SECOND DIVISION
March 12, 2013

No. 1-11-3403

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN ECONOMY INSURANCE COMPANY,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 10 CH 9631
ANDREW M. GREELEY,	)	Honorable Leroy K. Martin, Jr,
Defendant-Appellant,	)	Judge Presiding.

JUSTICE QUINN delivered the judgment of the court.
Presiding Justice Harris and Justice Simon concurred in the judgment.

O R D E R

¶ *1* *HELD*: Defendant insured appealed the judgment entered in favor of the insurer on the issue of whether a workers compensation setoff should be applied to his uninsured motorist portion of his insurance policy. This court found the policy language ambiguous and reversed the judgment of the circuit court on this issue, but affirmed the circuit court's denial of defendant's request to impose sanctions on the insurer.

¶ 2 I. INTRODUCTION

¶ 3 The plaintiff, American Economy Insurance Co., filed a declaratory judgment action against defendant, Andrew M. Greeley, who was seeking underinsured motorist benefits on his and his company's policy.

¶ 4 II PROCEDURAL HISTORY

¶ 5 Defendant purchased a commercial insurance policy package for himself and his company, Andrew Greeley Enterprises, Ltd., from the plaintiff that included underinsured motorist ("UIM") coverage for one million dollars. After defendant suffered permanent brain injury as he was exiting a taxi whose $250,000 insurance policy did not fully compensate him for his injuries, defendant made a UIM claim with the policy he held with plaintiff. The plaintiff, insurance company, maintains that defendant, Andrew M. Greeley, is not entitled to UIM coverage because he is not a named insured and, in any event, plaintiff is entitled to an offset for amounts defendant received as worker's compensation benefits which would wipe out the remaining $750,000 of the one million dollar policy after accounting for the $250,000 from the taxi's policy. Defendant, Greeley, filed a counterclaim to plaintiff's declaratory judgment action alleging breach of the insurance contract and the insurer's"bad faith" under section 155 of the Illinois Insurance Code.

¶ 6 Defendant filed a motion for summary judgment which the trial court granted, finding defendant was a named insured and also finding that there was a settlement agreement between plaintiff and defendant regarding defendant's acceptance of the $250,000 policy limit settlement offer from the taxi in defendant's underlying tort case so that plaintiff was not entitled to a setoff for worker's compensation benefits. The trial court also denied summary judgment on defendant's

breach of contract claim and whether defendant was entitled to prejudgment interest. It granted summary judgment to plaintiff, insurance company, on the issue of whether it violated section 155 of the Illinois Insurance Code.

¶ 7 The plaintiff, insurance company, filed a motion for reconsideration, re-arguing that defendant is not a named insured and that there existed no settlement agreement between plaintiff and defendant arising from defendant's acceptance of the taxi's payment of its $250,000 policy limits in the underlying tort claim

¶ 8 The trial court denied plaintiff's motion to reconsider whether defendant was a named insured but reversed its ruling on the worker's compensation setoff issue, now ruling in favor of the plaintiff, insurance company.

¶ 9 Defendant filed a motion to vacate the court's order which was denied. The trial court then ordered the parties to file briefs on the sole remaining issue, defendant's breach of contact allegations in defendant's counterclaim. Thereafter, the trial court dismissed the breach of contract claim as moot on October 20, 2011, and ruled that this order was the final, appealable order. Defendant filed his Notice of Appeal on November 16, 2011.

¶ 10 III. BACKGROUND

¶ 11 As a point of interest, defendant Andrew M. Greeley is Father Greeley, an author and Catholic priest with prior scholarly affiliations with both the University of Chicago and University of Arizona, focusing on the sociology of religion.

¶ 12 Back in November 2008, Father Greeley was exiting a taxicab when he fell, hit his head and, among other injuries, suffered a permanent and severe brain injury. He filed a personal injury

case against the taxi driver and its owner in May, 2009. *Greeley v. Mayza and Nanakaliy*, 09 L 6301. The defendants in that action offered the full insurance policy limits of $250,000 in settlement which was approved by the circuit court in March 2011.

