

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

2014 IL App (1st) 121063-U

SECOND DIVISION
March 4, 2014

No. 1-12-1063

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

COUNTRY MUTUAL INSURANCE COMPANY,
Plaintiff and Counterdefendant-Appellee
(TIG Insurance Company, Intervening Appellee),

v.

THOMAS OLSAK, individually, and as the assignor of
his claims, demands, and causes of action to Joseph
Pecoraro, and JOSEPH PECORARO, as the assignee
under a certain settlement agreement dated June 26, 2006,
Defendants and Counterplaintiffs-Appellants
(Fremd School Hockey Club and members of the Board
of Governors of the Fremd High School Hockey Club,
specifically James W. Balkonis, Frank Biskner, William
Degironemo, James Lapetina, Kenneth J. Nordgren,
Edward J. Pudlo, and Matthew M. Sprenzel, Defendants).

) Appeal from the
) Circuit Court of
) Cook County

) No. 05 CH 2618

) Honorable
) Nancy J. Arnold
) Judge Presiding.

JUSTICE SIMON delivered the judgment of the court.
Presiding Justice Harris and Justice Liu concurred in the judgment.

ORDER

¶1 *Held:* The circuit court did not err by dismissing Country Mutual's claim for declaratory judgment because the appellate court had already determined in the prior appeal that Country Mutual had a duty to defend Olsak in the underlying lawsuit. The circuit court did not err by granting judgment in favor of Olsak and Pecoraro on their counterclaim against Country Mutual, as Country Mutual did not provide any argument as to why the court's findings of a conflict of interest and resulting

Defendants' Exhibit No.

prejudice are against the manifest weight of the evidence and, regardless, the appellate court has already determined that Country Mutual had a duty to defend Olsak and there is no dispute that Country Mutual did not provide Olsak with a defense. The circuit court erred by dismissing for lack of jurisdiction the motion filed by Pecoraro and Olsak for a finding of reasonableness as to their amendment to their original settlement agreement because the finality of the order dismissing Pecoraro's claim against Olsak in the underlying action pursuant to the original settlement agreement had no bearing on the court's jurisdiction, as the motion did not ask the court to disturb that order. This court cannot determine whether the circuit court erred by only awarding Pecoraro \$5,000 on the counterclaim against Country Mutual until the circuit court conducts a hearing and makes a ruling as to the reasonableness of the amendment to the settlement agreement.

¶ 2 Thomas Olsak and Joseph Pecoraro appeal from orders of the circuit court of Cook County dismissing the declaratory judgment claim filed by Country Mutual Insurance Company (Country Mutual), entering judgment against Country Mutual on the counterclaim filed by Olsak and Pecoraro in the amount of \$5,000, and dismissing the motion filed by Olsak and Pecoraro for a finding of reasonableness as to an amendment to their settlement agreement. For the reasons that follow, we affirm in part and reverse and remand in part with directions.

¶ 3 BACKGROUND

¶ 4 On October 13, 2000, plaintiff filed a complaint regarding events which took place on October 21, 1998. On August 15, 2001, Pecoraro filed a three-count second amended complaint alleging claims against various parties. Pecoraro asserted that on October 21, 1998, he was the head coach of the Fremd High School Hockey Club (Fremd Hockey) and encountered Olsak, a 17-year-old member of the hockey team, in the locker room before a scheduled game. Pecoraro told Olsak that he could not play in the game because he had skipped two conditioning sessions earlier that week, and Olsak attacked Pecoraro and hit him in the head, causing Pecoraro to fall and strike the back of his head on the concrete floor. Pecoraro asserted that, as a result of the incident, he suffered serious head injuries, was in a coma for several days, and sustained permanent brain damage. Pecoraro alleged a claim of assault and battery against Olsak, a claim of negligence for failing to take actions to prevent the assault against Fremd Hockey and the

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individual members of the club's Board of Governors (Board), and a claim of negligence against Edward Pudlo, Olsak's stepfather, for failing to control or supervise Olsak. In addition to being Olsak's stepfather, Pudlo was also a member of the Board. The negligence claim against Pudlo for failing to control or supervise Olsak was subsequently dismissed with prejudice, and Fremd Hockey and the members of the Board filed a counterclaim for contribution against Olsak.

