2019 IL App (1st) 180721-U
Order filed: March 15, 2019

FIRST DISTRICT
Fifth Division

No. 1-18-0721

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ILLINOIS FARMERS INSURANCE COMPANY and FARMERS INSURANCE EXCHANGE, Plaintiffs-Appellees, v. GERALD MODORY and JOAN NEBEL, Defendants	)	Appeal from the Circuit Court of Cook County.
GERALD MODORY, Counterplaintiff-Appellant, v. ILLINOIS FARMERS INSURANCE COMPANY and FARMERS INSURANCE EXCHANGE, Counterdefendants-Appellees.	)	No. 16 CH 14881 Honorable Thomas A. Allen, Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Hall concurred in the judgment.

ORDER

¶ 1 *Held*: We reversed the order granting judgment on the pleadings in favor of Illinois Farmers Insurance Company and Farmers Insurance Exchange on their complaint for a declaratory judgment that they owed no duty to defend their insured, Gerald Modory, in the underlying defamation action against him. We remanded for

> further proceedings thereon. We affirmed the order granting judgment on the pleadings for Illinois Farmers Insurance Company and Farmers Insurance Exchange on the counterclaims of Gerald Modory for breach of contract and violation of section 155 of the Illinois Insurance Code.

¶ 2 Plaintiffs-counterdefendants-appellees, Illinois Farmers Insurance Company and Farmers Insurance Exchange (collectively referred to as Farmers), filed an amended complaint for a declaratory judgment that they owed no duty to defend or indemnify defendant-counterplaintiff-appellant, Gerald Modory, in the underlying lawsuit against him. Mr. Modory filed a counterclaim for a declaratory judgment that Farmers owed him a duty to defend and indemnify, and also sought damages for breach of contract and violation of section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2018)). The parties filed cross-motions for judgment on the pleadings. The circuit court granted Farmers' motion and denied Mr. Modory's motion. Mr. Modory appeals. We affirm in part, reverse in part, and remand.

¶ 3 I. THE UNDERLYING LAWSUIT

¶ 4 On January 27, 2017, Joan Nebel filed a first amended complaint against Oakton Community College (OCC) and Mr. Modory. In pertinent part, Ms. Nebel alleged she worked for OCC from 2002 until she received notice of termination on or about June 2, 2015. Her final job title was Sergeant, Public Safety. Mr. Modory was the training officer in the Department of Public Safety (DPS) at OCC.

¶ 5 As Sergeant, Ms. Nebel reported to the Acting Chief George Carpenter. On October 3, 2014, a female student cadet under Ms. Nebel's supervision, Monica Owca, filed a Title IX complaint against Mr. Carpenter for gender discrimination. On October 5, 2014, Ms. Nebel informed an Assistant Vice President at OCC, as well the Title IX coordinator, of Ms. Owca's complaint against Mr. Carpenter.

¶ 6 On October 28, 2014, an officer under Ms. Nebel's supervision, Lisa Scandora, filed a complaint for hostile work environment and gender discrimination in the DPS. OCC subsequently fired Ms. Scandora without warning, leaving Ms. Nebel as the only remaining female employee in the DPS.

¶ 7 In February 2015, OCC's Executive Director of Human Resources interviewed Ms. Nebel as part of OCC's investigation of Ms. Owca's and Ms. Scandora's allegations of gender discrimination. During the interview, Ms. Nebel informed the Executive Director of multiple instances of gender discrimination within the DPS. Ms. Nebel also described an incident occurring on June 28, 2014, when she was the acting Chief of Police for DPS and Mr. Modory acted insubordinately by hanging up on her. Ms. Nebel informed Mr. Carpenter of Mr. Modory's insubordination, but he refused to reprimand Mr. Modory. Ms. Nebel stated her belief that the only reason Mr. Carpenter "refused to support her in this matter was because she is female."

¶ 8 Ms. Nebel further stated during the interview with the Executive Director that in July 2014, Ms. Scandora was being trained by Mr. Modory and she asked him whether Ms. Nebel had sent him an email with her login number for LEADS, an online investigation system used by DPS. Mr. Modory responded: "that b**** wants me to do those LEADS log-ins and I'm not going to listen to a word she says. I don't like her and I'm never going to respect her." Again, Mr. Carpenter did not discipline Mr. Modory.

