnify the general contractor, claiming that the subcontractor's general liability policy with Houston General was not in effect on the date of the accident. Houston General, however, failed to file a declaratory judgment action concerning its obligations to the general contractor and failed to defend the general contractor under a reservation of rights.

¶ 8 In 2003, Statewide filed a declaratory judgment action against Houston General, the general contractor, and the injured worker. Statewide sought a declaration that Houston General had a duty to appear and defend the general contractor, breached that duty, and was liable for all sums paid and incurred by Statewide in its defense of the general contractor.

¶ 9 Meanwhile, the general contractor, Statewide and Westfield reached a settlement agreement that resolved Westfield's declaratory judgment action. They reached a settlement funding agreement which settled the injured worker's lawsuit for \$1.68 million. They also agreed to pursue a suit to recover the settlement payments from Houston General and to share any monies recovered, with Statewide receiving 70% and Westfield receiving 30% of any such recovery. Consequently, in 2004, Westfield joined Statewide's declaratory judgment action as

1-10-2680

an additional plaintiff, and they sought to recover from Houston General the monies paid in settlement of the injured worker's lawsuit on the general contractor's behalf, and the attorney fees and costs expended in connection with that litigation.

¶ 10 In 2006, Statewide and Westfield moved for summary judgment, claiming Houston General wrongly and intentionally refused to defend the general contractor. Houston General filed a cross-motion for summary judgment, contending it had no duty to defend the general contractor.

¶ 11 The circuit court granted summary judgment in favor of Statewide, denied summary judgment in favor of Westfield, and denied Houston General's cross-motion for summary judgment. In June 2007, the circuit court entered judgment in favor of Statewide and against Houston General, ruling that Statewide was entitled to recover: (1) the \$840,000 paid in settlement of the underlying litigation; (2) \$37,230.05 in defense fees and costs incurred in the underlying litigation; (3) \$152,255.39 in prejudgment interest from November 2003 to May 2007; and (4) \$261,856.60 in attorney fees and costs incurred in prosecuting its declaratory judgment action against Houston General. Houston General timely appealed, and Statewide and Westfield cross-appealed.

¶ 12 In December 2009, in a majority opinion, this court affirmed the circuit court's grant of summary judgment in favor of Statewide, award of damages to Statewide, and award of fees and costs to Statewide pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2006)). *Statewide Insurance Co. v. Houston General Insurance Co.*, 397 Ill. App. 3d 410 (2009). In addition, this court awarded Statewide its fees and costs incurred on appeal and

remanded the cause to the circuit court for a determination of reasonable appellate fees and costs.

Id. This court, however, reversed the circuit court's denial of summary judgment for Westfield, finding that Westfield did not have a concurrent duty to defend the general contractor, which had deactivated its tender of defense to Westfield. *Id.* Consequently, this court remanded the cause to the circuit court for a determination of Westfield's damages. *Id.*

¶ 13 In September 2010, the circuit court, on remand, granted plaintiffs' motion for entry of judgment and entered judgment in the amount of \$475,142.40. That amount consisted of an award of: (1) \$160,000 to Westfield, which amount represented the remainder of Houston General's \$1 million commercial liability policy limit after \$840,000 was paid to Statewide; (2) \$52,279.20 in prejudgment interest from November 2003 to May 2010; (3) \$112,224.25 to Westfield for section 155 attorney fees and costs expended in the declaratory judgment action in the circuit court through the June 2007 summary judgment ruling; and (4) \$150,638.95 to Statewide and Westfield for section 155 fees and costs incurred since the commencement of Houston General's appeal in July 2007 through April 2010.

¶ 14 On appeal, Houston General does not challenge the award of the policy limit remainder and prejudgment interest and has paid \$212,279.20 of the judgment. However, Houston General challenges the portions of the circuit court's judgment that awarded Westfield and Statewide \$262,863.20 in section 155 attorney fees and costs. Specifically, Houston General argues that the circuit court (1) exceeded its jurisdiction when it awarded Westfield section 155 attorney fees and costs as part of its damages; and (2) abused its discretion when it awarded appellate attorney fees and costs in excess of what was expended on behalf of Statewide only and compensated

Statewide for its undertakings to respond to Houston General's petition for leave to appeal to the supreme court.

¶ 15

II. ANALYSIS

¶ 16 The granting of attorney fees and penalties pursuant to section 155 of the Illinois Insurance Code is usually entrusted to the sound discretion of the trial court. *Meier v. Aetna Life & Casualty Standard Fire Insurance Co.*, 149 Ill. App. 3d 932, 940 (1986). However, when section 155 fees and costs are awarded as a judgment on the pleadings, the standard of review is *de novo*. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 160 (1999).

