2018 IL App (1st) 170421-U

FIRST DIVISION
January 22, 2018

No. 1-17-0421

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BEAN PRODUCTS, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 16 CH 7504
	)	
SCOTTSDALE INSURANCE CO.,	)	Honorable
	)	Kathleen M. Pantle,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Summary judgment for defendant insurer is affirmed because no conflict of interest existed in the underlying copyright infringement suit entitling plaintiff insured to independent counsel. Plaintiff was not entitled to reimbursement for the fees of its independent counsel and defendant was not subject to sanctions.

¶ 2 Plaintiff Bean Products, Inc., appeals from the judgment of the trial court in favor of defendant Scottsdale Insurance Co. and against Bean on cross-motions for summary judgment in a declaratory judgment action filed by Bean. In its judgment, the trial court found Bean was not entitled to independent counsel in an underlying copyright infringement suit under the parties'

insurance contract because no conflict of interest existed between the parties regarding the defense of that suit. The trial court also found Bean was not entitled to reimbursement of its independent counsel's fees and costs and Scottsdale was not subject to sanctions because its conduct was not vexatious or unreasonable. Bean has appealed from these rulings. For the following reasons, we affirm the trial court.

¶ 3 I. BACKGOUND

¶ 4 This action stems from an underlying suit in which Ontel Products Corporation (Ontel) alleged Bean marketed and sold home-gym products in violation of copyright and trademark rights held by Ontel. Bean tendered a claim for coverage to its insurer, Scottsdale. Scottsdale represented Bean under a reservation of rights and ultimately secured a settlement with Ontel. However, Bean retained independent counsel throughout the case, incurring litigation costs. This dispute concerns whether Scottsdale was obliged to pay for Bean's independent counsel.

¶ 5 A. The Policy

¶ 6 Scottsdale issued Bean a commercial general liability policy, effective January 13, 2014, to January 13, 2015. The policy provided coverage to Bean for "personal and advertising injury" and assigned to Scottsdale "the right and duty to defend the insured against any 'suit' seeking those damages." The policy defined "personal and advertising injury" to include "[i]nfringing upon another's advertising idea in [Bean's] 'advertisement'; or [i]nfringing upon another's copyright, trade dress or slogan in [Bean's] 'advertisement.' " It further stipulated that "[n]o insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without [Scottsdale's] consent." In addition, the policy excluded coverage for "[k]nowing [v]iolations of [the] [r]ights of [a]nother" and "[m]aterial [p]ublished with [k]knowledge of [f]alsity."

¶ 7 B. The Underlying Suit

¶ 8 On March 12, 2015, Ontel filed suit against Bean in the United States District Court for the Southern District of New York (*Ontel Products Corp. v. Bean, Inc.*, No. 1:15-cv-01824 (S.D.N.Y. filed Mar. 12, 2015)) (*Ontel* suit). In its complaint, Ontel alleged eight counts of unfair competition, copyright and trademark violations under federal and New York law. Ontel sought injunctive relief, an accounting, compensatory and/or statutory damages, treble damages, and attorneys fees and costs, though it asserted no specific amount of damages.

¶ 9 In a declaration attached to Bean's motion for summary judgment, attorney James A. Lowe stated that Bean is incorporated and has its primary place of business in Illinois. The policy "was issued to Bean in Illinois and Bean performed its policy obligations (paying premiums) in Illinois." He stated, "[a]lthough the *Ontel* Action was filed in New York, the acts of wrongdoing alleged in the *Ontel* Action emanated from Bean's Illinois-based activities."

¶ 10 Bean tendered notice to Scottsdale of the claims in the *Ontel* suit on March 25, 2015, through its independent defense counsel Gauntlett & Associates (G&A), where Mr. Lowe served as a partner. On March 31, 2015, G&A wrote to Scottsdale on behalf of Bean to assert that the *Ontel* suit triggered coverage under Illinois law. Stephen Straus, of the New York City-based law firm Traub Lieberman Straus & Shrewsberry LLP, confirmed to Scottsdale on April 9, 2015, that he would represent Bean in the suit. One week later, and through its attorneys, Scottsdale advised Bean that it had retained counsel to represent Bean and that it was "in the process of completing its coverage investigation and rendering its coverage opinion." The record is unclear as to when Bean first claimed a conflict of interest existed between it and Scottsdale that entitled it to independent counsel, but the letter of April 16, 2015, showed that Scottsdale was aware by that time that Bean had claimed such a conflict. Scottsdale argued no conflict existed and rejected

G&A's "self-appointment as independent counsel for Bean." In that letter, Scottsdale asked Bean to relinquish control of the *Ontel* suit defense, fully cooperate in the defense, and provide it with three categories of documents related to the defense.

