2019 IL App (5th) 180533-U

NO. 5-18-0533

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JEFFREY PATZIUS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 17-MR-304
	)	
AMERICAN FAMILY INSURANCE,	)	Honorable
	)	Julie K. Katz,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Barberis and Boie concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in finding that the plaintiff was not entitled to sanctions pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2016)) for the defendant insurance company's delay in making payment on his insurance claim where the defendant had a *bona fide* defense regarding coverage.

¶ 2 The plaintiff, Jeffrey Patzius, sought sanctions pursuant to section 155 of the Illinois Insurance Code (Code) (215 ILCS 5/155 (West 2016)) against the defendant, American Family Insurance, for the defendant's vexatious and unreasonable delay in making payment on the plaintiff's insurance claim. On August 7, 2018, the trial court denied the plaintiff's request for sanctions, finding that, because there was a *bona fide*

dispute concerning the amount of the loss for which coverage was available, an award of sanctions under section 155 was inappropriate. For the following reasons, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This matter involves an insurance claim arising out of a January 27, 2016, electrical fire that occurred at rental property owned by the plaintiff in Benld, Illinois. The plaintiff's son, David Patzius, rented the residence from the plaintiff. Although the fire damage was limited to the bathroom of the residence, the plaintiff claimed that the residence was uninhabitable as a result of the fire and that David and his family had to move out of the home. The plaintiff reported the fire to the defendant, his insurer, and an investigation ensued. During the investigation, it was discovered that the entire residence needed to be completely rewired to comply with the city's building code.

¶ 5 According to the defendant's claim adjuster, Ronald Clevlen, in his April 14, 2016, letter to the plaintiff, the plaintiff's insurance policy addressed code upgrades, in pertinent part, as follows[1]:

> "I. Increased Cost of Construction
>
> ***
>
> (2) In the event of damage by a Covered Cause of Loss to a building that is Covered Property, we will pay the increased costs incurred to comply with enforcement of an ordinance or law in the course of repair, rebuilding or replacement of damaged parts of that property, subject to the limitations stated in Paragraphs (3) through (9) of this Additional Coverage.
>
> (3) The ordinance or law referred to in Paragraph (2) of this Additional Coverage is an ordinance or law that regulates the construction or

[1]The actual insurance policy was never admitted into evidence at the trial court, and, thus, it is not part of the record on appeal.

repair of buildings or establishes zoning or land use requirements at the described premises, and is in force at the time of loss.

(4) Under this Additional Coverage, we will not pay any costs due to an ordinance or law that:

(a) You were required to comply with before the loss, even when the building was undamaged; and

(b) You failed to comply with."

¶ 6 Based on this policy language, Clevlen indicated that the code coverage only applied to the affected area of the residence (the bathroom) and that the rewiring of the house (excluding the bathroom) would not be covered as part of the damage claim. He also indicated that the cost to rewire the bathroom totaled $417.56. He advised that it was determined that the plaintiff's total loss for the fire damage to the bathroom was $3808.20. A check was issued to the plaintiff in that amount.

¶ 7 At some point, the plaintiff hired Dan Long, a professional appraiser at Gateway Adjusters, Inc., to assist him in the resolution of his insurance claim. On October 2, 2017, the plaintiff filed a petition for judicial appointment of an appraisal umpire in accordance with the appraisal clause of his insurance contract. The petition indicated that the appraisal clause stated as follows:

> "If we and you disagree on the value of the property or the amount of loss, either may make a written demand for an appraisal of the loss. In this event, each party will select a competent and impartial appraiser. The two appraisers will select an umpire. If they cannot agree, either may request that selection be made by a judge of a court having jurisdiction. The appraisers will state separately the value of the property and amount of the loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will be binding."

The petition asserted that there was a dispute between the parties as to the amount of loss sustained and that the plaintiff's fire damage claim remained unresolved. The petition

indicated that the plaintiff had selected Brian Hernandez of Brico Development, LLC, and 911 Restoration of Metro East, Inc., as his appraiser.