¶ 9 Ms. Nebel alleged that in retaliation for supporting Ms. Owca's and Ms. Scandora's complaints about gender discrimination, she was terminated by OCC on or about June 2, 2015. Following her termination, Mr. Modory posted copies of a flyer in the patrol, sergeant's, and

interview rooms advertising a one-day workshop for "Problem Employees and the Games They Play." Mr. Modory altered the flyer to include a photograph of Ms. Nebel next to the title.

¶ 10 According to the flyer, the workshop would help attendees "learn what games are actually being played and why problem employees are motivated to play these games," with a special emphasis on "addressing gossip and rumors." Ms. Nebel alleged that her photograph juxtaposed with the workshop's title "intentionally created the impression that Ms. Nebel was herself a 'problem employee' who engaged in these actions." Even though the supposed date of the workshop was November 17, 2015, the flyer was still posted in multiple publicly accessible locations as of the date of the filing of the complaint on January 27, 2017.

¶ 11 Ms. Nebel alleged that "[t]here is no purpose for the posting of the flyer other than to defame, embarrass, and humiliate" her. OCC and Mr. Modory "knew that the flyer's statements and implications that Ms. Nebel was a 'problem employee' who had engaged in 'gossip and rumors' were false." OCC and Mr. Modory posted the flyer "with actual malice and/or reckless disregard of Ms. Nebel's rights to be free from defamation.' Mr. Modory's actions in posting the flyer were "willful and wanton."

¶ 12 In count I of her amended complaint, Ms. Nebel alleged that OCC engaged in retaliation against her in violation of Title VII. Counts II and III alleged defamation *per se* respectively against OCC and Mr. Modory, arising out of their posting of the defamatory flyer with her photograph, which falsely implied that she was a problem employee who spread gossip and rumors. Ms. Nebel sought compensatory as well as punitive damages.

¶ 13 II. THE INSURANCE POLICIES

¶ 14 A. The Homeowners Policy

¶ 15 Mr. Modory was the named insured in a homeowners policy issued by Illinois Farmers Insurance Company, which was in effect at the time of his allegedly defamatory conduct. The policy provided:

> "We will pay those damages which an insured becomes legally obligated to pay because of bodily injury, property damage or personal injury resulting from an occurrence to which this coverage applies. Personal injury means any injury arising from *** libel, slander, defamation of character."

¶ 16 An occurrence was defined as "an accident including exposure to conditions which results during the policy period in bodily injury or property damage."

¶ 17 In pertinent part, the homeowners policy excluded coverage for "bodily injury, property damage or personal injury which *** arises from or during the course of business pursuits of an insured" or is either "caused intentionally by or at the direction of an insured" or "results from any occurrence caused by an intentional act of any insured where the results are reasonably foreseeable."

¶ 18 B. The Umbrella Policy

¶ 19 Mr. Modory was also the named insured in a personal umbrella policy issued by Farmers Insurance Exchange, which was in effect at the time of his allegedly defamatory conduct. The umbrella policy was designed to add extra liability coverage above the limits of the homeowners policy. The umbrella policy provided coverage for bodily injury, personal injury or property damage caused by an occurrence. Personal injury was defined in relevant part as an "injury arising out of *** libel, slander, defamation of character." An occurrence was defined as follows:

"a. with regard to bodily injury or property damage, an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in bodily injury or property damage during the policy period; or

b. with regards to personal injury, offenses committed during the policy period, even if the resulting injury takes place after the policy expires."

¶ 20 The umbrella policy excluded coverage for damages "[e]ither expected or intended from the standpoint of an insured" or "[a]rising out of business or business property of an insured."

¶ 21 III. THE TENDER OF MS. NEBEL'S AMENDED COMPLAINT TO FARMERS

¶ 22 On July 26, 2016, Mr. Modory's attorney tendered Ms. Nebel's amended complaint to Farmers. On August 9, 2016, Farmers advised Mr. Modory's attorney to continue defending him while Farmers reviewed whether he was covered for the loss. Farmers stated that if it determined that Mr. Modory was covered, it would reimburse him for the reasonable defense costs.

¶ 23 Subsequently, on November 7, 2016, the federal district court dismissed count III of Ms. Nebel's amended complaint against Mr. Modory (for defamation) with prejudice. Thereafter, a settlement was reached between Ms. Nebel and OCC.

¶ 24 On November 15, 2016, Farmers sent Mr. Modory a letter denying coverage based on the business and intentional conduct exclusions in the homeowners and umbrella policies.