¶ 13 There also existed a commercial general liability insurance policy package from the plaintiff in this action. After receiving the offer from the two defendants for their policy limits of $250,000 in his personal injury case and before accepting the settlement, Father Greeley made a claim seeking UIM coverage on the UIM portion of the policy issued by plaintiff, American Economy Insurance Company. The UIM coverage on the defendant's policy in question provides one million dollar coverage for all amounts the "insured" is entitled to recover as damages from the owner/driver of an UIM vehicle.

¶ 14 IV. ANALYSIS

¶ 15 A) Whether the Notice of Appeal was Timely

¶ 16 Plaintiff, insurance company, as part of its responsive brief submits that this court does not have jurisdiction over this appeal, arguing that the circuit court's final, appealable order was entered on July 21, 2011, when it granted their motion for reconsideration on the issue of a setoff and ordered additional briefing on defendant's breach of contract counterclaim. Their argument is that the defendant's notice of appeal should have been filed using the July 21, 2011 order as the final, appealable order, not the October 20, 2011 order which ruled on defendant's breach of contract claim in spite of the fact that the trial court designated in its ruling that the October 20, 2011 order was the final, appealable order when it held as follows: "[T]he court rules that this order is the final and appealable order as of today's date, Oct. 20, 2011, rejecting plaintiff's argument that the July 20, 2011

order is final and appealable."

¶ 17 At the time the trial court entered its July 21, 2011 order, it is clear from the record that defendant's breach of contract counterclaim was not resolved. Additional briefing was ordered by the trial court on the issue. It was only after the scheduled hearing on that issue was held on October 20, 2011 and the trial court entered an order on the breach of contract claim that the case became ripe for appeal. On October 20, 2011, the trial court dismissed the breach of contract claim and made the specific ruling, not contained in its July 21, 2011 order, that the October 20, 2011 order was the court's final, appealable order. *Alliance Syndicate, Inc. v. Brad Foote Gear Works, Inc.*, 244 Ill. App. 3d 737 (1993) (a nonfinal order that may affect future rulings in the case does not retroactively make the nonfinal order a final, appealable order). Therefore, the defendant's notice of appeal filed on November 16, 2011 is timely and this court has appellate court jurisdiction to hear the matter.

¶ 18 B. Standard of Review

¶ 19 The parties agree that this court should provide *de novo* review for the trial court's order which granted summary judgment as well as its construction of the terms of the insurance contract.

¶ 20 Additionally, we note that the parties are in agreement that there are no material facts in dispute. Therefore, in construing the UIM coverage of the insurance policy in question, our primary objective is to ascertain and give effect to the parties' intentions as expressed in the policy. *Rich v. Principal Life Insurance Co.*, 226 Ill. 2d 359 (2007). We also construe the policy according to the plain, ordinary meaning of its unambiguous terms. *Nicor, Inc. v. Associated Electric & Gas Co.*, 223 Ill. 2d 407 (2006). Illinois courts always liberally construe any ambiguous insurance policy provisions in favor of providing coverage. *Founders Insurance Co. v. Munoz*, 237 Ill. 2d 424 (2010).

¶ 21 This court reviews the circuit court's decision to not impose sanctions against the plaintiff for abuse of discretion. *Valdovinos v. Gallant Insurance Co.*, 314 Ill. App. 3d 1018, 1020 (2000).