¶ 17 A court may award reasonable attorney fees and other costs for a vexatious and unreasonable action by or against a company where there is an issue of the liability of a company on an insurance policy or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim. 215 ILCS 5/155 (West 2006). One purpose of the remedy is to “punish insurance companies for misconduct.” *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 681 (2000). A court should consider the totality of the circumstances when deciding whether an insurer’s conduct is vexatious and unreasonable, including the insurer’s attitude, whether the insured was forced to sue to recover, and whether the insured was deprived of the use of his property. *McGee*, 315 Ill. App. 3d at 681. If a *bona fide* coverage dispute exists, an insurer’s delay in settling a claim will not be deemed vexatious or unreasonable for purposes of section 155 sanctions. *Baxter International, Inc. v. American Guarantee & Liability Insurance Co.*, 369 Ill. App. 3d 700, 710 (2006). However, the mere existence of a *bona fide* dispute does

1-10-2680

not preclude the imposition of section 155 fees and costs where the insurer failed to file a declaratory judgment action and failed to defend under a reservation of rights. *Korte Construction Co. v. American States Insurance*, 322 Ill. App. 3d 451, 460-61 (2001).

¶ 18 Section 155 permits the court to award reasonable attorney fees and costs “to an insured who encounters unnecessary difficulties when an insurer withholds policy benefits.” *Garcia v. Lovellette*, 265 Ill. App. 3d 724, 728 (1994). The section 155 remedy “is intended for the protection of the insured party, or an assignee who succeeds to the same position of the insured, but is not intended for ‘true’ third parties.” *Id.* See also *Stamps v. Caldwell*, 133 Ill. App. 2d 524, 528 (1971); *Loyola University Medical Center v. Med Care HMO*, 180 Ill. App. 3d 471, 479-81 (1989); *Aabye v. Security-Connecticut Life Insurance Co.*, 586 F. Supp. 5 (N.D.Ill. 1984); *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill. 2d 458, 466 (1990); *Peerless Enterprises, Inc. v. Kruse*, 317 Ill. App. 3d 133, 144 (2000). When an insured or its assignee must bring a declaratory judgment action against the insurer to enforce its right to coverage, the insured may recover section 155 attorney fees incurred in both the underlying suit and the declaratory action. *Mobil Oil Corp. v. Maryland Casualty Co.*, 288 Ill. App. 3d 743, 757 (1997).

¶ 19 A. Westfield’s Section 155 Award

¶ 20 Defendant argues the circuit court exceeded its jurisdiction on remand when it awarded attorney fees and costs as part of Westfield's damages. According to defendant, this court's 2009 opinion and mandate limited Westfield's damages on remand to reimbursement of Westfield's contribution to the settlement of the lawsuit underlying the declaratory action and related

prejudgment interest. Defendant contends the circuit court's consideration of attorney fees and costs as part of Westfield's damages did not conform with this court's opinion and mandate.

¶ 21 Defendant's jurisdiction argument lacks merit. The issue of whether the circuit court violated this court's mandate is a question of law that we review *de novo*. *Clemons v. Mechanical Devices Co.*, 202 Ill. 2d 344, 351-52 (2002). Defendant's argument is based essentially on the absence in this court's 2009 opinion of a discussion of Westfield's entitlement to section 155 fees and costs in contrast to the extensive discussion of Statewide's entitlement to section 155 fees and costs. Defendant, however, overlooks the obvious fact that one of the issues raised for review in the prior appeal was the circuit court's award, upon granting Statewide's motion for summary judgment, of section 155 fees and costs in favor of Statewide. Because the circuit court had denied Westfield's motion for summary judgment, the circuit court did not consider the issue of awarding Westfield any section 155 fees and costs, and this court, consequently, had no occasion to review the appropriateness of such an award on behalf of Westfield.

¶ 22 On remand, the circuit court's consideration of Westfield's request for section 155 fees and costs was not inconsistent with this court's opinion and mandate. Westfield had sought an award of section 155 fees and costs in its motion for summary judgment before the circuit court. When the circuit court's denial of Westfield's motion for summary judgment was reversed and this cause came before the circuit court again on remand, the circuit court properly considered Westfield's request for fees and costs. See *id.* at 353 (a reviewing court is not required to state specific directions in an order reversing a judgment and remanding a cause, and it is the duty of

1-10-2680

the trial court to examine the reviewing court's opinion and proceed in conformity with it);

People ex rel. Department of Transportation v. Firststar Illinois, 365 Ill. App. 3d 936, 939 (2006) (accord).