¶ 5 On February 9, 2005, Country Mutual filed a complaint against Olsak, Pecoraro, Fremd Hockey, and the members of the Board, seeking a declaratory judgment that it was under no obligation to defend or indemnify Olsak in connection with the lawsuit brought by Pecoraro or the counterclaim brought by Fremd Hockey and the Board. Country Mutual asserted that, although it had issued a homeowner's policy and a personal and professional umbrella policy to Pudlo and Olsak's mother, neither policy covered Olsak's actions because the policies did not cover damages caused by an insured's intentional acts and any injuries suffered by Pecoraro were caused by Olsak's intentional acts.

¶ 6 On June 26, 2006, Olsak and Pecoraro entered into a settlement agreement under which Olsak agreed to pay Pecoraro \$5,000 and assign and transfer to Pecoraro all money owed to Olsak by Country Mutual and TIG Insurance Company (TIG), as an insurer of Fremd Hockey, and all claims Olsak may have against Country Mutual and TIG in relation to the underlying lawsuit. In exchange, Pecoraro agreed to release and discharge Olsak from all claims arising from the incident. The agreement provided that Pecoraro would be entitled to seek reinstatement of his claim against Olsak if Olsak breached the agreement and that the amount of compensatory damages to which Pecoraro was entitled would be determined by a jury or judge pursuant to the holding in *Guillen v. Potomac Insurance Co. of Illinois*, 203 Ill. 2d 141 (2003). On August 28,

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2006, the court entered an order dismissing Pecoraro's claim against Olsak pursuant to the terms and conditions of the settlement agreement and finding that the agreement was reached in good faith pursuant to the Joint Tortfeasor Contribution Act (740 ILCS 100/2 (West 2006)). Fremd Hockey appealed the finding that the agreement was reached in good faith and asserted that the amount of the settlement was inadequate, and the appellate court held that the circuit court did not abuse its discretion by finding that the agreement was in good faith, noting that Olsak did not have any assets of consequence and that there was little or no probability that Olsak could ever satisfy a significant judgment against him. *Pecoraro v. Balkonis*, 383 Ill. App. 3d 1028, 1037-39 (2008).

¶ 7 Counsel for Pecoraro then assumed the representation of Olsak, and Olsak and Pecoraro filed an answer to Country Mutual's declaratory judgment claim and set forth various affirmative defenses, including that Country Mutual breached its obligations under the policies issued to Pudlo and Olsak's mother by denying coverage to Olsak and refusing to provide him with a defense in the underlying action. Olsak and Pecoraro also filed a counterclaim against Country Mutual in which they asserted that Country Mutual had a duty to defend Olsak in the underlying action, provided a defense and insurance coverage to Pudlo in connection with the claim brought against him as a member of the Board, and was faced with a conflict of interest regarding its defenses of Olsak and Pudlo. Olsak and Pecoraro alleged that Country Mutual breached its duty to defend Olsak by failing to disclose the conflict and advise Olsak that he could retain independent counsel at Country Mutual's expense and by failing to provide Olsak with a defense in the underlying action. Olsak and Pecoraro requested declarations that Country Mutual breached its duty to defend Olsak and was estopped from raising policy defenses, an evidentiary

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hearing as to the amount of damages Pecoraro was entitled to receive for his injuries, and judgment in favor of Pecoraro and against Country Mutual for compensatory and punitive damages. Olsak and Pecoraro also alleged that Country Mutual's conduct in failing to defend Olsak or advise him of the conflict of interest was vexatious and unreasonable and requested attorney fees and costs pursuant to section 155 of the Illinois Insurance Code (Insurance Code) (215 ILCS 5/155 (West 2000)).

¶ 8 Country Mutual filed a motion for summary judgment on its complaint for declaratory judgment, a motion to dismiss the affirmative defenses asserted by Olsak and Pecoraro, and a motion for summary judgment on the counterclaim. The court granted summary judgment in favor of Country Mutual on its declaratory judgment claim and the counterclaim and dismissed the affirmative defenses with prejudice. In doing so, the court found that Country Mutual did not have a duty to defend or indemnify Olsak.