¶ 8 The petition also indicated that, on October 6, 2016, the plaintiff had made a written demand for an appraisal in accordance with the insurance contract and provided written notice of his appraiser selection to the defendant. The petition asserted that the defendant had refused the plaintiff's request for appraisal and had failed to select and/or name its appraiser. Thus, the plaintiff requested that the trial court appoint an appraisal umpire so that the umpire could determine the amount of loss. Attached to the petition was the October 6, 2016, letter in which the plaintiff notified the defendant that he was exercising his right to demand an appraisal under the insurance policy and identified his appraiser. Also attached to the petition was a March 27, 2017, letter from Clevlen to Long, in which Clevlen indicated that, as noted in his October 21, 2016, letter, the defendant was denying the plaintiff's request for an appraisal as the appraisal process was only applicable for disagreements on the value of the damaged property, not for disagreements about coverage.

¶ 9 On October 10, 2017, the trial court entered an order appointing retired Judge Lloyd Cueto as the appraisal umpire in this property-damage claim. On December 22, 2017, the appraisal umpire issued an appraisal award, finding that the plaintiff's total loss was $55,564.91 (the plaintiff's net loss was $51,756.71 as $3808.20 had already been paid by the defendant).

¶ 10 On January 5, 2018, the defendant filed a motion to vacate the appraisal award, arguing that contractual disputes concerning coverage and terms within an insurance

policy were considered legal disputes that could not be determined by an appraisal award. Thus, the defendant contended that an appraisal award could not determine coverage and could not bind the defendant to making a payment that it was not required to pay under the insurance policy. Instead, the defendant asserted that, before payment would be proper under the policy, the coverage dispute must be determined by a court. The defendant also argued that its counsel did not receive notice of the appointment of the appraisal umpire because the notice was mailed to the wrong address. The defendant argued that it did not learn about the umpire appointment until well after it occurred, and thus, it was denied notice and an opportunity to respond. Attached to the motion was the October 21, 2016, letter from Clevlen to Long, which indicated that the defendant was denying the plaintiff's request for an appraisal. Clevlen asserted that the appraisal process was applicable for disagreements regarding the value of the damaged property, but the parties here agreed with the "loss settlement for the fire damage." He indicated that the issue was with rewiring the entire residence, which was not damaged by the fire, and that this was a "coverage issue and not subject to appraisal."

¶ 11 On January 11, 2018, the plaintiff filed a petition to confirm the appraisal award, requesting that the trial court adopt the umpire's appraisal award of $51,756.71. The next day, on January 12, 2018, the plaintiff filed a reply to the motion to vacate the appraisal award, arguing that the defendant had waived its participation in the appraisal process by failing to timely name its own appraiser. On February 26, 2018, the trial court entered an order granting the defendant's motion to vacate the December 26, 2017, appraisal award due to the deficiencies in the notice provided to the defendant. The court then remanded

the matter back to the parties to properly participate in the appraisal and arbitration process.

¶ 12 On March 9, 2018, the plaintiff filed a petition to compel the defendant to appoint its appraiser, arguing that it had been more than 18 months since he had initiated the appraisal process, and the defendant had yet to name its own appraiser. On March 20, 2018, the defendant named Scott Charbonneau as its appraiser. The defendant subsequently removed Charbonneau as its appraiser and, on April 23, 2018, named James O'Brien as its new appraiser.

¶ 13 On May 18, 2018, retired Judge Cueto again issued his appraisal award, finding that the net loss was $51,756.71. Although O'Brien participated in the appraisal process, he did not sign the award. Thereafter, the defendant paid the full appraisal award to the plaintiff.

¶ 14 On June 15, 2018, the plaintiff filed a petition seeking sanctions pursuant to section 155 of the Code (215 ILCS 5/155 (West 2016)) for the defendant's vexatious and unreasonable delay in settling his insurance claim. As evidence of delay, the plaintiff pointed to the defendant's initial "low" offer of $3808.20 on the claim, its prolonged refusal to agree to the selection of an umpire, refusal to name its own appraiser, its continued refusal to pay full indemnity for the electrical wiring, and its delayed payment following the issuance of the appraisal award. The plaintiff contended that the defendant was statutorily required to pay the following sanctions: a 60% penalty, his attorney fees, prejudgment interest, the plaintiff's $277 filing fee, $1800 for the appraisal umpire's fee, and $1600 for the plaintiff's appraiser's fee.