¶ 11 In a letter dated April 30, 2015, Scottsdale agreed to defend Bean in the *Ontel* suit under a limited reservation of rights (Reservation Letter) with respect to punitive and exemplary damages (Punitive Damages Reservation). Scottsdale likewise refused to waive defenses that might unfold as the case progressed, stating: "please know that nothing herein constitutes, nor should it be construed by Bean as, a waiver of any of the rights of Scottsdale under the policies, nor is it the purpose by this letter to waive any additional defenses which further investigation will reveal." Scottsdale also reiterated its request for cooperation in supplying the three categories of litigation documents. G&A responded to Scottsdale by email on May 3, 2015, alleging it was owed fees incurred prior to the Reservation Letter and that "the nature of Scottsdale's reservation of rights creates a conflict of interest, entitling [Bean] to independent counsel under New York law." In reply, Scottsdale notified G&A on May 12, 2015, that it would pay defense costs incurred by Bean between the tender on March 25 and the agreement on April 30. However, Scottsdale rejected G&A's assertion that the contents of the Reservation Letter created a conflict of interest and insisted that Bean (and G&A) cooperate in the defense by submitting the documents requested in earlier letters.

¶ 12 On May 15, 2015, G&A supplied Scottsdale with a lengthy analysis claiming that (1) under both New York and Illinois law, Bean was entitled to independent representation in the *Ontel* suit; (2) Scottsdale's appointed counsel lacked the requisite experience to defend an intellectual property suit; and (3) the duty to cooperate did not require submission of the three categories of privileged documents sought by Scottsdale, which included both settlement

discussions between Bean and Ontel and Bean's internal evaluation of the *Ontel* suit. Scottsdale responded on May 18, 2015, that it "never reserved the right to cite unidentified defenses," and clarified that "the coverage defenses specifically reserved in its [Reservation Letter] are the only defenses Scottsdale is relying upon." "Of course," Scottsdale admonished, "should there be new information presented to Scottsdale, Scottsdale will evaluate that new information and determine whether it provides an additional, independent basis to disclaim coverage."

¶ 13 On June 3, 2015, counsel for Scottsdale notified G&A and Bean via email that Mr. Straus and Ontel had reached an agreement in principal to settle the suit for $30,000 in exchange for a release of claims against Bean. And counsel for both Ontel and Bean notified the federal district court of the settlement by letter on June 19, 2015.

¶ 14 On September 25, 2015, G&A wrote to Scottsdale demanding payment of $15,373.75 in litigation expenses in the *Ontel* suit incurred after the April 30 Reservation Letter. Meanwhile, the parties in the *Ontel* suit resolved the remaining issues and, on December 17, 2015, filed a joint stipulation of dismissal with prejudice predicated on a complete settlement, effective as of September 2, 2015. Pursuant to that settlement, Scottsdale paid Ontel $30,000 on behalf of Bean.

¶ 15 Mr. Lowe stated in his initial declaration in support of Bean's motion for summary judgment that Scottsdale's appointed counsel—Mr. Straus—did not appear of record in the *Ontel* suit before its resolution and had "no role in the *** Motion to Dismiss [drafted by Mr. Lowe, which] encouraged Ontel to settle." Mr. Lowe claimed Mr. Straus played a secondary role to him, in that he (Mr. Lowe) communicated with counsel for Scottsdale and Ontel and obtained from Bean documents necessary to secure the settlement. In his supplemental declaration, attached to Bean's reply brief in support of its motion for summary judgment, Mr. Lowe claimed Mr. Straus had "no apparent experience in defending intellectual property cases" and the only

role Mr. Straus played "was to obtain Scottsdale's authority to offer $30,000 to Ontel as part of the settlement." Bean, through Mr. Lowe's declarations, insisted it was entitled to reimbursement for the fees and costs associated with G&A's representation.