¶ 9 Olsak and Pecoraro appealed, asserting that Country Mutual was faced with a conflict of interest regarding the defenses of Olsak and Pudlo and should have paid for independent counsel to defend Olsak. *Country Mutual Insurance Co. v. Olsak*, 391 Ill. App. 3d 295, 301 (2009). The appellate court determined that the interests of Olsak and Pudlo were diametrically opposed in the underlying action and that the evidence before the court showed that Country Mutual had failed to disclose that conflict to Olsak. *Id.* at 304-05. The appellate court also determined that Country Mutual had a duty to defend Olsak because the allegations in Pecoraro's claim against Olsak revealed a potential for coverage by Country Mutual pursuant to the policies issued to Pudlo and Olsak's mother. *Id.* at 305-07. The appellate court concluded that the circuit court erred by granting summary judgment on the complaint and counterclaim and dismissing the

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affirmative defenses and remanded the matter to the circuit court for a final determination as to whether a conflict of interest existed between Olsak and Pudlo and, if so, whether Olsak was prejudiced by Country Mutual's failure to retain independent counsel to represent him. *Id.* at 307.

¶ 10 On May 31, 2010, Olsak and Pecoraro executed an amendment to their prior settlement agreement in which they related that Olsak had not satisfied the \$5,000 payment required in the original agreement. Olsak agreed to pay Pecoraro \$6 million for his injuries in exchange for a reaffirmation by Pecoraro of the release provided in the original settlement agreement and the forgiveness of his default on the \$5,000 payment. The parties also agreed that the \$6 million payment would be satisfied through the assignment of Olsak's rights under the relevant insurance policies issued by Country Mutual and TIG as set forth in the original agreement.

¶ 11 On June 16, 2010, Olsak and Pecoraro filed a motion for a finding that the amendment to the original settlement agreement was reasonable, citing the holding in *Guillen*, 203 Ill. 2d 141. That same day, Olsak and Pecoraro also filed a motion to consolidate the claims against Country Mutual and TIG for the purpose of adjudicating the motion for a finding of reasonableness as to the amendment of the settlement agreement. The court granted the motion to consolidate. TIG and Country Mutual then filed a motion to dismiss, asserting that the court did not have subject matter jurisdiction over the request for a finding of reasonableness because the order dismissing Pecoraro's claim against Olsak pursuant to the original settlement agreement was a final order which could no longer be vacated or modified. The court granted the motion to dismiss filed by TIG and Country Mutual, finding that the order dismissing Pecoraro's underlying claim against Olsak was a final order and that the court, therefore, lacked subject matter jurisdiction over the

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request for a finding that the amendment to the settlement agreement was reasonable.

¶ 12 Beginning on January 9, 2012, the circuit court conducted a hearing as to the issue of a conflict of interest between Olsak and Pudlo on remand from this court's prior decision regarding Country Mutual's claim for declaratory judgment and the affirmative defenses and counterclaim filed by Olsak and Pecoraro. Jon Yambert, an attorney at Chilton, Yambert, & Porter, testified in an evidence deposition that he filed an appearance on behalf of Olsak on February 6, 2001, and filed an appearance on behalf of Pudlo in October 2001. Yambert also testified that his firm only represented Pudlo as to the claim against him as an individual for failing to control or supervise Olsak and that his representation of Pudlo ended when that claim was dismissed on March 13, 2002. Yambert also testified that his firm's representation of Olsak did not occur at the request of Country Mutual, he did not believe his firm was ever paid for its representation of Olsak, and his firm filed a motion to withdraw as counsel for Olsak on July 7, 2004.