¶ 15 On July 26, 2018, the plaintiff filed a trial brief memorandum of law in support of his petition for sanctions in which he noted that, under Illinois law, where there was a *bona fide* dispute over insurance coverage, section 155 sanctions were not appropriate. Noting that a *bona fide* dispute was one that is real, genuine, timely, or not feigned, the plaintiff contended that there was no *bona fide* dispute because the defendant had failed to file a timely declaratory judgment action. The plaintiff also contended that there was no *bona fide* dispute because the rewiring of the entire house was covered under his insurance policy.

¶ 16 The following testimony was adduced at the July 31, 2018, hearing on the petition for section 155 sanctions. The plaintiff testified that he purchased an insurance policy from the defendant for his rental property located in Benld, Illinois; the effective dates of coverage were February 12, 2015, through February 12, 2016; and he had paid the annual premium of $1411 for that period. The plaintiff's son, the son's girlfriend, and their children were living in the house at that time.

¶ 17 On January 27, 2016, there was an electrical fire of an undetermined origin in the residence. Although the plaintiff indicated that the actual fire damage occurred on the outside wall of the bathroom, he claimed that the house was uninhabitable. The plaintiff submitted the insurance claim to the defendant. During the investigation into the claim, it was determined by the Benld, Illinois, building inspector that the entire residence needed to be rewired to be code compliant. The plaintiff acknowledged that the code violations related to the wiring were present before the fire and noted that the defendant had determined that rewiring the entire house was not a covered loss based on the language of

the insurance contract. Although the defendant's claim adjuster offered to pay $3808.20 in satisfaction of the claim, which represented compensation for the bathroom repair and the rewiring of the bathroom, the plaintiff indicated that this was not enough to physically repair all of the fire damage to the house. Therefore, the plaintiff had to pay for the remaining repairs, which included rewiring the house, out of his own pocket because the claim was not resolved in a timely manner.

¶ 18 In October 2016, the plaintiff invoked the appraisal clause in the insurance contract by demanding an appraisal and identifying his appraiser. However, the defendant did not name its own appraiser until March 20, 2018 (18 months after the written demand of appraisal). The defendant's first named appraiser did not actually serve as its appraiser; the initial appraiser was replaced by a substitute appraiser on April 23, 2018. On May 18, 2018, the appraisal umpire determined the total amount of loss as $55,564.91 (most of the cost was rewiring the house). The plaintiff testified that, according to the insurance contract, the defendant's payment following an appraisal award was due within 30 days of the issuance of the award. The plaintiff did not receive the payment until July 9, 2018, which was 51 days after the issuance of the appraisal award. The defendant never filed a declaratory judgment action for a determination of the parties' rights and duties related to coverage, and the plaintiff acknowledged that he never filed a declaratory judgment action.

¶ 19 Clevlen testified as follows. He explained that he did not reply to the plaintiff's October 6 written demand for appraisal until October 21 because he had to verify coverage. Under the appraisal clause of the insurance contract, after receiving a written

demand of appraisal, the insurance company had 20 days to name its appraiser. The defendant did not name its appraiser within that 20-day period because it denied the plaintiff's demand for an appraisal. After the issuance of the appraisal award, on June 14, 2018, Clevlen mailed a check for $51,756.71 (the total appraisal award minus the amount already paid) to Long. However, that check was never received because it was sent to an old address, and Clevlen was never notified of the change of address. Thereafter, on June 22, 2018, the day that he received notice that Long never received the initial check, Clevlen mailed a second check. Clevlen then issued a third check on July 6, 2018, when he received notice that Long never received the second one.

