2015 IL App (2d) 140728-U
No. 2-14-0728
Order filed June 23, 2015

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

STONECRAFTERS, INC., Individually and on Behalf of Members of a Certified Class, Plaintiff and Third-Party Citation Petitioner-Appellee and Cross-Appellant, v. WHOLESALE LIFE INSURANCE BROKERAGE, INC., Defendant (Unitrin, Inc., Third-Party Citation Respondent and Milwaukee Insurance Company, Third-Party Citation Respondent-Appellant and Cross-Appellee).	)	Appeal from the Circuit Court of McHenry County. No. 03 CH 435 Honorable Michael J. Sullivan, Judge, Presiding

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JUSTICE Burke delivered the judgment of the court.
Justices Hutchinson and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in granting summary judgment in favor of plaintiff as there remain material questions of fact that must be resolved at a *Guillen* hearing. Reversed and remanded.

¶ 2 Plaintiff, Stonecrafters, Inc., brought a putative class action lawsuit against defendant, Wholesale Life Insurance, Inc., seeking relief for unsolicited faxes sent to the putative class. Plaintiff and defendant settled the case and a $5,999,999.98 judgment was entered against defendant for the benefit of the putative class. Plaintiff agreed not to collect damages from defendant and sought recovery only from defendant's insurers, Milwaukee Insurance Company (MIC) and Unitrin, Inc.[1] Plaintiff brought supplementary third-party citations against MIC and Unitrin. The trial court granted plaintiff's motion for summary judgment, finding the settlement to be reasonable and limited the accrual of interest on the settlement to the period from the date of the entry of summary judgment. MIC appeals the judgment entered against it. Plaintiff cross-appeals the trial court's judgment limiting accrual of interest from the date of the entry of summary judgment. We reverse and remand the cause to hold a hearing on the reasonableness of the settlement.

¶ 3 I. BACKGROUND

¶ 4 On November 18, 2002, defendant contracted with Village E Docs, an internet fax service provider, to transmit an advertisement for its life insurance products. Defendant selected businesses to receive the fax from a list of about 23,000 on a CD Rom it received from Illinois Manufacturers News.

¶ 5 Village E sent defendant an invoice on November 21, charging it for 17,339 minutes worth of fax transmissions. Village E charged defendant six cents per minute of fax transmission time, with a minimum of .5 minutes per "fax job." Village E charged defendant for transmissions that were not received by a fax machine.

[1] Unitrin is a former holding company that was a parent of MIC. Summary judgment was entered in favor of Unitrin and it is no longer involved in the case.

¶ 6 On June 12, 2003, plaintiff filed a suit on behalf of itself and a putative class against defendant, alleging that defendant's fax transmissions violated the Telephone Consumer Protection Act (TCPA), pursuant to 47 U.S.C. § 227; the Illinois Consumer Fraud and Deceptive Business Practices Act, pursuant to 815 ILCS 5/505 *et seq.* (West 2002); and committed conversion under Illinois law.

¶ 7 Defendant sent MIC a copy of the class action suit and made a claim for defense and indemnity under the policy, which had a $2 million aggregate limit. MIC denied defendant's request. Defendant also tendered defense to another insurer, American Economy Insurance Company. The policy issued by American Economy to defendant included a $4 million aggregate limit. American Economy agreed to defend defendant under a reservation of rights, and it filed a separate declaratory judgment action seeking a declaration that it had no duty to defend or indemnify defendant.[2]

¶ 8 On November 22, plaintiffs' attorney, Wanca, sent proposed settlement documents to defendant's counsel, Jerome Crotty. Plaintiff proposed to settle for $5,999,999.98, which was 2 cents less than the sum of the aggregate limits under defendant's policies with MIC and American Economy. The draft settlement provided that each class member who returned a claim form would receive a *pro rata* share of the settlement amount, not to exceed $500. It did not require class members to attach a copy of the fax or to declare that they had received one. It allowed for attorney fees and costs of $2 million, regardless of how many members of the class returned the claim forms. Any unclaimed funds from the approximately $4 million designated

[2] American Economy was never made a party to the citation proceedings and the record does not show the outcome of its declaratory judgment action.

for the plaintiff's class would go toward an unnamed *cy pres* recipient. The proposal also provided a $4,000 incentive award to plaintiff.

¶ 9 Defendants assigned to the settlement class all of its rights under its insurance policies. Plaintiff agreed that the settlement was enforceable only against the proceeds of defendant's insurers. The parties specifically agreed that defendant's MIC policy "provides for $1 million per occurrence and $2 million aggregate," and that defendant's other policy with American Economy "provides for $2 million per occurrence and $4 million aggregate." MIC was not informed of the settlement terms or related hearings.