¶ 16 C. The Declaratory Judgment Action

¶ 17 Bean filed this declaratory judgment action against Scottsdale on June 2, 2016. Bean sought, among other things, a declaration that Scottsdale had a duty to reimburse Bean for more than $16,000, plus interest, in attorney fees and costs and a declaration that Scottsdale's conduct was vexatious and unreasonable, entitling Bean to $60,000 in sanctions.

¶ 18 The parties filed cross-motions for summary judgment. The trial court heard oral arguments on November 23, 2016, without a court reporter, and entered a memorandum order finding for Scottsdale on January 20, 2017. In its order the trial court analyzed Bean's claimed conflict of interest exclusively under Illinois law to determine if independent counsel was warranted, notwithstanding Bean's argument in its briefing that New York law applied and entitled Bean to independent counsel.

¶ 19 D. The Bystander's Report

¶ 20 After Bean filed its opening brief in this appeal on May 31, 2017—in which it argued that the trial court failed to conduct a choice-of-law analysis and properly apply New York law—Scottsdale moved in the trial court for certification of a bystander's report reflecting that Bean conceded at oral argument that Illinois law applied. Specifically, the bystander's report, which the trial court certified, stated, "[i]n response to [the trial court's] identification of three preliminary issues, the first of which was the applicable law, [counsel for Bean] conceded to the court that *** Illinois law was applicable to determine the pending summary judgment motions."

The trial court held a hearing on the motion for certification on July 20, 2017, during which it stated:

> "I recall the concession that Illinois law, not New York law, applied to determine the pending summary judgment motion; and that's why the whole argument revolved around Illinois law [and that's] another reason why my order addressed only Illinois law."
>
> * * *
>
> "[I]f Bean was that interested in that argument, it could have filed a motion to reconsider; but it didn't. If Bean really wanted my opinion weighing in on [whether New York law applied], it should have taken the steps to file a motion to reconsider rather than laying in wait for the Appellate court."

After the trial court certified the bystander's report, this court allowed Scottsdale leave to supplement the record with the bystander's report and a transcript of the certification hearing.

¶ 21 II. JURISDICTION

¶ 22 Bean filed its notice of appeal on February 21, 2017, and filed an amended notice of appeal with leave of this court on March 15, 2017. This court thus has jurisdiction under Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered by the circuit court in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015).

¶ 23 III. ANALYSIS

¶ 24 Summary judgment is warranted "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2016). "Where the parties file cross-motions for summary judgment, *** they concede the absence of a genuine issue of material fact, agree that only questions of law are involved, and

invite the court to decide the issues based on the record." *Stevens v. McGuireWoods LLP*, 2015 IL 118652, ¶ 11. We review the granting of summary judgment *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 25 On appeal, Bean argues that (a) the trial court erred by not conducting a choice-of-law analysis; (b) under the undisputed facts it is clear that a conflict of interest existed between Bean and Scottsdale in the *Ontel* suit entitling Bean to independent counsel; (c) even without a conflict of interest, Scottsdale was obliged to reimburse those fees and costs of Bean's independent counsel costs that were necessary for settlement; and (d) Scottsdale's conduct was vexatious and unreasonable, warranting sanctions. We review each argument in turn.

¶ 26 A. Illinois Law Should be Applied to Determine the Conflict of Interest Issue

¶ 27 Before addressing the merits of Bean's conflict of interest claim, we must determine whether, as Scottsdale argues, Bean conceded that Illinois law applies and, if not, whether to apply Illinois or New York law. Bean argues the trial court erred by not conducting a choice-of-law analysis that, according to Bean, would have led to application of New York law entitling it to independent counsel. In response, Scottsdale relies on the certified bystander's report to argue that, at the hearing on the cross-motions for summary judgment, Bean conceded that Illinois law applied. Scottsdale alternatively argues both that Illinois law and New York law do not conflict on this issue and that, if they did, Illinois law should be applied under the "most significant contacts" test. Bean challenges the contents of the bystander's report in its reply brief, which was filed after Scottsdale supplemented the record with the report, and, notwithstanding the contents of the report, asks us to reach the issue.