¶ 20 After testimony, counsel made the following arguments. The plaintiff's counsel contended that the plaintiff had "code coverage" but did not admit the insurance policy into evidence; it was the plaintiff's position that having "code coverage" meant that the defendant agreed that the cost of bringing the entire property up to code was covered under his policy. The defendant disagreed with the plaintiff's position and instead argued that the coverage only applied to the affected area, *i.e.*, the bathroom, because the issue with the wiring was a problem that had existed before the fire.

¶ 21 During arguments, the following colloquy occurred between the trial court and counsel:

> "THE COURT: *** What do you believe the company should have done when it took that position [(determined that the rewiring of the entire house was not covered under the insurance policy)]?
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> [THE PLAINTIFF'S COUNSEL]: Contemporaneously or within a reasonable time—The only party with a coverage question is American Family

Insurance. They should have filed a declaratory judgment action before Thanksgiving of 2016 but did not.

So that's why whether they abandoned the position or waived it, they should at least be equitably estopped from asserting it at this late date.

THE COURT: And I don't have the policy in front of me but are you suggesting that within the 15 days after the demand for appraisal is made they must file a declaratory judgment action?

[THE PLAINTIFF'S COUNSEL]: No. Not within the 20 days. The 15 days is for the two appraisers to select their umpire which didn't happen because they didn't have an appraiser.

THE COURT: Okay.

[THE PLAINTIFF'S COUNSEL]: But within that, no, not necessarily within 20 days, although that would have been prudent by American Family. It would have been proper. I could have no objection that it's a premature [declaratory judgment] action. So it should have been filed contemporaneously within a reasonable time of October 21, 2016. It hasn't been filed today.

THE COURT: Okay. All Right. [The defendant's counsel]?

[THE DEFENDANT'S COUNSEL]: *** I think the denial that Mr. Clevlen provided and set forth exactly why he was denying the claim. The Patziuses are adults. *** They could have themselves filed their own declaratory judgment action.

I'm not exactly sure what counsel means when he says American Family is the only one that had a coverage question. If there's a coverage question everybody has one.

THE COURT: There's a dispute in other words.

[THE DEFENDANT'S COUNSEL]: Exactly, Your Honor. I don't see how just one person can—You know, American Family says that there's no coverage. He says there is coverage. His wife says there's coverage. There's a *bona fide* dispute there.

THE COURT: I would assume their action rather than a declaratory judgment would simply be a breach of contract action.

[THE DEFENDANT'S COUNSEL]: Yes. They could do that, Your Honor, correct. And maybe that would have prompted a declaratory judgment action on the part of American Family. ***

* * *

> THE COURT: *** So as I understand it you continue to take the position that the award should not have been paid by American Family because it included the cost of rewiring the entire house. But as I understand it you have paid it?
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> [THE DEFENDANT'S COUNSEL]: We paid it in an effort to gain peace, Your Honor—
>
> THE COURT: All right.
>
> [THE DEFENDANT'S COUNSEL]: —and put this behind us.
>
> THE COURT: So you're not—You've paid it but you're suggesting that your payment of that award does not somehow act as an acknowledgement that you were obligated to pay it?
>
> [THE DEFENDANT'S COUNSEL]: Exactly, Judge. And even if it did, we attempted to pay within the 30 day time period of—If the argument is that our payment acknowledges coverage, then we could not have acknowledged coverage until we paid it.
>
> And we have, Your Honor, consistently made the point that there's no coverage. There was a motion that I filed with the Court—let's see—in January of this year stating repeatedly and with case law support that there's—that coverage issues can only be determined by the Court."

¶ 22 The trial court then asked the defendant's counsel what his client's options were within the 20-day period after a demand for appraisal was made. Counsel responded that his client could deny coverage where there was no coverage and then there would be nothing to appraise because there would not be any coverage for that issue. Counsel also clarified that it was not the defendant's sole obligation to initiate a declaratory judgment action; if the defendant determined that there was no coverage, then the insured could file an action in the courts to resolve the dispute.