¶ 25 IV. FARMERS' AMENDED COMPLAINT FOR DECLARATORY RELIEF

¶ 26 On November 28, 2016, Farmers filed a five-count amended complaint seeking a declaration that it owed Mr. Modory no duty to defend or indemnify him in Ms. Nebel's action. Count I alleged that it owed no duty to defend or indemnify Mr. Modory under the homeowner's policy because Ms. Nebel's amended complaint did not allege bodily injury or property damage

as those terms were defined by the policy, and because she did not seek damages resulting from accidental conduct. Count II alleged that it owed no duty to defend or indemnify Mr. Modory under the umbrella policy because Ms. Nebel's amended complaint did not seek damages for bodily injury or property damage caused by an occurrence as those terms were defined by the policy. Count III alleged that it owed no duty to defend or indemnify Mr. Modory under either the homeowners or umbrella policy, because both policies excluded coverage for damages arising out of business pursuits. Count IV alleged that it owed no duty to defend or indemnify Mr. Modory under either the homeowners or umbrella policy, because both policies excluded coverage for damages intentionally caused by the insured. Count V alleged that it owed no duty to indemnify Mr. Modory for any award of punitive damages, as such an award "would arise from conduct that is not covered by [either] policy."

¶ 27 V. MR. MODORY'S COUNTERCLAIM FOR DECLARATORY JUDGMENT

¶ 28 On January 27, 2017, Mr. Modory filed a counterclaim for a declaratory judgment. Mr. Modory alleged that the homeowners policy and the personal umbrella policy were both ambiguous with regard to whether the alleged defamatory conduct was potentially covered therein and that any such ambiguity should be resolved in his favor. Count I sought a declaration that Farmers owed him the duty to defend and indemnify him in Ms. Nebel's underlying action, and that he was entitled to be reimbursed for his defense costs. Count II alleged that Farmers breached the insurance contracts by failing to provide him a defense in the underlying action. Count III alleged that by improperly denying him coverage, Farmers engaged in vexatious and unreasonable conduct in violation of section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2016)).

¶ 29 VI. THE CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

¶ 30 On November 21, 2017, Mr. Modory filed a motion for judgment on the pleadings. Mr. Modory explained therein that because a settlement had been reached in Ms. Nebel's underlying action against OCC, and her cause of action against Mr. Modory had been dismissed, "there will never be anything to indemnify." Therefore, the only issue was whether Farmers owed Mr. Modory a duty to reimburse him for his costs in defending the underlying action. Mr. Modory argued that the trial court should enter judgment in his favor on his counterclaims, and against Farmers on its declaratory judgment complaint, and find that Farmers owed him a duty to defend such that it should reimburse him for his defense costs.

¶ 31 On January 15, 2018, Farmers filed its cross-motion for judgment on the pleadings, arguing that it owed no duty to defend Mr. Modory in the underlying action because his allegedly defamatory statements were intentional and were made during the course of his business, and, thus, were excluded from coverage under the homeowners and umbrella policies. Farmers also argued that it did not engage in vexatious and unreasonable conduct in violation of section 155 of the Illinois Insurance Code. Accordingly, Farmers asked the court to enter judgment in its favor on its declaratory judgment complaint, and to rule against Mr. Modory on his counterclaims.

¶ 32 VII. THE TRIAL COURT'S RULING

¶ 33 On April 3, 2018, the trial court granted Farmers' motion for judgment on the pleadings and denied Mr. Modory's cross-motion, finding that Farmers owed Mr. Modory no duty to defend in the underlying action.

¶ 34 VIII. MR. MODORY'S APPEAL

¶ 35 First, Mr. Modory argues that the trial court erred by granting Farmers' motion for a declaratory judgment that it owed no duty to defend him in Ms. Nebel's underlying defamation

action, and by denying his cross-motion on count I of his counterclaim that sought a declaration that Farmers owed him a duty to defend.

¶ 36 A court properly enters judgment on the pleadings when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *H&M Commercial Driver Leasing, Inc. v. Fox Valley Containers, Inc*., 209 Ill. 2d 52, 56 (2004). The court only considers those facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions in the record. *Id*. at 56-57. All well-pleaded facts and all reasonable inferences from those facts are taken as true. *Id*. at 57. We review the entry of a judgment on the pleadings *de novo*. *Id*.