¶ 28 On the record before us, it appears that Bean affirmatively waived this issue when it argued the motions before the trial court. The only record we have as to what Bean said to the

trial court prior to the hearing is the bystander's report. That certified report states that, when the parties appeared for the hearing, the trial judge identified choice-of-law as an issue for its consideration, and that counsel for Bean "conceded to the court that *** Illinois law was applicable to determine the pending summary judgment motions." Ultimately, "it is the duty of any appellant *** who wishes to proceed in a reviewing court properly to preserve the entire record of proceedings so that the reviewing court may be fully informed of the issues before it." *Belcher v. Spillman*, 28 Ill. App. 3d 973, 975 (1975). Bean did not supply a verbatim transcript and apparently there was no court reporter at the hearing on the cross motions for summary judgment. In the absence of a verbatim transcript of proceedings, we may rely upon a bystander's report which has been certified as true and correct by the trial court. Ill. S. Ct. R. 323(c) (eff. Feb. 1, 1994); see *e.g. In re Dawn H.*, 281 Ill. App. 3d 746, 753 (1996).

¶ 29 Moreover, even if Bean did not waive the issue, we find both that Illinois law was the proper law to apply and a choice-of-law analysis was unnecessary because there is no conflict between Illinois and New York law that is significant in this case. "A choice-of-law determination is required only when a difference in law will make a difference in the outcome." *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 155 (2007). Under Illinois law, a conflict of interest exists if, comparing the claims in the complaint to the terms of the policy, "the insurer's interests would be furthered by providing a less than vigorous defense to the allegations." *Williams v. American Country Insurance Co.*, 359 Ill. App. 3d 128, 138 (2005). New York law mandates a similar test, in that "[i]ndependent counsel is only necessary in cases where the defense attorney's duty to the insured would require that he defeat liability on any ground and his duty to the insurer would require that he defeat liability only upon grounds which would render the insurer liable." *Public Service Mutual Insurance Co. v. Goldfarb*, 53 N.Y. 2d 392, 401

(1981).

¶ 30 Bean's only claim that the outcome of this case would be different under New York law than under Illinois law rests on the fact that the trial court referred to a requirement in Illinois that the insured show "prejudice" to establish a conflict of interest. The trial court referenced *Williams v. American Country Insurance Co.*, 359 Ill. App. 3d 128 (2005), and Scottsdale cites *Hanover Insurance Co. v. American Engineering Co.*, No. 93 C 4195, 1995 WL 654012 (N.D. Ill. Nov. 6, 1995), for the proposition that in Illinois an insured must show prejudice stemming from a conflict of interest. But both *Williams* and *Hanover* are inapposite because they have to do with the showing an insured must make after the insured has already been provided counsel by the insurance company. In this case, Bean never relinquished its claim to independent counsel and instead retained G&A throughout the litigation, incurring the fees and costs for which it demands repayment. If the facts of the present case were more aligned with *Williams* or *Hanover*, Bean could have been required under those cases to establish that it was prejudiced by the actions taken by its insurer-picked counsel. Here, however, there were no such actions by insurer-picked counsel and Bean had only to show a conflict of interest existed as manifested by the claims in the *Ontel* suit, the policy, and the reservations found in Scottsdale's Reservation Letter. In sum, Bean did not have to show prejudice in order to demonstrate a conflict of interest in this case, and the fact that such a showing might be required under other circumstances is not a relevant distinction between New York and Illinois law. It is likewise immaterial that the trial court relied, in part, on the absence of prejudice, since our review is *de novo*.

¶ 31 Furthermore, even if a relevant conflict of law existed, application of Illinois law would have been proper. Where no express choice-of-law provision exists, the insurance policy is generally governed by "the location of the subject matter, the place of delivery of the contract,

the domicile of the insured or of the insurer, the place of the last act to give rise to a valid contract, the place of performance, or other place bearing a rational relationship to the general contract." (Internal citations omitted.) *Lapham-Hickey Steel Corp. v. Protection Mutual Insurance Co.*, 166 Ill. 2d 520, 526-27 (1995). As Mr. Lowe stated in his initial declaration for Bean, not only is Bean incorporated in Illinois with a primary place of business in Illinois, but the policy agreement was formed in Illinois, the policy obligations were performed in Illinois, and the alleged violations occurred in Illinois. The sole contact with New York is the fact that the underlying claim was filed there. We find under the "most significant contacts" test that Illinois law applies.