¶ 23 On August 7, 2018, the trial court entered an order, denying the plaintiff's request for section 155 sanctions. In the order, the court indicated that the question of whether the policy language excluded coverage for the cost of rewiring the entire property was not before the court because the plaintiff did not file a breach of contract

action against the defendant when it denied coverage for the cost of rewiring the residence nor did the defendant file a declaratory judgment action to determine coverage. The court indicated that the only question before it was whether the defendant was liable for penalties and costs for refusal to pay the claim in a timely manner. The court further indicated that the appraisal award was issued on May 18, 2018; the defendant issued payment on the appraisal award on June 14, 2018; that the initial payment had been mailed to the public adjuster at his previous address because the defendant had not been notified of any address change; that a subsequent check was issued on June 22, 2018, the same day that the defendant learned of the address change; and that when the defendant learned the second check was not received by the public adjuster, a third check was issued on July 6, 2018.

¶ 24 The trial court found that, assuming the defendant was under an obligation, either statutory or contractual, to tender payment of the appraisal award within 30 days from the issuance of the award,[2] the defendant had not violated that provision. The court concluded that the defendant made a good faith effort to pay the appraisal award within 30 days as evidenced by the draft issued originally on June 14. Although the check was not received by the plaintiff until July 11, the court did not believe that the defendant was solely at fault. The court then noted that the fact that an appraisal award had been paid in full did not, by itself, defeat a section 155 claim; the relevant inquiry to determine whether an insurer's actions were vexatious and unreasonable was whether it had a *bona fide* dispute concerning coverage. The court concluded that the defendant asserted a

[2]The trial court indicated that the plaintiff had not provided it with any support for this position.

bona fide defense concerning its obligation to pay for the cost of rewiring the entire residence, and it was not unreasonable to take the position that the "fact that the wiring in the house was not code-compliant was a problem that existed prior to the fire and was not caused by a fire that was limited to one bathroom." Thus, the court concluded that there was a *bona fide* dispute concerning the amount of the loss for which coverage was available, and an award of sanctions under section 155 would be inappropriate.

¶ 25 On September 5, 2018, the plaintiff filed a posttrial motion and/or motion to reconsider the trial court's order, arguing that a coverage determination was a condition precedent to reaching a conclusion on whether an insurer had properly and timely raised a *bona fide* dispute as to insurance policy coverage and that there was no coverage determination here because the defendant never filed a declaratory judgment action. The plaintiff argued that whether the defendant had an actual *bona fide* defense had never been litigated or decided because no court had ruled on the merits of the coverage question and that a dispute by a claim adjuster, who had no authority to determine coverage issues, did not create a *bona fide* dispute. The plaintiff cited *Korte Construction Co. v. American States Insurance*, 322 Ill. App. 3d 451 (2001), for the proposition that the defendant was required to raise the coverage issue in a declaratory judgment action.

¶ 26 The plaintiff also contended that the fire caused damage to the electrical wiring throughout the house, that the wiring could not be "patched" or "spliced" or it would cause another fire, and that he had not been required to comply with the building code prior to the fire because the original construction wiring was "grandfathered in." The

plaintiff again argued that the defendant was equitably estopped from asserting any kind of *bona fide* defense in that it admitted coverage by paying the appraisal award.

¶ 27 On October 9, 2018, the defendant filed a response to the plaintiff's posttrial motion, contending that the trial court did not need to make a determination on the coverage issue; the court only needed to determine that both sides had a *bona fide* argument and position; and the insurer could be wrong about its coverage denial and not be considered vexatious. The defendant noted that the plaintiff failed to point to any language in the insurance policy that supported his position that the rewiring of the house was covered under the policy. The defendant contended that the plaintiff's citation to *Korte* was misplaced in that *Korte* dealt with an insurance company's duty to defend an insured, not an insurer's duty to make payment on an insured's claim.