¶ 37 "An insurer's duty to defend its insured is much broader than its duty to indemnify its insured. An insurer may not justifiably refuse to defend an action against its insured unless it is clear from the face of the underlying complaint that the allegations set forth in that complaint fail to state facts that bring the case within or potentially within the insured's policy coverage. A court must compare the allegations in the underlying complaint to the policy language in order to determine whether the insurer's duty to defend has arisen. If the underlying complaint alleges facts within or potentially within policy coverage, an insurer is obligated to defend its insured even if the allegations are groundless, false or fraudulent." (Internal citations omitted.) *General Agents Insurance Co. of America v. Midwest Sporting Goods Co*., 215 Ill. 2d 146, 154-55 (2005). The threshold for pleading a duty to defend is low, and any doubt with regard to such duty is resolved in favor of the insured. *Metropolitan Property and Casualty Insurance Co. v. Stranczek*, 2012 IL App (1st) 103760, ¶ 12.

¶ 38 In the present case, the underlying complaint filed by Ms. Nebel alleged that Mr. Modory defamed her by altering a flyer titled "Problem Employees and the Games They Play" to include

a photograph of her next to the title, and then posting the flyer in the patrol, sergeant and interview rooms. Comparing the allegations in the underlying complaint with the policy language in the homeowners policy, we note that the homeowners policy provided coverage to Mr. Modory for "personal injury resulting from an occurrence" and it defined "personal injury" as an injury arising from "libel, slander, defamation of character." However, the homeowners policy defined "occurrence" as "an accident including exposure to conditions which results during the policy period in *bodily injury* or *property damage*." (Emphasis added.) In short, the homeowners policy was internally inconsistent, because on the one hand it purported to provide coverage for personal injury (including defamation) resulting from an occurrence, but on the other hand it defined "occurrence" as only including accidents resulting in bodily injury or property damage (not personal injury). Well-established case law holds that the internal inconsistency must be resolved against the insurer and in favor of coverage for the insured. See *e.g.*, *Illinois Farmers Insurance Co. v. Keyser*, 2011 IL App (3d) 090484 and *Cincinnati Insurance Co. v. American Hardware Manufacturers Ass'n*, 387 Ill. App. 3d 85 (2008) (where a policy provided coverage for certain torts under the definition of "personal injury" but then removed them under the meaning of "occurrence," the resulting inconsistency/ambiguity was resolved in favor of coverage for the insureds).

¶ 39 We reach a similar conclusion regarding coverage under the umbrella policy, which provides extra liability coverage above the limits of the homeowners policy for personal injury (defined as injury arising out of "libel, slander, defamation of character") caused by an occurrence. The umbrella policy defined "occurrence" as "with regards to personal injury, offenses committed during the policy period, even if the resulting injury takes place after the

policy expires." The allegedly defamatory conduct at issue here occurred during the policy period and, thus, came within the umbrella policy's extra liability coverage.

¶ 40 Our analysis is not finished, though, because we must consider Farmers' argument that certain policy exclusions applied to preclude coverage under the facts of this case. Where the insurer rejects a tender of defense based on a provision that it contends excludes coverage, we review the applicability of that provision to ensure it is " 'clear and free from doubt' that the policy's exclusion prevents coverage." *Atlantic Mutual Insurance Co. v. American Academy of Orthopaedic Surgeons*, 315 Ill. App. 3d 552, 560 (2000) (quoting *Bituminous Casualty Corp. v. Fulkerson*, 212 Ill. App. 3d 556, 564 (1991)). The burden of proof is on the insurer to prove that the exclusion applies. *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453-54 (2009).

¶ 41 Farmers first cites to the exclusion in the homeowners policy for personal injury that "arises from or during the course of business pursuits of an insured." An activity is a "business pursuit" if it "is a continuous or regular activity done for the purpose of earning a profit." *Stranczek*, 2012 IL App (1st) 103760, ¶ 19.

¶ 42 To fall within the business pursuits exclusion, the injury-causing act must be within the scope of employment and be employment-related activity. *Id.* Thus, for Mr. Modory's allegedly defamatory conduct to fall within the business pursuits exclusion, so as to preclude Farmers' duty to defend, the allegations in the underlying complaint must show, free and clear from doubt, that such conduct was a continuous or regular employment-related activity he performed during the scope of his employment as a training officer in the Department of Public Safety at OCC. Farmers bears the burden of proof. *Fay*, 232 Ill. 2d at 453-54.