¶ 10 The agreement between plaintiff and defendant was finalized on December 21, 2004, and the parties moved for preliminary approval of the settlement. As of May 2, 2005, plaintiff declared that, of the 20,864 faxes provided by defendant, 14,144 were still active numbers. From the active numbers, plaintiff received 1,365 completed claim forms, representing a claim-in percentage of 10%. The opt-out and objection period had expired. Of the $5.99 million judgment, $682,500 was to be paid to class members, $2 million to plaintiff's attorneys, and $3.3 million of unclaimed settlement funds was to be given to Misericordia Heart of Mercy, the charity favored by defendant's attorney. The trial court approved the settlement on May 2, 2005.

¶ 11 Plaintiff filed a citation notice and citation to discover assets of the third-party citation respondents, MIC and Unitrin, requesting documentation of the policy and the claims file relating to defendant's tender of defense. Thereafter, plaintiff filed a motion for payment of the insurance proceeds in satisfaction of the judgment against defendant. Plaintiff argued that its class action claims against defendant were covered under the policy's "advertising injury" and "property damage" provisions. Plaintiff also argued that MIC was estopped from raising any defenses because it had breached its duty to defend defendant in the underlying litigation. The

court allowed the citation proceedings to continue and found that MIC was entitled to respond to plaintiff's motion, to assert affirmative defenses, and to take discovery.

¶ 12 In responding to plaintiff's motion, MIC and Unitrin denied that the class action complaint included allegations that were covered by the policies; that the settlement was "fair and reasonable;" that defendant's decision to settle conformed to the standard of a prudent uninsured; and that "the damage amount [was] within the policy's coverage limits."

¶ 13 The trial court stayed the case pending resolution of *Valley Forge Insurance Company v. Swiderski Electronic, Inc.*, 223 Ill. 2d 352 (2006). Contrary to MIC's argument, the supreme court held that TCPA claims for unsolicited faxes do trigger coverage for advertising injury. *Id.* at 379.

¶ 14 After the stay was lifted, plaintiff argued that MIC should not have the opportunity to investigate the reasonableness of the settlement because the court's final approval of the settlement was binding. The trial court disagreed, based on *Guillen v. Potomac Insurance Company of Illinois*, 203 Ill. 2d 141 (2003). *Guillen* recognized the possibility of collusion when two parties negotiate the terms of a settlement that a third party ultimately would have to pay. *Id.* at 163. *Guillen* required the plaintiff to prove that the settlement reached with the insured was reasonable before a settlement could have any binding effect on the insurer. *Id.* Based on the holding in *Guillen*, the trial court concluded that the finding of reasonableness in the underlying litigation without participation of the citation respondents was not a bar to the citation respondents' right to raise the issue of reasonableness of the settlement in the citation proceedings. Therefore, the trial court ordered the parties to move forward with discovery.

¶ 15 Plaintiff still refused MIC's discovery requests and moved to certify for interlocutory appeal the following questions: (1) whether an insurer citation respondent is collaterally

estopped to challenge reasonableness findings regarding a settlement when it has breached a duty to defend; (2) whether an insurer citation respondent must be afforded a hearing on the judgment's reasonableness findings; and (3) whether an insurer citation respondent can take discovery of facts underlying the reasonableness findings. We held that *Guillen* does not prevent an insurer from challenging the reasonableness of the underlying settlement even though it has breached its duty to defend and is prevented from claiming any coverage defenses, and because *Guillen* allows the insurer to request a hearing where the plaintiff must prove that the settlement it reached with the insured was reasonable, the trial court must permit the parties to take discovery regarding the reasonableness of the settlement. *Stonecrafters, Inc. v. Wholesale Life Insurance Brokerage, Inc.*, 393 Ill. App. 3d 951, 966 (2009).

¶ 16 Following our decision in *Stonecrafters*, MIC commenced discovery. It deposed defendant's president, Bruce Burns, who testified that he believed that the CD sent to Village E had been filtered so that Village E only sent the advertising fax to a subset of the listed businesses. He could not state how the CD had been filtered, or how many of the businesses were chosen to receive the fax.