¶ 28 On October 10, 2018, the trial court held a hearing on the posttrial motion. After hearing counsels' arguments, the court stated as follows:

> "I assume what would have happened after the appraisal if [the defendant] did not then pay the award is at that point in time either [the plaintiff] would have sued for breach of contract or [the defendant] would have then filed a declaratory judgment action if, after the arbitrator's decision was rendered, I think push would have had to have come to shove at that point and somebody would have had to have done something. They instead went ahead and paid the claim. Whether or not they would have prevailed, I'll never know. Whether or not you would have been able to establish that they were obligated to pay the claim will never be determined by a Court.
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> So everything that you argued may very well have carried the day, but the point is, no judge is ever going to be able to make that determination. So when a claim is brought to me under 5/155, I have to look at whether or not the dispute was, in fact, a *bona fide* dispute, a legitimate argument, because I'm never going to have the benefit of knowing whether or not a court would have found [the defendant] liable for payment of the claim. And I think either one of you could

have brought that before the Court. I don't necessarily believe that it was only the [the defendant's] obligation to bring that matter before the Court.

I agree with [the defendant's counsel] because the thoughts that he set forth in his response were exactly the thoughts I had when I read *Korte*. *Korte* has to do with the insured being sued for a tort and the insurance company taking the position that it wasn't obligated to pay the claim. And all of the cases cited in *Korte* and the line of cases that *Korte* relies upon all speak to what an insurance company has to do at that point if it's taking the position that there's no coverage. It either has to file a declaratory judgment action or it has to defend under a reservation of rights.

I find *Korte* to be distinguishable as [the defendant's counsel] argues. This is not a case where [the plaintiff] was being sued because some faulty wiring caused somebody to be hurt or damaged. He wasn't being sued. He's making the claim himself against the insurance company for his loss. And I do find the cases that talk about the duty to defend to be applicable to cases where there's an underlying cause of action that's being asserted against the insured and the insurance company is not defending its insured, so I do think those are different.

All I'm obligated to find in this case—and I would disagree *** that I found that there was no obligation to cover. I didn't make that finding at all. I specifically said I wasn't making that finding. All I found was that it made a legitimate argument that it was a *bona fide* dispute. Maybe, ultimately, had I had the case before me that would have determined coverage, I might have sided with [the plaintiff] and found that there was coverage, but as I've indicated, I'm not going to get that opportunity nor is any court going to have that opportunity.

So all I can do is look at whether or not the position they took was a reasonable one to take, albeit, it might have been wrong. ***

One of the cases that I looked at was the *West Bend Mutual Insurance v. Norton*, which points to the key question in the Section 155 claim being whether or not insurance company's conduct is unreasonable and vexatious, and it goes on to say that an insurance company does not violate Section 155 merely by unsuccessfully challenging a claim. Also, it does not create a duty to settle. And a delay in settling a claim does not violate the code if the delay is caused by a *bona fide* dispute concerning coverage. And it's quoting [the] *Buais* case, *** [which] tells me that if an argument is being made that has merit, not necessarily correct argument, but that it at least has a valid basis for taking that position, and I think that [the defendant] had a reason to question whether or not all of the wiring in the

> house would have had to have been replaced or whether or not that was a condition that existed precedent and was not caused by the fire."

Thus, because the court concluded that the defendant had at least a valid argument here, it stood by its decision that the defendant did not engage in unreasonable and vexatious conduct and denied the plaintiff's posttrial motion. That same day, the trial court entered a written order denying the plaintiff's posttrial motion. The plaintiff appeals.

¶ 29 The plaintiff challenges the trial court's finding that he is not entitled to section 155 sanctions because the defendant did not engage in vexatious and unreasonable conduct. He contends that the defendant was equitably estopped from asserting its *bona fide* defense to his insurance claim where it failed to file a declaratory judgment action seeking a judicial determination on the coverage issue and fully paid the appraisal award. He also argues that the defendant waived any coverage issue by not filing a declaratory judgment action.