¶ 32 We find inapposite Bean's citation to New York's Rules of Professional Conduct, mandating that: "[w]here a lawyer defends a policyholder in civil litigation, the client is the policyholder, not the insurance company," even though" the insurance company has retained the lawyer pursuant to its contractual duty to defend the policyholder." N.Y. State Bar Association Committee on Professional Ethics, Op. 716 (March 1999). This rule does not inform the outcome of a choice-of-law analysis, but rather determines how attorneys conduct themselves in the course of litigation pursued in New York.

¶ 33 For all of these reasons we agree with the trial court that we should consider Bean's request for independent counsel under Illinois law.

¶ 34 B. No Conflict of Interest Existed

¶ 35 Bean argues that Scottsdale's Punitive Damages Reservation and the "open ended" nature of its Reservation Letter each created a conflict of interest between the parties, entitling Bean to independent counsel in the *Ontel* suit. The general rule in Illinois is that the allegations of the underlying complaint determine whether the insurer owes a duty to defend its insured. *Illinois*

Masonic Medical Center v. Turegum Insurance Co., 168 Ill. App. 3d 158, 162 (1988). If the complaint alleges facts within or potentially within the coverage of the policy, the duty to defend has been established. *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187, 193 (1976). This duty to defend extends to cases where the complaint alleges several causes of action or theories of recovery, one of which is within the coverage of a policy while the others may not be. *Id.* at 194. Generally, the insurer's duty to defend includes the right to assume control of the litigation. *Nandorf, Inc. v. CNA Insurance Companies*, 134 Ill. App. 3d 134, 136 (1985).

¶ 36 Where there is a conflict of interest between an insurer and the insured, instead of participating in the defense itself, the insurer must decline to defend and pay for independent counsel for the insured. *Williams*, 359 Ill. App. 3d at 137-38. A conflict exists under Illinois law "if, in comparing the allegations of the complaint to the terms of the policy, the insurer's interests would be furthered by providing a less than vigorous defense to the allegations." *Id.* However, "this exception is not meant to swallow the general rule requiring the insurer to provide its insured with a defense when the coverage is potential." *Murphy v. Urso*, 88 Ill. 2d 444, 458 (1981). "Only where actual conflicts of interest appear is the general rule relaxed." *Id.*

¶ 37 1. No Conflict Arose from the Punitive Damages Reservation

¶ 38 Bean argues the Punitive Damages Reservation—asserted by Scottsdale in connection with covered claims for unfair competition—evinced a conflict of interest because the intent component of such claims "could lead to a damages award for unfair competition falling outside of coverage." Bean emphasizes paragraph 82 of the complaint in the *Ontel* suit, which alleged Bean engaged in unfair competition, and the prayer for relief seeking "an award of exemplary or punitive damages in an amount to be determined by the Court." Given that Scottsdale reserved the right to deny coverage for exemplary or punitive damages, Bean argues Scottsdale had an

interest in providing a "less than vigorous defense" to the punitive damages claim. See *Williams*, 359 Ill. App. 3d at 138. In other words, "in the underlying suit, the insurer-retained counsel would have the opportunity to shift facts in a way that takes the case outside the scope of policy coverage, [thus] the insured is not required to defend" with the insurer's chosen counsel. *Stoneridge Development Co. v. Essex Insurance Co.*, 382 Ill. App. 3d 731, 742-43 (2008).

¶ 39 Bean relies on *Nandorf*, for the proposition that an insurer's reservation of the right to disclaim coverage for punitive damages triggers a conflict of interest entitling it to independent counsel. In *Nandorf*, we reviewed the dismissal of a retail shop owner's declaratory action against its insurer, CNA, in which the insured sought independent counsel. *Nandorf*, 134 Ill. App. 3d 135. The underlying plaintiffs sought $5,000 in compensatory damages and $100,000 in punitive damages, alleging store employees had "seized" and wrongfully imprisoned them. *Id.* Nandorf tendered notice to CNA and CNA agreed to defend Nandorf, but reserved the right to disclaim coverage for punitive damages. *Id.* We found CNA's punitive damages reservation created a conflict of interest because "CNA's interests would have been just as well served by an award of minimal compensatory damages and substantial punitive damages." *Id.* at 138.