¶ 17 Burns testified that he was not substantively involved in the settlement negotiations between plaintiff and defendant. He could not remember doing anything to evaluate defendant's risk besides "talking to [his] attorney." Burns believed that the parties arrived at the $5.99 million settlement figure by simply adding American Economy's $4 million coverage limits to MIC's $2 million limit. He felt that defendant would have no further liability if it accepted the proposed settlement agreement. When questioned whether he would have agreed to the settlement if it had been executed against defendant itself, Burns stated that such a settlement "would bankrupt [defendant]."

¶ 18 MIC also deposed Crotty, the attorney who represented defendant during the settlement negotiations. When asked if the settlement had not included a covenant to only execute against the insurance proceeds so as to protect all the other assets, would Crotty have recommended that this settlement agreement be accepted, Crotty responded, "I doubt it."

¶ 19 Plaintiff filed an amended summary judgment motion, which relied upon a one-page document known as the "broadcast summary." Plaintiff alleged that the broadcast summary had been produced by Village E and that it "identif[ied] 16,674 successful transmissions of the fax sent by [defendant]." Plaintiff had not used this as an exhibit to any prior motions in the six years of citation proceedings.

¶ 20 Crotty testified at his deposition that he had received the document from his client, defendant, who allegedly had received it from Village E. However, Crotty had no personal knowledge of how the document was created. The summary was described as an enclosure to a May 28, 2008, letter from Crotty to plaintiff's counsel, Wanca, transmitting "the original documents and files for your use in connection with your clients(') answers to [MIC's] discovery requests." In the letter, Crotty described the broadcast summary as "Village edocs (*sic*) broadcast count." The summary is part of a nine-page document, with 8 pages consisting of fax numbers under the header, "Combined Unique Fax Receipts For All Archives Combined/Successful transmission only." The summary does not contain authenticating information, such as dates and names. It states:

"Total in broadcast: 20862

No. of Successes: 16674

No. of cancellations:

Held By User: 0

Deleted By User: 0

No. of Failures: 4188"

¶ 21 MIC moved to strike the summary, arguing that it had not been properly authenticated and was inadmissible hearsay. Plaintiff argued that the summary was Crotty's or defendant's business record. In the alternative, plaintiff argued that the document was not hearsay because it was not offered for the truth of the matter.

¶ 22 The trial court denied plaintiff's summary judgment motion and granted MIC's motion to strike the broadcast summary, finding that "no proper foundation was laid in this case for the admission of this document as a business record of [defendant]" and that "the 'broadcast report' document *** could [never] be considered to be a business record of Attorney Jerome F. Crotty." The court also rejected plaintiff's alternative argument regarding the hearsay rule.

¶ 23 Plaintiff deposed Michael Alan Richard, the former chief financial officer of Village E. Richard acknowledged that Village E did send emails to its customers that contained the type of information listed in the summary. However, he did not know whether the summary had anything to do with defendant. Richard testified that there was no way that he could tell what client it pertained to, what date the referenced broadcast occurred, who the recipients were, or which fax numbers it was transmitted to. While he was asked to assume that the summary was a description of a broadcast that Village E made on behalf of defendant, Richard never offered any testimony to establish this. He did not relate information as to where the summary came from or how it was kept. He stated that he did not obtain the document from Village E's records. Richard did not attempt to collect records relating to defendant, and he "struggle[d] to know where to start looking." Richard stated that he had never seen the document before he was served with a subpoena. Richard noted that Village E usually keeps a record of fax

transmissions containing some form of information. However, Village E did not have a fax log for defendant's transmissions.

¶ 24 Richard further testified that Village E did not retain broadcast summaries in the ordinary course of its business. He doubted that any documents relating to defendant's fax transmission in November 2002 still existed in Village E's records.

¶ 25 Richard attempted to correlate the broadcast summary to the invoice. He was asked by counsel whether the fact that 17,339 minutes were used for 20,862 attempted transmissions would be consistent with his experience in fax broadcasting. Richard responded: "I can't speak to experience with fax broadcasting because I don't claim that, but this business, certainly with usages, it is very possible for -- when I see 16, almost 17, thousand successes, it translates very reasonably into 17,000 minutes."

¶ 26 The parties filed cross motions for summary judgment. Plaintiff continued to rely on the broadcast summary, maintaining that, based on Richard's testimony, the document was a business record of Village E. MIC moved to strike the broadcast summary on the basis that Richard's testimony failed to establish that the summary was a business record of Village E.

¶ 27 On March 26, 2014, the trial court granted summary judgment in favor of Unitrin and granted summary judgment in favor of plaintiff against MIC. The court acknowledged that "the path to authentication" of the broadcast summary was "not a classic law school text book example of how to lay a foundation for the admissibility for an exhibit." However, it found that the summary had been properly authenticated and that Richard's testimony was "the key to [its] admissibility." The court further found it important that the "document in question was found in the records of [defendant]." The court did not address MIC's argument that the summary should

be excluded as hearsay and never found that the broadcast summary was a business record, and if so, of what entity.