¶ 30 The plaintiff argues that the standard of review for a sanction award under section 155 is in conflict and urges us to apply a *de novo* standard of review to this appeal. However, we find that this is not an accurate characterization of the case law cited by the plaintiff. Generally, a trial court's decision whether to award sanctions under section 155 is reviewed for an abuse of discretion. *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 160 (1999). However, our supreme court has stated that the underlying procedural posture must be considered when assessing the underlying facts supporting the award. *Charter Properties, Inc. v. Rockford Mutual Insurance Co.*, 2018 IL App (2d) 170637, ¶ 32. Thus, for example, when reviewing an award of

sanctions that is entered on a party's motion for judgment on the pleadings, the standard of review is *de novo*. *Employers Insurance of Wausau*, 186 Ill. 2d at 160; *Statewide Insurance Co. v. Houston General Insurance Co.*, 397 Ill. App. 3d 410, 425 (2009). As this case was determined by a bench trial with testimony and facts admitted into evidence, rather than a determination solely based on the pleadings, this court finds that the abuse of discretion standard applies. An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court. *John T. Doyle Trust v. Country Mutual Insurance Co.*, 2014 IL App (2d) 121238, ¶ 30.

¶ 31 Section 155(1) of the Code provides as follows:

> "(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;
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> (b) $60,000;
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> (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." (Emphasis added.) 215 ILCS 5/155(1)(a) through (1)(c) (West 2016).

¶ 32 This statute provides "an extracontractual remedy" to policyholders whose insurer refuses to recognize liability and pay a claim under a valid insurance policy in a vexatious and unreasonable manner. *Peerless Enterprise, Inc. v. Kruse*, 317 Ill. App. 3d 133, 144 (2000). When determining whether an insurer's conduct is vexatious and unreasonable, a court should consider the totality of the circumstances, 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.*, 2018 IL App (2d) 170637, ¶ 29.

¶ 33 However, section 155 does not create a duty to settle a claim, and a delay in settling does not violate the statute where the delay results from a *bona fide* dispute regarding coverage. *McGee v. State Farm Fire & Casualty Co.*, 315 Ill. App. 3d 673, 681 (2000). Section 155 applies to those situations in which the insurer vexatiously delays or rejects legitimate claims and was meant to discourage insurers from using their superior financial position by delaying payment of legitimate contractual obligations to profit at the insured's expense. *Neiman v. Economy Preferred Insurance Co.*, 357 Ill. App. 3d 786, 797 (2005). An insurer does not violate section 155 merely by unsuccessfully challenging a claim for coverage. *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 745 (2010).

¶ 34 Thus, where a *bona fide* dispute concerning coverage exists, section 155 sanctions are inappropriate. *Charter Properties, Inc.*, 2018 IL App (2d) 170637, ¶ 30. A *bona fide* dispute is one that is real, actual, genuine, and not feigned. *Id.* If the insurer's delay is based on a *bona fide* dispute over coverage, the delay will not violate section 155, but the dispute must be rationally based in fact. *Cook v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 49. An insured cannot merely allege that the insurer's conduct was vexatious and unreasonable—the insured must include a "modicum of factual support." (Internal quotation marks omitted.) *Id.* Moreover, an insured may state a valid claim for

unreasonable delay even where the disputed amount has been paid in full prior to commencement of the litigation. *McGee*, 315 Ill. App. 3d at 682-83.

¶ 35 Initially, although certain provisions of the contract, *i.e.*, the provision concerning code compliance and the appraisal clause, are quoted elsewhere in the record, we note that the insurance contract is not part of the record on appeal. As the appellant, the plaintiff has the duty to present this reviewing court with a complete record on appeal, and any doubts arising from an incomplete record will be resolved against the plaintiff. See *Korte Construction Co.*, 322 Ill. App. 3d at 456. Thus, any issues that, for their resolution, depend on facts not in the record, we will affirm. See *id.*

¶ 36 Based on what we have before us, the trial court did not abuse its discretion in finding that the defendant's conduct in settling the claim was not vexatious and unreasonable; the court did not abuse its discretion in finding that the defendant had a *bona fide* defense to coverage. The evidence at the hearing indicated that the fire was limited to the bathroom but that the entire residence needed to be rewired to be code compliant. The defendant, finding that the insurance policy did not cover the cost of the rewiring because that issue existed before the fire, promptly tendered payment to the plaintiff for the cost to repair the bathroom, which included the cost of rewiring the bathroom. The plaintiff testified that the insurance contract contained "code coverage" which meant that the defendant had agreed that the cost of bringing the entire residence into code compliance was covered under his policy, but did not point to anything in the insurance policy that supported that position.