¶ 23 Defendant also argues that Westfield was not entitled to section 155 fees and costs because its attorney fees and costs were not proximately caused by Houston General's breach of its duty to defend the general contractor. Westfield responds that it was entitled to section 155 attorney fees and costs because the general contractor deactivated its tender to Westfield, so Westfield did not have an obligation to defend and indemnify the general contractor until the limits of Houston General's primary policy were exhausted. Westfield argues that it was entitled to section 155 fees and costs because it was forced to participate in the underlying litigation, fund a portion of the settlement on behalf of the general contractor, and join Statewide's declaratory judgment action to recover the settlement payments from Houston General.

¶ 24 In awarding section 155 fees and costs to Westfield, the circuit court determined that this court's reasons for affirming the award of section 155 fees and costs to Statewide applied equally to Westfield because Houston General's unreasonable and vexatious behavior was the same to both. Specifically, the circuit court noted that Statewide had no obligation to defend the general contractor whereas Houston General had failed twice to defend or indemnify the general contractor after it had selectively tendered the defense to Houston General. Moreover, Houston General failed to defend under a reservation of rights, and failed to file a declaratory judgment action concerning its obligations. The circuit court concluded that, because those same findings applied to Westfield, its damages should include the award of section 155 attorney fees and

costs.

¶ 25 We find, however, that Westfield is not entitled to the section 155 remedy. Our ruling that Statewide was entitled to section 155 fees and costs was based not only on Houston General's unreasonable and vexatious behavior, but also on Statewide, as the assignee of the insured general contractor, succeeding to the same position of the insured. *Statewide Insurance Co.*, 397 Ill. App. 3d at 426-27. Specifically, this court noted that Statewide's policy contained a provision whereby the general contractor transferred any and all rights to recovery to Statewide when it made a payment under the policy to settle the underlying lawsuit. Furthermore, the terms of the settlement funding agreement established that Statewide was the general contractor's assignee.

¶ 26 Westfield, in contrast, has neither argued nor established that it too was the general contractor's assignee and had succeeded to the same position of the general contractor. Moreover, we find no support in the record for such a proposition. Unlike Statewide, which had no obligation to defend the general contractor, Westfield did have an obligation to defend and indemnify the general contractor after the limits of Houston General's primary policy were exhausted. Furthermore, the general contractor had tendered its defense to both Westfield and Houston General, and Westfield, in response, filed a declaratory judgment action alleging the general contractor had violated the conditions of insurance. Consequently, Statewide stepped in to defend the general contractor and ultimately settled both the underlying litigation and Westfield's declaratory judgment action by negotiating a settlement funding agreement that put a heavier burden on Houston General to fund the settlement than Westfield. It was not until the

general contractor, Statewide and Westfield reached their settlement funding agreement that the general contractor was deemed to have deactivated its tender to Westfield. *Id.* at 430-31.

¶ 27 Under these circumstances, we cannot find that Westfield was the insured's assignee and had succeeded to the same position as the insured. Accordingly, we reverse the circuit court's award of section 155 fees and costs to Westfield.

¶ 28 B. Statewide's Section 155 Award

¶ 29 Houston General challenges the amount of section 155 appellate fees and costs awarded to Statewide by the circuit court on remand. First, Houston General argues the circuit court lacked the jurisdiction or authority to award Statewide its fees and costs expended in connection with Houston General's petition for leave to appeal (PLA). Houston General contends such an award violated this court's mandate because the language used in this court's 2009 opinion was not broad enough to include any award for fees and costs incurred in responding to the PLA. Houston General also contends the award of Statewide's PLA fees and costs was improper because plaintiffs were not required to respond to the PLA under the court rules.

¶ 30 Houston General's arguments are not persuasive. Houston General ignores this court's statement in the 2009 opinion, which certainly was broad enough to include a section 155 award for the fees and costs Statewide incurred in responding to Houston General's PLA. Specifically, this court stated:

"Houston General's unreasonable and vexatious conduct supports Statewide's request that this court award it the fees incurred in defending this appeal. [Citations.] We award fees and costs of appeal to Statewide and remand

the cause to the trial court for the taking of evidence for a determination of reasonable attorney fees and costs." *Id.* at 428.

Furthermore, Houston General cites no authority to support its position that the filing of its PLA was not a part of the appeal.

¶ 31 Next, Houston General argues the circuit court failed to limit Statewide's section 155 award to the reasonable fees and costs of appeal that Statewide alone was forced to expend. Houston General contends the section 155 award to Statewide should be reversed and remanded for a determination of only Statewide's identifiable fees and costs.

¶ 32 As discussed above, we find that Westfield is not entitled to the section 155 remedy and reverse that portion of the circuit court's judgment. Consequently, the award of \$150,638.95 to both Statewide and Westfield for their appellate costs and fees must be modified to compensate only Statewide for its appellate fees and costs.