¶ 28 The trial court found the following: (1) that a reasonably prudent person in the position of defendant would have agreed to settle this case for the amount of $5.99 million; (2) that, considering the totality of the circumstances in the case, the decision of the insured did conform to the standard of a prudent uninsured; (3) the common sense consideration for the totality of the facts bearing on the liability and damage aspects of plaintiff's case as well as the risks of going to trial when applied to the facts and circumstances support the finding that a reasonably prudent person would have entered into the same settlement as defendant did; (4) there was a substantial risk of a judgment of damages between more than $8 million at $500 per TCPA violation and more than $25 million for treble damages of $1,500 for willful or knowing violations, and this was sufficient proof that defendant acted reasonably and prudently; and (5) after reviewing the concerns that the settlement in question was within the policy limits of the available insurance coverage, there was no evidence of collusion in settling the case for $5,999,999.98.

¶ 29 MIC filed a motion to reconsider, arguing that (1) the broadcast summary was not properly authenticated; (2) the court's opinion did not address MIC's separate objection regarding hearsay; and, in the alternative, (3) the judgment should be reduced to MIC's insurance coverage limit of $2 million.

¶ 30 The trial court denied MIC's motion to reconsider and clarified that postjudgment interest would begin to accrue from the date of the judgment against MIC, which was March 26, 2014. MIC timely appeals the trial court's order finding summary judgment in favor of plaintiff. Plaintiff argues in its cross-appeal that postjudgment interest should have begun to accrue from the date of the settlement.

¶ 31 II. ANALYSIS

¶ 32 Summary judgment is appropriate "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 2002). While use of the summary judgment procedure is to be encouraged as an aid in the expeditious disposition of a lawsuit, it is a drastic means of disposing of litigation and therefore it should be allowed only when the right of the moving party is clear and free from doubt. *Beverly Bank v. Alsip Bank*, 106 Ill. App. 3d 1012, 1016 (1982).

¶ 33 Underlying our determination as to whether summary judgment was proper is the well established legal principle that the purpose of a summary judgment motion is not to try an issue of fact, but to determine whether a genuine issue of material fact exists which would warrant a trial (or a hearing on the reasonableness of the settlement in this case). *LaGrange Bank & Trust Company v. Rodriguez*, 137 Ill. App. 3d 1009, 1013-14 (1985). If what is contained in the pleadings and affidavits constituted all of the evidence before the court, and that evidence left nothing to go to the trier of fact, summary judgment should be entered. *Id*. at 1014. However, where a defense raises an issue of fact as to the plaintiff's right to recover, summary judgment must be denied. *Id*. Our review of the trial court's summary judgment ruling is *de novo*. *Guillen*, 203 Ill. 2d at 149.

¶ 34 In *Guillen*, the supreme court set the standards we must use to evaluate whether a settlement reached by an insured defendant where the insurer has breached its duty to defend is binding on the third-party insurer. In *Guillen*, the plaintiff in the underlying personal injury action claimed that she was exposed to lead-contaminated paint in an apartment leased to her by the defendants. *Guillen*, 203 Ill. 2d at 143. After the defendants tendered defense on the claim,

the insurer denied its obligation to defend or indemnify based on a recently added endorsement to defendants' policy excluding such claims. *Id*. at 143-44. The insurer neither defended under a reservation of rights nor filed an action seeking to declare its rights under the policy. *Id.* at 144. The defendants settled the plaintiff's claim for $600,000 and assigned the plaintiff their rights under the insurer's policy. *Id*.

¶ 35 The supreme court rejected the insurer's invocation of the exclusion and its argument that its insured's assignment of rights under the policy to the underlying plaintiff was ineffective, and then it turned to the insurer's ability to challenge its responsibility to pay the settlement. The court concluded that, although the insurer's concern over the possibility of collusion was well taken, "the risk of collusion and fraud can be lessened ***, if not avoided altogether, by placing a requirement upon the plaintiff to prove that the settlement it reached with the insured was reasonable before that settlement can have any binding effect upon the insurer. [Citations.]" *Id*. at 163.