¶ 40 However, in *Nandorf* we cautioned:

> "Our finding that a conflict of interest existed in the instant case is not meant to imply that an insured is entitled to independent counsel whenever punitive damages are sought in the underlying action. Under the peculiar facts and circumstances of this litigation, punitive damages formed a substantial portion of the potential liability in the [underlying] action and CNA's disclaimer of liability for punitive damages left Nandorf with the greater interest and risk in the litigation." *Id.* at 140.

The complaint in the *Ontel* suit did not demand a specific amount of damages, much less a

disproportionate ratio of compensatory to punitive damages like the ratio at issue in *Nandorf*, that would create conflicting interests between Bean and Scottsdale. We decline to extend the holding in *Nandorf* such that any insurer's punitive damages reservation, in the face of a punitive or exemplary damages prayer for relief, automatically triggers a right to independent counsel. Considering the frequency of general punitive damages demands in litigation, such a trigger would eviscerate an insurer's right to control the defense of its insured. See *id.* at 136.

¶ 41 The other cases cited by Bean, in which the court found a conflict of interest existed, involved "actual" conflicts and not merely the attenuated, hypothetical conflict relied on here. In *Murphy*, a woman was injured while riding as a passenger in a school van during off-hours. *Murphy*, 88 Ill. 2d at 448. She sued the van's driver as well as the van's owners, on the basis that the driver was acting as an agent of the owners. *Id.* Our supreme court determined the owners' insurance company had a duty to defend the driver in addition to the owners because the policy covered permissive drivers of the vehicle. *Id.* at 453. The court found a conflict arose necessitating independent counsel because the driver's interest "lay in siding with the plaintiff [on the agency question] and shifting liability to [the owners]," whereas the insurer's interest "lay in separating [the driver] from [the owners] so that [the driver] would bear the entire liability." *Id.*

¶ 42 Similarly, in *American Family Mutual Insurance Co. v. W.H. McNaughton Builders, Inc.*, 363 Ill. App. 3d 505 (2006), a conflict of interest arose between an insurer and the insured building company because, although their interests aligned toward a finding that the builder was not liable for mold damage to the underlying plaintiff's home, the insurer was equally protected if the damage was determined to have occurred before the policy's inception. *Id.* at 513. Thus, an "actual" conflict existed and the builder was entitled to retain its own legal counsel. *Id.*

¶ 43 Here, no actual conflict of interest existed to entitle Bean to independent counsel based simply on the fact that the complaint sought punitive damages. We decline to extend the holding in *Nandorf* beyond the particular facts of that case and affirm summary judgment for Scottsdale on this issue.

¶ 44 2. No Conflict Arose from the "Open Ended" Reservation Letter

¶ 45 Bean also argues the "open ended" nature of Scottsdale's Reservation Letter created a conflict of interest on similar grounds as above—that the Reservation Letter allowed Scottsdale to "lay the groundwork" for a later denial of coverage while still controlling the *Ontel* suit defense. See *McNaughton*, 363 Ill. App. 3d at 511. Although a party need not wait until "a lack of coverage is unequivocally established" to show a conflict, it must show "the divergent interests of the insurer and insured are apparent and the attorney representing the insured can no longer represent both clients' interests without prejudice to either client." *Id.* at 514.

¶ 46 Bean has not shown that the Reservation Letter made it apparent that the parties' interests diverged. At best, as with the Punitive Damages Reservation, Bean has shown an attenuated possibility that Scottsdale, at the point of the Reservation Letter, *could have* molded the litigation to come under some unspecified defense that could only be revealed by the factual progress of the *Ontel* suit. Bean offers nary a guess as to what that defense might be, stating only that the "open ended" language in the reservation allows Scottsdale this potential. But Illinois courts are clear that only "actual" and not merely "potential" conflicts entitle an insured to independent counsel. *Murphy*, 88 Ill. 2d at 458.