¶ 43 Review of the underlying complaint shows that it is not at all clear and free from doubt that Mr. Modory's allegedly defamatory conduct fell within the business pursuits exclusion. The

complaint alleged that Mr. Modory was a training officer in the Department of Public Safety at OCC, but it did not allege that his altering and posting of the flyer advertising a one-day workshop for problem employees, with Ms. Nebel's photograph next to the title, was done at his employer's request or direction, or that he altered or posted it during working hours. There was no allegation that the altering and posting of such a flyer was the type of activity that Mr. Modory was regularly called on to perform pursuant to his employment or that it in any way fell within the scope of his employment. Rather, a reading of the entire complaint reveals that Mr. Modory's altering and posting of the flyer, indicating that Ms. Nebel was a problem employee, was done due to his personal animosity toward her, as demonstrated by his calling her a derogatory name, hanging up on her, and stating that he did not like or respect her, and was not an employment-related activity that was performed in his capacity as a training officer or on behalf of OCC. Accordingly, Farmers has failed to meet its burden of showing, free and clear from doubt, that the defamation claim against Mr. Modory fell within the business pursuits exclusion in the homeowners policy.

¶ 44 Farmers also argues that the defamation claim fell within the exclusion in the umbrella policy for damages "[a]rising out of business or business property of an insured." For all the reasons just discussed, Farmers has failed to meet its burden of showing, free and clear from doubt, that the defamation claim fell within this exclusion in the umbrella policy, where the underlying complaint indicates that Mr. Modory's defamatory conduct arose out of his personal animosity toward Ms. Nebel and did not arise out of his business or his business property.

¶ 45 Farmers next argues that the provisions in the homeowners and umbrella policies excluding coverage for damages intentionally caused by the insured (intentional acts exclusion) precluded coverage here. We disagree.

¶ 46 *St Paul Insurance Co. of Illinois v. Landau, Omahana & Kopka, Ltd*., 246 Ill. App. 3d 852 (1993), is instructive. In *Landau,* St. Paul Insurance Company of Illinois (St. Paul) issued a commercial general liability insurance policy to the law firm of Landau, Omahana & Kopka, Ltd. (the firm), covering it for "personal injury and advertising injury liability." *Id*. at 853. The policy defined both personal injury and advertising injury as including injuries caused by libel or slander. *Id*. at 853-54. The policy excluded coverage for "personal injury or advertising injury that results from written or spoken material made public by or for the protected person if the material is known by that person to be false." *Id*. at 854.

¶ 47 Karen Conti, a former member of the firm, filed a complaint against the firm and against certain individual members of the firm, alleging that they had defamed her by stating to other firm members and to third parties that she was incompetent and had defrauded the firm. *Id*. Ms. Conti specifically alleged that defendants "knew and intended that these statements were false." *Id*. at 857. Ms. Conti further alleged that the defamatory statements constituted tortious conduct that "was motivated, planned, and performed by defendants recklessly and maliciously and with the intent to damage Ms. Conti and to place her in a false light." *Id*. at 856.

¶ 48 The trial court granted judgment on the pleadings in favor of St. Paul, finding that coverage was excluded because of the allegations in the complaint indicating defendants knew that the statements they made about Ms. Conti were false. *Id*. at 855. Defendants appealed, arguing that the trial court erred in granting judgment on the pleadings for St. Paul, because the allegations of Ms. Conti's complaint triggered St. Paul's duty to defend. *Id*.

¶ 49 The appellate court began its analysis by noting that defamation is now governed by two standards of fault and proof—negligence and actual malice. *Id*. at 858. Actual malice need not be equated with an intention to do an act from which injury may be expected. *Id*. Rather, actual

malice may be shown by a statement that was made with reckless disregard for its truth or falsity. *Id*. Ms. Conti's complaint alleged that defendants acted not only intentionally, but also recklessly and maliciously. *Id*. at 858-59. The appellate court held that the allegations of recklessness and maliciousness were sufficient to bring the defamation claim within the potential coverage of a policy that covers defamation but excludes knowing or intentional falsehoods. *Id*. at 859. Accordingly, the appellate court reversed the grant of judgment on the pleadings in favor of St. Paul and remanded for further proceedings. *Id*.

¶ 50 Similarly, in the present case, Ms. Nebel's underlying complaint alleged that Mr. Modory acted not only intentionally, but also recklessly and maliciously, by altering and posting the flyer indicating that she was a problem employee. As in *Landau*, the allegations of recklessness and maliciousness were sufficient to bring the defamation claim within the potential coverage of the homeowners and umbrella policies; Farmers therefore failed to meet its burden of showing, free and clear from doubt, that the defamation claim fell within the intentional acts exclusion.