¶ 22 C. Underinsured Motorist Coverage for Defendant as a Named Insured and The Scope of This Appeal

¶ 23 In defendant's opening brief, it was represented that "[i]t is uncontested on appeal that Father Greeley is a named insured ***." The trial court granted defendant's motion for summary judgment in favor of UIM coverage for Father Greeley when it ruled that the policy covered Father Greeley under plaintiff's insurance policy in question. It reaffirmed its initial ruling when it denied plaintiff's motion for reconsideration on this issue on July 21, 2011. Despite these rulings, plaintiff, in its responsive appellate brief, argues that defendant, Father Greeley, is not an insured under the UIM provision of the policy. The plaintiff, insurance company, challenges the trial court's ruling on this issue, arguing for reversal. and states that this court may affirm on any basis supported in the record. Therefore, in its responsive brief it challenges the trial court's ruling that Father Greeley is not an insured under the insurance policy and that the UIM coverage provision is inapplicable to him.

¶ 24 However, defendant appealed some, but not all, of the circuit court's judgment. Defendant, of course, agreed with the portion of the judgment that found defendant to be a named insured under the policy. Defendant's opening brief represented that "[i]t is uncontested on appeal that Fr. Greeley is a named insured ***." In doing so, defendant was relying on the fact that the plaintiff never filed a cross-appeal to contest whether the trial court erred when it found the defendant to be a named insured entitled to coverage under the insurance policy issued by the plaintiff. However, despite plaintiff's failure to file a cross-appeal, the insurance company now attempts, in its responsive brief, to challenge the trial court's unfavorable ruling that Fr. Greeley is a named insured,

arguing that this court may affirm the circuit court on any grounds. *Material Service Corp. v. Department of Revenue*, 98 Ill. 2d 382, 387 (1985). While it is true that this court may affirm on any basis supported in the record, the present record, as it exists, contains the trial court's finding and order that Fr. Greeley is a named insured, which makes the judgment entered by the trial court, at least in part, unfavorable to the plaintiff. *Id.* This court would have to reverse this order that defendant is a named insured in order to rule in plaintiff's favor on this issue. Because plaintiff did not file a cross-appeal on the issue, this court is without jurisdiction to consider and rule on cross-errors raised by the plaintiff in its responsive brief. *Village of Arlington Heights v. National Bank of Austin*, 53 Ill. App. 3d 917, 920 (1977) and cases cited therein.

¶ 25 A notice of a cross-appeal is mandatory to review a judgment adverse to the appellee. Ill. Sup. Ct. R. 318 (a); 366 (b) (2) (ii) (iv.); *Greco v. Coleman*, 176 Ill. App. 3d 394, 401 (1988) ("in the absence of a cross-appeal, this court is not authorized to examine or decide an issue raised by the appellee, but is confined to the issues raised by appellant."); 5A Nichols, Ill. Civ. Prac., Part V. Cross- Appeals, § 105.36 (West 2012). The filing of a notice of cross-appeal is jurisdictional and when this court recognizes a lack of jurisdiction, it has an obligation to raise it, *sua sponte*. We acknowledge the fact that defendant-appellant did not point out a lack of this court's jurisdiction and confined his argument in his reply brief to the lack of factual merit of the insurance company's position raised for the first time in its responsive brief. However, we hold that because the trial court's judgment was a partially unfavorable judgment for the plaintiff and plaintiff did not file a cross-appeal, this court is confined to a review of the issues raised by the defendant in his notice of appeal. Our supreme court has clearly held that "in the absence of a cross-appeal, [a] matter [raised

by the appellee] is not open to consideration." *Phelps v. Seeley*, 3 Ill. 2d 210, 218 (1954); see also *Bowden v. Furlong*, 16 Ill. App. 2d 174, 185 (1958) (there is no mechanism for an appellee to seek reversal of a trial court's order other than by a cross-appeal). The filing of a notice of cross-appeal is mandatory and jurisdictional. *Greco v. Coleman*, 176 Ill. App. 3d 394, 401 (1988) citing *In re Petition of Village of Kildeer to Annex Certain Property*, 162 Ill. App. 3d 262, 280 (1987). In the absence of plaintiff's cross-appeal, we cannot address the issue of whether the trial court was wrong when it entered judgment in favor of the defendant and against the plaintiff on this issue and held that the defendant, Andrew M. Greeley is a named insured along with Andrew M. Greeley Enterprises Ltd. under the insurance policy issued by the plaintiff.