¶ 47 Bean's reliance on *Stoneridge Development Co. v. Essex Insurance Co.*, 382 Ill. App. 3d 731 (2008), does not help it. Rather, we held in *Stoneridge* that there was *no* conflict of interest. *Id.* at 747. There, the insurer "reserved the right to withdraw from the defense if the 'property

damage' did not constitute an 'occurrence' under the policy." *Id.* at 748. In finding no conflict, we observed that the insurer "was focusing on whether the factual allegations of the [underlying plaintiff homeowners'] claims fit within its policy," rather than on theories of liability that could potentially bring the suit outside the policy's coverage. *Id.* at 747-48.

¶ 48 Like the reservation of rights in *Stoneridge*, Scottsdale's boilerplate reservation in this case was premised on generalized concerns and not on any issue giving rise to a conflict of interest. Scottsdale stated its Reservation Letter was not a "waiver of any of the rights of Scottsdale under the policies, nor is it the purpose by this letter to waive any additional defenses which further investigation will reveal." In clarifying its coverage position in a May 18, 2015, letter to Bean, Scottsdale bound itself to those rights articulated in the Reservation Letter and simply admonished, "should there be new information presented to Scottsdale, Scottsdale will evaluate that new information and determine whether it provides an additional, independent basis to disclaim coverage." Like the claimed conflict in *Stoneridge*, our case presents only the remote possibility that a conflict could develop and thus "stands in stark contrast to *Peppers*, *Murphy*, [and] *McNaughton* [], where examinations of the complaints, policies, and any relevant memos or letters revealed clear conflicts of interest." *Id.* at 748. We affirm summary judgment for Scottsdale on this issue.

¶ 49 C. Bean is Not Owed Reimbursement for Legal Fees Voluntarily Undertaken

¶ 50 Bean argues that, even absent a right to independent counsel, it was entitled to recover attorney fees incurred for legal work that was necessary to settle the *Ontel* suit. However, Bean offers no authority—in its opening brief or reply brief—for the proposition that an insured has a right to attorney fees it voluntarily incurred in securing the settlement of an underlying suit, where, as in this case, we have found there was no right to independent counsel. Bean recites the

facts attested to by Mr. Lowe in his declarations regarding the work G&A did in the *Ontel* suit and the secondary role Scottsdale's appointed counsel played. Bean never explains why G&A's work was "necessary," or why Scottsdale's chosen counsel—Mr. Straus—could not have accomplished what G&A did.

¶ 51 The operative rule binding the parties is the one they both agreed to in the policy, which states that "[n]o insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense *** without [Scottsdale's] consent." Bean has never disputed that the fees for G&A's representation were voluntarily undertaken without the consent of Scottsdale. It is entirely appropriate to enforce this provision, as it is nothing more than a facet of an insurer's right to control the defense in order to "protect [its] financial interest in the outcome of the litigation and to minimize unwarranted liability claims." *Illinois Masonic*, 168 Ill. App. 3d at 163. We affirm summary judgment for Scottsdale on this issue.

¶ 52 D. Scottsdale's Conduct was Not Vexatious or Unreasonable

¶ 53 Finally, Bean seeks sanctions against Scottsdale under section 155 of the Insurance Code (215 ILCS 5/155 (West 2016)) for the insurer's refusal to forfeit its right to defend Bean in the *Ontel* suit. Section 155 provides, in pertinent part:

> "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 [certain penalties]." 215 ILCS 5/155(1) (West 2016).

Whether an insurer's conduct is vexatious and unreasonable is a matter within the trial court's

discretion. *Williams*, 359 Ill. App. 3d at 141. "[W]here a *bona fide* dispute concerning coverage exists, costs and sanctions are inappropriate." *State Farm Mutual Automobile Insurance Co. v. Smith*, 197 Ill. 2d 369, 380 (2001). Because we agree with Scottsdale that Bean was not entitled to independent counsel or to reimbursement for independent counsel's services, at the very least a *bona fide* dispute existed between the parties over the conflict issue. Section 155 sanctions were therefore inappropriate and the trial court did not abuse its discretion in so ruling.

¶ 54 IV. CONCLUSION

¶ 55 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 56 Affirmed.