¶ 51 In sum, as Ms. Nebel's underlying defamation claim against Mr. Modory alleged facts potentially within policy coverage, and as Farmers failed to show, free and clear from doubt, that the business pursuits and intentional acts exclusions applied, Farmers was obligated to defend Mr. Modory. Accordingly, we reverse the trial court's order granting judgment on the pleadings in favor of Farmers on counts I through IV of its amended complaint, which sought a declaration that it owed no duty to defend Mr. Modory in the underlying action, and denying Mr. Modory's cross-motion on count I of his counterclaim for a declaration that Farmers owed him a duty to defend. We remand for further proceedings.

¶ 52 Next, we address the trial court's order granting judgment on the pleadings in favor of Farmers on count V of its declaratory judgment complaint, which sought a declaration that it

owed no duty to indemnify Mr. Modory for any award of punitive damages. As no award of punitive damages was assessed, the issue is moot. See *Westchester Fire Insurance Co. v. G. Heileman Brewing Co., Inc*., 321 Ill. App. 3d 622, 636 (2001) ("The duty to indemnify arises only when the insured becomes legally obligated for a judgment in the underlying action.").

¶ 53 Next, we address the trial court's order granting judgment on the pleadings in favor of Farmers on count II of Mr. Modory's counterclaim for breach of contract. Mr. Modory has forfeited review by making only a cursory argument, with no citation to relevant authority on contract law, in support of count II. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018).

¶ 54 Next, we address the trial court's order granting judgment on the pleadings in favor of Farmers on count III of Mr. Modory's counterclaim for violation of section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2018)). Section 155 states:

> "(1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts:
>
> (a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;
>
> (b) $60,000;
>
> (c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the

company offered to pay in settlement of the claim prior to the action." 215 ILCS 5/155 (West 2018).

¶ 55 Section 155 was enacted by the legislature "to provide a remedy to an insured who encounters unnecessary difficulties when an insurer withholds policy benefits." *Richardson v. Illinois Power Co.*, 217 Ill. App. 3d 708, 711 (1991). The key question in a section 155 claim is whether the insurer's conduct is vexatious and unreasonable. *McGee v. State Farm Fire and Casualty Co.*, 315 Ill. App. 3d 673, 681 (2000). An insurance company does not violate the statute merely because it unsuccessfully litigates a dispute involving the scope of coverage or the magnitude of the loss. *Id.* A court should consider the totality of the circumstances when deciding whether an insurer's conduct was 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. *Charter Properties, Inc. v. Rockford Mutual Insurance Co.*, 2018 IL App (2d) 170637, ¶ 29.

¶ 56 Where there is a *bona fide* dispute concerning coverage, sanctions pursuant to section 155 are inappropriate. *Id.* ¶ 30. A *bona fide* dispute is one that is " '[r]eal, actual, genuine, and not feigned.' " *McGee*, 315 Ill. App. 3d at 683 (quoting Black's Law Dictionary 177 (6th ed. 1990)). Where the insurer reasonably relies on evidence sufficient to form a *bona fide* dispute, that insurer has not acted unreasonably or vexatiously under section 155. *Charter Properties*, 2018 IL App (2d) 170637, ¶ 30.

¶ 57 Review of the totality of the facts and circumstances apparent from the face of the pleadings shows a *bona fide* dispute existed concerning coverage. Specifically, relying on the allegations in the underlying complaint that Mr. Modory's allegedly defamatory conduct was done intentionally and while employed as a training officer in the Department of Public Safety at

OCC, Farmers asserted that the business pursuits and intentional acts exclusions precluded coverage here; in contrast, Mr. Modory argued that those exclusions were inapplicable given the complaint's other allegations that his conduct was done not only intentionally, but also recklessly and maliciously, and that his conduct was done for personal reasons not related to or arising from his employment. The trial court agreed with Farmers' coverage position and ruled in its favor; as discussed, we have reversed and remanded, finding a potential for coverage sufficient to trigger Farmer's duty to defend. Despite our reversal of the trial court's order, we find no evidence in the record indicating that Farmers' coverage arguments were unreasonable or vexatious under section 155; rather, Farmers' coverage arguments raised a genuine, *bona fide* dispute as to whether the business pursuits and intentional acts exclusions precluded coverage for the defamatory acts alleged in the underlying complaint. Accordingly, we affirm the trial court's order granting Farmers' motion for judgment on the pleadings on count III of Mr. Modory's counterclaim for violation of section 155.

¶ 58 As a result of our disposition of this case, we need not address the other arguments on appeal.

¶ 59 Affirmed in part, reversed in part, and remanded.