¶ 26 In any event, we observe that there is ample evidence in the record to support the trial court's order that defendant is a named insured. For instance, "Andrew M. Greeley" is identified as a named insured on the policy's Title Page and the Renewal Declaration Page. Additionally, the policy contains an exclusion schedule for professional services provided by the insured of "priest", "author" and "sociologist' that only an individual can perform. The named insured shows up both as an "individual" and "individual and other entity" in plaintiff's underwriter files regarding this policy. The plaintiff's file reference repeatedly refers to "Andrew M. Greeley, *et al.*" which indicates more than one insured. These facts are more than sufficient, at the very least, to create an ambiguity that must be strictly construed against the insurance company which was responsible for drafting the policy. *Pekin Insurance Co. v. Estate of Goben*, 303 Ill. App. 3d 639, 642 (1999).

¶ 27 D. Should Plaintiff Be Allowed a Setoff For Worker's Compensation Benefits Received By Defendant.

¶ 28 The policy in question contains an UIM endorsement that provides the limits of liability to $1,000,000 (one million dollars) per occurrence.

¶ 29 The UIM portion of the insurance policy in question contains section D, entitled "Limits of Insurance", and sets forth UIM limits both when there is and there is not a "settlement agreement", as follows:

> " 2. Except in the event of a 'settlement agreement', the Limit of Insurance for this coverage shall be reduced by all sums paid or payable:
>
> a. By or for anyone who is legally responsible, including all sums paid under this Coverage Form's Liability Coverage.
>
> b. Under any workers' compensation, disability benefits or similar law. However the Limits of Insurance for this coverage shall not be reduced by any sums paid or payable under Social Security disability benefits.
>
> c. Under any automobile medical payments coverage.
>
> 3. In the event of a 'settlement agreement', the maximum Limit of Insurance for this coverage shall be the amount by which the limit of insurance of this coverage exceeds the limits of bodily injury liability

> bonds or policies applicable to the owner or operator of the 'underinsured motor vehicle'."

¶ 30 Settlement agreement" is defined in the insurance policy under section F of the UIM endorsement, entitled "Additional Definitions" , as follows:

> " 3. 'Settlement agreement' means we and an 'insured' agree that the 'insured' is legally entitled to recover from the owner or operator of the 'underinsured motor vehicle', damages for 'bodily injury' and without arbitration, agree also as to the amount of damages. Such agreement is final and binding regardless of any subsequent judgment or settlement reached by the 'insured' with the owner or operator of the 'underinsured motor vehicle'. "

¶ 31 Also found in section F is the UIM endorsement definition for "tentative agreement", as follows:

> "4. "'Tentative agreement' means an offer from the owner or operator of the 'underinsured motor vehicle' to compensate an 'insured' for damages incurred because of 'bodily injury' sustained in an accident involving an 'underinsured motor vehicle'."

¶ 32 According to the above excerpts, if there is a settlement agreement, the insurance company is entitled to a setoff for the sum paid by the underinsured motorist, in this case $250,000.00. If there was no settlement agreement, the insurance company is entitled to setoffs for not only the sum paid by the underinsured motorist, but amounts paid under workers' compensation and disability

insurance. The insurance policy does not specify what form this "settlement agreement" must take.

¶ 33 With these portions of the policy terms as a backdrop, we review the precise issue in the instant case: Whether the insurance company is entitled to a setoff for the worker's compensation benefits Fr. Greeley has received?