¶ 13 Robert Shipley, an attorney, testified that he was retained by Country Mutual to represent Pudlo in his capacity as a member of the Board and to monitor the case. Shipley filed an appearance on behalf of Pudlo on May 11, 2004, but did not take part in drafting any motions to dismiss the claims against the individual members of the Board, never received any instructions from Country Mutual as to arguments to be made on behalf of Pudlo, and never gave Pudlo any legal advice. On cross-examination, Shipley stated that he attended the circuit court hearing as to whether the original settlement agreement between Olsak and Pecoraro was reached in good faith and argued against such a finding at that proceeding.

¶ 14 Pudlo testified that Country Mutual assigned Yambert to represent him and that he could not remember if he ever met with Shipley and did not remember being in contact with Yambert

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after the claim brought against him as an individual was dismissed. Olsak testified that he could not remember if he paid anyone pursuant to the settlement agreement he reached with Pecoraro.

Neil Napolitano, an assistant general counsel for Country Mutual, testified that Shipley was retained to monitor the litigation and that Country Mutual was not involved in the representation of the members of the Board in any way.

¶ 15 On March 16, 2012, the court entered a written order dismissing the declaratory judgment claim filed by Country Mutual as moot and granting a \$5,000 judgment in favor of Olsak and Pecoraro on their counterclaim. In doing so, the court found that a conflict of interest existed between the defenses of Olsak and Pudlo during that period of time in which Country Mutual retained Shipley to monitor the litigation on Pudlo's behalf and that Olsak was prejudiced by Country Mutual's failure to appoint counsel to represent him to the extent he was required to settle with Pecoraro for \$5,000.

¶ 16

ANALYSIS

¶ 17 Olsak and Pecoraro contend that the court committed various errors when, upon remand, it entered an order dismissing Country Mutual's complaint for declaratory judgment as moot and granting judgment in favor of Olsak and Pecoraro on their counterclaim for \$5,000. Olsak and Pecoraro assert that the court erred as a matter of law by "mooting" Country Mutual's declaratory judgment claim, their affirmative defenses to that claim, and their counterclaims against Country Mutual. Olsak and Pecoraro also contend that this court should enter a judgment declaring that Country Mutual had a duty to defend Olsak in the underlying action and that it breached its duty by failing to provide him with a defense, advise him of the conflict of interest with Pudlo, or provide him with independent counsel. Olsak and Pecoraro further assert that the circuit court

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erred by awarding them only \$5,000 in compensatory damages and that this court should enter a judgment declaring that Country Mutual is estopped from raising policy defenses and remand the matter for an evidentiary hearing as to the compensatory damages owed to Pecoraro and whether Pecoraro is entitled to attorney fees and costs under section 155 of the Insurance Code. Country Mutual responds that the \$5,000 judgment entered against it should be vacated because there is no evidence that Olsak paid any money to Pecoraro pursuant to their settlement agreement.

¶ 18 A reviewing court defers to the circuit court's findings of fact unless they are against the manifest weight of the evidence, but reviews its conclusions of law *de novo*. *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 154 (2005). A finding of fact is against the manifest weight of the evidence if the opposite conclusion is clearly evident or the finding is unreasonable, arbitrary, or not based on the evidence presented. *Best v. Best*, 223 Ill. 2d 342, 350 (2006).

¶ 19 As an initial matter, the record does not support the assertion that the circuit court found the counterclaim filed by Olsak and Pecoraro to be moot, as the court entered judgment in their favor on the counterclaim and only found Country Mutual's claim for declaratory judgment to be moot. In addition, this court determined in the prior appeal that Country Mutual had a duty to defend Olsak in the underlying action because the allegations in Pecoraro's complaint revealed a potential for coverage (*Olsak*, 391 Ill. App. 3d at 305-07) and that decision is now the law of the case and is binding upon remand in the circuit court and a subsequent appeal (*Zabinsky v. Gelber Group, Inc.*, 347 Ill. App. 3d 243, 248 (2004)). Thus, regardless of whether Country Mutual's claim for declaratory judgment was moot, the circuit court did not err by dismissing that claim because this court had already determined in the prior appeal that Country Mutual had a duty to defend Olsak in the underlying action. See *Sherman v. Township High School District 214*, 404

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Ill. App. 3d 1101, 1107 (2010) (the appellate court may affirm the dismissal of a claim on any ground apparent from the record). As such, we now consider whether the court erred by entering a \$5,000 judgment in favor of Olsak and Pecoraro on their counterclaim.