¶ 33 In their motion for entry of judgment, Statewide and Westfield sought \$150,638.95 in appellate attorney fees and costs. That amount represented the total fees and costs incurred by both Statewide and Westfield. Of that amount, \$11,247.50 was attributed to Westfield's work. Furthermore, \$17,372.97 was expended in connection with Statewide and Westfield's response to Houston General's PLA. In addition, entries for which Statewide's and Westfield's work could not be separated totaled \$58,003.18. Plaintiffs submitted affidavits from the two attorneys tasked with primary responsibility for the appellate briefs submitted on behalf of Statewide and Westfield, indicating that about 90% of their time was spent on Statewide's behalf, and that, at a minimum, at least 75% of their time was spent in connection with work performed on behalf of

Statewide. By deducting \$11,247.50, \$17,372.97, and \$58,003.18 from \$150,638.95, \$64,015.30 is attributed solely to Statewide's work.

¶ 34 Next, we address Statewide's portion of the unallocated \$17,372.97 and \$58,003.18 fees and costs, which total \$75,376.15. The billing statements and the briefs filed on appeal establish that the majority of the work in connection with the appeal was performed on Statewide's behalf. Only five pages of plaintiffs' 51-page appellate brief, or about 10%, were devoted to Westfield's cross-appeal, where only one issue was argued. In contrast, Statewide defended multiple issues, including contract interpretation, agency law, equitable subrogation, and the section 155 remedy. Even Houston General allocated only two pages of its 20-page PLA to issues connected with Westfield's cross-appeal.

¶ 35 Accordingly, 90% of both plaintiffs' appellate brief and Houston General's PLA were devoted to issues related to Statewide. Furthermore, plaintiffs' attorneys spent about 90% of their time in connection with Statewide's defenses. Consequently, we conclude that Statewide should recover 90% of the \$75,376.15 in unallocated fees and costs, or \$67,838.54. When the \$67,838.54 is combined with the \$64,015.30 that can be attributed solely to work on behalf of Statewide, we find that Statewide is entitled to recover \$131,853.83 for section 155 fees and costs incurred on appeal.

¶ 36 Accordingly, we modify the circuit court's award of \$150,638.95 in total appellate fees and costs to both Statewide and Westfield, and instead award Statewide \$131,853.83 for its appellate fees and costs. Statewide's request of this court for additional section 155 fees and costs incurred since the circuit court's 2010 judgment is denied.

¶ 37

III. CONCLUSION

¶ 38 We reverse the circuit court's award to Westfield of section 155 fees and costs.

Furthermore, we affirm the circuit court's award of Statewide of appellate fees and costs, but we have modified the circuit court's \$150,638.95 award to reflect Statewide's allocation of its appellate fees and costs.

¶ 39 Reversed in part and affirmed, as modified, in part.

¶ 40 JUSTICE GARCIA, dissenting in part:

¶ 41 I persist in my disagreement with the majority's conclusion that section 155 of the Insurance Code (215 ILCS 5/155 (West 2008)) permits an insurance company to recover sanctions for vexatious delay against the offending insurance company when the insurance company seeking sanctions is an assignee of its insured. See *Statewide Ins. v. Houston General Ins.*, 397 Ill. App. 3d 410 (2010) (GARCIA, J., dissenting in part) ("I see no good reason to open the door still further and allow Statewide, a fellow insurer, to recoup attorney fees and costs from Houston General on a claim of vexatious and unreasonable delay to Statewide's insured based on a bald assignment from JCC."); *Estate of Price v. Universal Casualty Co.*, 334 Ill. App. 3d 1010, 1016 (2002) ("The purpose of section 155 is to discourage the insurer from using its superior financial position to profit at the insured's expense").

¶ 42 Under the Statewide policy, its primary insured (and the assignee) was JCC; JCC was an additional insured under Houston General's policy issued to one of JCC's subcontractors. *Statewide Ins.*, 397 Ill. App. 3d at 432-33 (GARCIA, J., dissenting). I remain unpersuaded that JCC's assignment of its rights to insurance coverage under Houston General's policy that provided coverage to JCC as an additional insured, transformed Statewide, as JCC's primary insurer, into a party entitled to recover sanctions for the vexatious and unreasonable delay when "the two policies do not cover the identical loss." *Id.* at 433 (GARCIA, J., dissenting). When Statewide defended JCC it presumably did so under its policy. "I [remain] unpersuaded that sanctions provided for in section 155 for the insured's protection were meant to benefit an insurance company, which must itself provide coverage to the insured from which it received the

1-10-2680

assigned claim under a separate policy." *Id.* at 432 (GARCIA, J., dissenting).

¶ 43 Consequently, I dissent from the majority's decision to uphold section 155 appellate fees and costs to Statewide.