¶ 34 The facts important to this issue are as follows:

¶ 35 On July 20, 2009, defendant wrote to his insurance company, the plaintiff, and notified it that the amount of monetary damages he sustained as a result of his traumatic brain injury would result in a UIM claim under his policy with the plaintiff. Again, on January 22, 2010, defendant wrote to his insurance company notifying it that he had a settlement offer from the owner of the underinsured motor vehicle for the full policy limits of $250,000.00 and requested directions from his insurance company as to how to proceed. Defendant's insurance company inquired about other existing insurance policies that might reduce his UIM claim. On January 27, 2010, defendant responded that there were no other such insurance policies. Thereafter, by letter dated March 9, 2010, plaintiff informed the defendant, for the first time, that he was not a named insured under the policy and was not entitled to UIM coverage. It stated, in part, as follows:

> " *** Mr. (sic) Greeley is not entitled to UIM benefits under the Policy for the damages he allegedly sustained as a result of the Accident. Greeley Enterprises is designated as a 'corporation' in the Policy's declarations. Therefore, to qualify as an insured under the Policy, Mr. (sic) Greeley must be occupying a covered 'auto' at the time of the accident. To qualify as a covered 'auto' under the Policy

> for purposes of UIM coverage, the vehicle involved in the accident must, at the very least, be owned by Greeley Enterprises. Greeley Enterprises did not own the taxicab involved in the Accident, and thus, Mr. (sic) Greeley was not occupying a covered 'auto' at the time of the accident."

¶ 36 The trial court ruled against the insurer regarding this interpretation of the insurance policy when it ruled that Fr. Greeley was an insured entitled to seek recovery under the terms of the policy. This ruling is in line with existing Illinois law as this case is not about a direct claim on a liability insurance policy. Unlike direct liability insurance, uninsured and underinsured coverage can protect a named insured and others "when they are operating or are passengers in a motor vehicle, as well as when they are engaged in any other activity such as walking, riding a bicycle, *** or even sitting on a front porch." 3 Alan I. Widiss and Jeffrey E. Thomas, *Insured and Underinsured Motorist Insurance*, § 4.2 and 33.2 (3rd ed. 2005); *Doyle v. State Farm Mutual Auto Insurance Co.*, 333 Ill. App. 3d 81 (2002) (coverage for pedestrian struck by vehicle). With the above as background, Father Greeley would certainly be provided UIM coverage as a person injured when exiting a cab. In any event, any argument by the plaintiff to the contrary has been forfeited for plaintiff's failure to file a cross-appeal on this issue, as well. (See *supra,* ¶¶ 22, 23 of this opinion and cases cited therein on failure to file cross-appeal on issue not appealed by appellant).

¶ 37 That same letter dated March 9, 2010, from the plaintiff, insurance company stated, in part, as follows:

> "...[E]ven if Mr. (sic) Greeley was entitled to UIM benefits under the

> Policy for the Accident, a fact which AEI [American Economy Insurance] expressly denies, AEI would be entitled to a setoff equal to the amount paid or payable to Greeley for damages arising out of the Accident, including, but not limited to, all sums paid through workers' compensation or anyone legally responsible."

¶ 38 However, the letter did not discuss the issue of setoffs as outlined in the policy if a settlement agreement was reached between the parties. A settlement agreement under the policy merely requires the insurer and insured to agree that the insured [Father Greeley] is legally entitled to recover damages from the tortfeasor and agree on the amount of damages.

¶ 39 In that same letter, plaintiff wrote that "AEI [American Economy Insurance] acknowledges receipt of your January 22, 2010 letter wherein you advised that [defendant] Mr.(sic) Greeley received an offer to settle the underlying lawsuit from the defendants' insurance company...for its policy limits of $250,000. AEI does not object to your client accepting [the] settlement offer, and does not intend to subrogate the matter." This plain language from plaintiff was its agreement with defendant that he could accept the $250,000.00 settlement offer of the policy limits from the owner of the underinsured vehicle. This was not a tentative settlement agreement between the tortfeasor and the plaintiff. The language used by the insurer in its letter did not refer to any settlement agreement as "tentative." The insurer removed any and all objections to any settlement agreement between the tortfeasor and Fr. Greeley in this letter.