¶ 20 In count one of their counterclaim, Olsak and Pecoraro alleged that Country Mutual breached its duty to defend Olsak in the underlying action by failing to disclose the conflict of interest between the defenses of Olsak and Pudlo and advise Olsak that he could have retained independent counsel at Country Mutual's expense. On remand, the circuit court found that there was a conflict of interest between the defenses of Olsak and Pudlo and that Olsak was prejudiced by the conflict. Although Country Mutual states in its brief that it believes there was no conflict, it does not provide any argument as to why the court's finding is against the manifest weight of the evidence and has, therefore, forfeited any such claim. Ill. S. Ct. 341(h)(7) (eff. July 1, 2008). Regardless, Olsak and Pecoraro are entitled to judgment on count two of their counterclaim, in which they alleged that Country Mutual breached its duty to defend Olsak by failing to provide him with a defense, as this court has already determined that Country Mutual owed Olsak a duty to defend (*Olsak*, 391 Ill. App. 3d at 305-07) and there is no dispute that Country Mutual did not provide Olsak with a defense in the underlying action. Thus, Olsak and Pecoraro are entitled to judgment on their counterclaim against Country Mutual because they established that Country Mutual breached its duty to defend Olsak in the underlying action.

¶ 21 We now consider whether the circuit court erred by awarding \$5,000 in damages on those claims. In the original settlement agreement, Olsak agreed to pay Pecoraro \$5,000 and to assign Pecoraro all his claims against Country Mutual and TIG in the underlying lawsuit. The court then entered an order dismissing Pecoraro's claim against Olsak in the underlying action pursuant

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to the terms and conditions of the settlement agreement. Olsak and Pecoraro subsequently filed their counterclaim against Country Mutual in which they alleged that Country Mutual breached its duty to defend Olsak and requested that the court conduct an evidentiary hearing to determine the amount of damages to which Pecoraro was entitled for his injuries and enter judgment in favor of Pecoraro for compensatory damages. Olsak and Pecoraro later amended their settlement agreement to provide that Olsak agreed to pay Pecoraro \$6 million, to be satisfied through the assignment of his claims against Country Mutual and TIG as provided in the original settlement agreement, in exchange for a reaffirmation of his release from all claims by Pecoraro and the forgiveness of his failure to pay \$5,000 as required by the original agreement.

¶ 22 Olsak and Pecoraro maintain that, because Country Mutual breached its duty to defend Olsak, it is estopped from raising policy defenses as to its coverage of its insured (*Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 150-51 (1999)) and that Country Mutual is estopped from raising policy defenses to Pecoraro's claims against Olsak and must provide Olsak with coverage as to any damages imposed in the underlying action. Olsak and Pecoraro conclude that Country Mutual is liable to Pecoraro for reasonable compensatory damages arising from the underlying claim under the settlement agreement and its amendment, through Olsak's claim against Country Mutual for breach of its duty to defend. Country Mutual responds that the most it could be required to pay Pecoraro for breaching its duty to defend is the \$5,000 Olsak was required to pay Pecoraro under the original agreement and that this court should vacate that portion of the court's order granting a \$5,000 award because the evidence does not show that Olsak ever paid Pecoraro any money. As the original settlement agreement provided for a hearing to determine the amount of compensatory damages to which Pecoraro is

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entitled and the amendment to the agreement sets that sum at \$6 million, we must determine the effect of the amendment on the original agreement before we can ascertain the amount of damages to which Pecoraro is entitled on the counterclaim against Country Mutual.

¶ 23 After Olsak and Pecoraro executed the amendment to their settlement agreement, they filed a motion requesting a finding that the amendment was reasonable pursuant to the decision in *Guillen*, 203 Ill. 2d 141. TIG and Country Mutual filed motions to dismiss, asserting that the court did not have subject matter jurisdiction because the previous order dismissing Pecoraro's claim against Olsak was final and could no longer be vacated or modified. The court granted the motion to dismiss, finding that it lacked jurisdiction over the matter because the order dismissing Pecoraro's claim against Olsak was a final order. Olsak and Pecoraro maintain that the court erred by dismissing their request for a reasonableness finding for lack of jurisdiction because the order dismissing Pecoraro's claim against Olsak was not a final order and did not bar Olsak and Pecoraro from executing the amendment.