¶ 37 Following the initial claim investigation and throughout the appraisal process, the defendant maintained its position that the rewiring was not covered under the policy. The defendant based its position on the language contained in the insurance policy. As noted by the trial court, it was not unreasonable for the defendant to take the position that the fact that the wiring in the house was not code compliant was a problem that existed prior to the fire and was not caused by a fire that was limited to one bathroom. The court does not need to make an actual determination on the coverage issue; it just needs to determine whether there had been a *bona fide* dispute about coverage. Thus, we find that the defendant had asserted a *bona fide* defense that had a rational basis in fact; the plaintiff has failed to establish that the defendant did anything more than have an honest dispute about its liability under the insurance policy. Although ultimately the defendant might not have prevailed on this policy defense if this issue had gone to trial, there is no evidence that the defendant acted vexatiously and unreasonably in initially denying the plaintiff's claim.

¶ 38 Moreover, we find that the trial court did not abuse its discretion in finding that the delay in payment after the appraisal award was not vexatious and unreasonable as the defendant made a good faith effort to make the payment within 30 days of the appraisal award, and any delay was not the sole fault of the defendant.

¶ 39 Even though the trial court found the defendant had a *bona fide* defense, the plaintiff contends that there cannot be a *bona fide* dispute here because no court has determined that there is a dispute. The plaintiff also contends that the defendant is

equitably estopped or is waived from asserting this defense because it failed to timely file a declaratory judgment action and made full payment on the claim.

¶ 40 The plaintiff relies on *Korte Construction Co.*, 322 Ill. App. 3d at 457, for the proposition that insurers must file a declaratory judgment action for a determination of coverage or risk forfeiting any coverage dispute. However, unlike this case, which deals with the right to payment, the *Korte* case deals with the insurer's duty to defend its insured and is thus distinguishable. In the context of the insurer's duty to defend, *Korte* states that an insurer has two options when taking the position that the insured is not covered under the policy: the insurer must defend the suit under a reservation of rights or seek a declaratory judgment that there is no coverage. *Id*. "If the insurer fails to exercise either of its two options and refuses to defend an insured who ultimately incurs an adverse judgment, the insurer will be estopped from raising noncoverage as a defense to an action brought to recover the policy proceeds." *Id.* In the present case, unlike *Korte*, the plaintiff is not seeking to invoke the insurer's duty to defend because he is being sued by a third party. Instead, the plaintiff is making a claim against the defendant insurance company for his own property loss—a claim that the defendant has consistently denied based on the insurance policy language.

¶ 41 Also, although the plaintiff urges us to find that the defendant forfeited any right to assert its *bona fide* defense by making full payment of the appraisal award, we decline to do so. The full payment was made after the defendant had asserted its disputed coverage defense and after the appraisal determination was issued. The plaintiff has cited no case law that supports his position that a subsequent payment on the claim would

forfeit any coverage dispute that was raised before the payment was made. We also note that the defendant is not requesting return of its payment; it is just arguing that the plaintiff is not entitled to section 155 sanctions because it had genuinely disputed coverage before the payment was made. Thus, we find that the trial court's determination that the plaintiff was not entitled to section 155 sanctions was not an abuse of discretion.

¶ 42 Lastly, the plaintiff makes an argument that the defendant's claim adjuster failed to perform a complete and thorough investigation into his insurance claim and thus violated section 154.6(h) of the Code (215 ILCS 5/154.6(h) (West 2016)). However, as this argument was not raised in the trial court, there are no facts contained in the record on appeal to provide any support for the plaintiff's position. Thus, we find that the plaintiff has forfeited this argument on appeal. See *Bank of New York Mellon v. Rogers*, 2016 IL App (2d) 150712, ¶ 32 (issues not raised in the trial court are forfeited and may not be raised for the first time on appeal).

¶ 43 III. CONCLUSION

¶ 44 For the foregoing reasons, we affirm the judgment of the circuit court of St. Clair County.

¶ 45 Affirmed.