¶ 40 We also agree with defendant's position that plaintiff's interpretation of the term "damages" in the definition of "settlement agreement"found in section F(3) of the UIM endorsement has

changed multiple times. Initially, in its motion for summary judgment, plaintiff argued that "damages" referred to plaintiff precisely agreeing to the amount of defendant's damages. Next, in its motion for reconsideration, plaintiff argued that "damages" were the amount of damages suffered by defendant and the damages paid by the underinsured motorist. Next, plaintiff argued in its reply in its motion for reconsideration that "damages" equated to the amount of damages sustained by defendant. Next, counsel for plaintiff argued that "damages" contemplated setoffs. This was followed by an assertion by plaintiff in response to defendant's motion to vacate and/or reconsideration that "damages" meant all damages defendant is entitled to recover. In its brief on appeal, plaintiff, insurance company argues "a 'settlement agreement' under the policy requires that the insurer and the insured agree that the insured is legally entitled to recover damages from the tortfeasor and, without arbitration, agree on the amount of damages the insured sustained in the accident." It cannot plausibly be argued that this amount was less than one million dollars, the amount of the UIM policy coverage. These various interpretations proffered by the plaintiff for the word "damages" in its policy are proof that this term as used in the policy is reasonably susceptible to more than one meaning and, by definition, is an ambiguous term that will be strictly construed against the insurer. *Pekin Insurance Co. v. Goben*, 303 Ill. App. 3d 639, 642 (1999).

¶ 41 In any event, given the plain definition of “settlement agreement" provided in the parties’ insurance contract, this typical exchange of letters by the insured and the insurer in this case shows that the parties reached an agreement that defendant was entitled to recover the tortfeasor's policy limits of $250,000.00 that was offered and more since plaintiff did not wish to subrogate. Because there exists an agreement between the parties that this settlement was justified, section D (3) of the

Insurance Policy together with section F (3) which defined "settlement agreement" dictates that the only setoff to be applied to the parties $1,000,000.00 insurance policy is the $250,000.00 amount paid to the defendant by the underinsured.

¶ 42 Therefore, when the trial court originally ruled in favor of defendant, Father Greeley on this issue, it was correct. The plain language of the insurance contract demonstrated that the trial court erred on reconsideration when it reversed itself on this issue and ruled in favor of plaintiff. After deducting the only setoff of $250,000.00, defendant, Fr. Greeley is entitled to the $750,000.00 remaining in UIM benefits.

¶ 43 We reverse the trial court's second ruling on defendant's motion for summary judgment on this issue when it granted plaintiff's motion for reconsideration.

¶ 44 E. Defendant's Argument for Sanctions

¶ 45 Defendant 's request that we reverse the trial court's ruling that the plaintiff, insurance company, was not guilty of bad faith as that term is defined in section 155 of the Illinois Insurance Code (215 ILCS 5/155 (l) (West 2010)) is denied . Defendant continues to argue that the insurance company's conduct in denying coverage and filing this declaratory judgment action was vexatious and unreasonable. *Buais v. Safeway Insurance Co.*, 275 Ill. App. 3d 587, 593-93 (1995). A finding by the trial court regarding whether the insurance company's conduct is in bad faith is reviewed under the abuse of discretion standard. *Valdovinos v. Gallant Insurance Co.*, 314 Ill. App. 3d 1018, 1020 (2000). The trial court believed that at least one portion of plaintiff's defense had sufficient merit for it to reverse itself and rule in the plaintiff's favor. Even unsuccessful litigation, without more, does not support section 155 sanctions. *Buais v. Safeway Insurance Co.*, 275 Ill. App. 3d 587,

591 (1995).

¶ 46 Therefore, the trial court's order denying defendant's request for imposition of section 155 sanctions on plaintiff is affirmed.

¶ 47 V. CONCLUSION

¶ 48 The trial court's judgment is reversed in part and affirmed in part. The defendant is entitled to recover the remaining $750,000 on the UIM benefits coverage from the plaintiff. No sanctions will be imposed against the plaintiff.

¶ 49 Affirmed in part and reversed in part.