¶ 24 As an initial matter, the finality of the order finding the original settlement agreement to have been made in good faith and dismissing Pecoraro's claim against Olsak is not determinative as to whether the circuit court had subject matter jurisdiction to consider the reasonableness of the amendment to the agreement. In their motion, Olsak and Pecoraro only sought a finding that the amendment to the settlement agreement was reasonable, and did not ask the court to disturb its prior order dismissing Pecoraro's claim against Olsak. Thus, even if TIG and Country Mutual are correct and the prior order dismissing Pecoraro's claim against Olsak is final and may not be vacated or modified, that fact does not affect the court's jurisdiction over the motion regarding the separate issue of the reasonableness of the amendment to the original agreement.

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¶ 25 In *Guillen*, 203 Ill. 2d at 161-63, our supreme court held that, when an insurer breaches its duty to defend its insured and the insured reaches a settlement agreement with the plaintiff in the underlying action, the insurer is legally obligated to indemnify the insured and must pay the settlement amount so long as the plaintiff can establish that the settlement was reasonable. The court explained that to establish that the settlement agreement was reasonable, the plaintiff must show that a prudent uninsured person in the insured's position would have settled and, in making its determination, the court shall consider both whether the decision to settle was reasonable and whether the amount of the settlement was reasonable. *Id.* at 163-64. The court then remanded the matter to the circuit court for a hearing because the reasonableness of the agreement could not be determined from the pleadings. *Id.* at 164.

¶ 26 To the extent TIG and Country Mutual maintain that Pecoraro could not reinstate his claim against Olsak because that claim was dismissed with prejudice and the order doing so may no longer be vacated or modified, that argument goes to the issue of whether the amendment is unreasonable for lack of consideration. Also, the concern expressed by TIG and Country Mutual regarding whether the amendment was a product of collusion between Olsak and Pecoraro is the exact type of issue a reasonableness hearing was designed to address. *Id.* at 163. Thus, matters of collusion or lack of consideration are reserved for a hearing before the circuit court at which the parties may present evidence bearing on those issues and the court shall determine whether Olsak's decision to enter into the amendment to the settlement agreement was reasonable and whether the settlement amount of \$6 million was reasonable as well. Until the court conducts such a hearing and determines the validity of the amendment, it is impossible to determine the value of Olsak's claim against Country Mutual and whether the circuit court erred by awarding

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Pecoraro \$5,000 on that claim.

¶ 27

CONCLUSION

¶ 28 Accordingly, we affirm those portions of the circuit court's order from March 16, 2012, dismissing Country Mutual's claim for declaratory judgment and entering judgment in favor of Olsak and Pecoraro on the counterclaim against Country Mutual for breach of its duty to defend Olsak in the underlying action, and we reverse the portion of the order awarding Pecoraro \$5,000 on that judgment. We also reverse the circuit court's March 8, 2011, order dismissing the motion filed by Olsak and Pecoraro for a finding of reasonableness as to the amendment to the original settlement agreement, and we remand the matter for a hearing regarding the reasonableness of the amendment, as set forth in *Guillen*, 203 Ill. 2d at 163-64. We also remand the matter to the circuit court for a determination of the damages to which Pecoraro is entitled on the counterclaim against Country Mutual, taking into account the court's ruling as to the reasonableness of the amendment to the settlement agreement. In addition, the circuit court has not yet made any findings or rulings regarding count three of the counterclaim against Country Mutual, in which Pecoraro requested an award of attorney fees and costs under section 155 of the Insurance Code, and we remand that matter for a ruling on that claim to be made when the court determines the amount of damages to award Pecoraro on the counterclaim.

¶ 29 Affirmed in part; reversed and remanded in part with directions.