¶ 36 The court set forth two "reasonableness" inquiries that must be addressed. First, with respect to the insured's decision to settle, "the litmus test must be whether, considering the totality of the circumstances, the insured's decision 'conformed to the standard of a prudent uninsured.' " *Id*. (quoting *Rhodes v. Chicago Insurance Company*, 719 F.2d 116, 120 (5th Cir. 1983)). In addition, "with respect to the amount of damages agreed to, the test 'is what a reasonably prudent person in the position of the [insured] would have settled for on the merits of plaintiff's claim.' " *Id.* (quoting *Miller v. Shugart*, 316 N.W.2d 729, 735 (Minn. 1982)). The latter test involves a "commonsense consideration of the totality of 'facts bearing on the liability and damage aspects of plaintiff's claim, as well as the risks of going to trial.' " *Id*. (quoting *Miller*, 316 N.W.2d at 735). Under either test, the burden of proving reasonableness lies with the

underlying plaintiff, "both out of fairness, since the plaintiff was the one who agreed to the settlement, and out of practicality, since, as between the plaintiff and the insurer, the plaintiff will have better access to the facts bearing upon the reasonableness of the settlement." *Id*. at 163-64. The insurer is also entitled to rebut any preliminary showing of reasonableness with affirmative evidence bearing on the issues. *Id*. at 164.

¶ 37 As stated, plaintiff has the burden of proving that the settlement was reasonable. A determination of reasonableness requires consideration of the facts bearing on liability and damages, as well as the risks of a trial. Reasonableness is a question of fact for the factfinder and thus, generally it is not appropriate for determination on a motion for summary judgment. See *Boender v. Chicago North Clubhouse Association, Inc.*, 240 Ill. App. 3d 622, 627 (1992). In this case, the reasonableness of the settlement and whether it is not the product of fraud or collusion raise material questions of fact, which cannot be determined on a summary judgment motion.

¶ 38 The trial court concluded that the parties' settlement for $5.99 million was reasonable. The court based its finding of reasonableness upon evidence from the broadcast summary that "there were 16,674 successes and 4,188 failures" in the Village E broadcast for defendant. The court relied heavily on these numbers in calculating defendant's total legal exposure under the TCPA and determined that defendant's decision to settle for nearly $6 million conformed to the standard of a prudent uninsured and that the amount was what a reasonably prudent person in the position of defendant would have settled for on the merits of plaintiff's claim.

¶ 39 The court did not address the fact that the parties entered into a settlement agreement in 2002, but in 2005, only $682,500 was paid to class members. There is evidence that defendant sought 20,000 fax transmissions and paid for 17,000 minutes of usage, which bear on whether

defendant was exposed to a large judgment. The figures supplied by plaintiff and relied on by the trial court assumed that the outcome of a trial could have been a judgment of damages somewhere between $8 million and $25 million.

¶ 40 The court in *Central Mutual Insurance Company v. Tracy's Treasures, Inc*, 2014 IL App (1st) 123339, recognized that it is difficult to identify the recipients of faxes and, even when those individuals or companies are identified, most likely only a small percentage will receive actual notice of the settlement. *Id.* ¶ 70. In the context of TCPA claims, the amount of exposure is uncertain. In *Central Mutual*, the court held that reliance on an "overblown" exposure amount is insufficient to sustain the burden under *Guillen*. *Id*. ¶¶ 71, 83. Theoretically, the liability faced by defendant might have been exorbitant but from a practical standpoint it is not. See *Id*. ¶ 72 (where a court sitting in equity will fashion a damage award that fairly compensates claiming class members and deters future violations without destroying the defendant's business, it is unlikely to enter an astronomical judgment). Thus, the reasonably anticipated value of potential claims expected would be vastly lower than the amount relied on by the trial court in basing its decision, and it is unlikely that a trial court would deem it appropriate to enter an excessive judgment in a class action suit. In this case, a $5.99 million judgment may be seen as excessive to compensate 1,365 claiming class members and deter future violations by defendant.

¶ 41 Evidence of the percentage of those recipients who most likely would have received the fax transmissions and evidence to predict claimant response rates, all of which affect the value of defendant's potential exposure, should be considered by the factfinder in a *Guillen* hearing. This evidence is material in determining whether a prudent uninsured would have done more to identify potential claimants instead of reaching a quick settlement and whether a reasonably

prudent person in defendant's position would have agreed to pay $5.99 million to resolve the claims.

¶ 42 Other facts which raise issues regarding the reasonableness of the settlement include: whether there was an abdication of a true defense and whether there were strategic efforts by the parties to implicate coverage up to the limits of defendant's policies. See *Central Mutual*, 2014 IL App (1st) 123339, ¶ 76.

¶ 43 First, defendant had two insurance policies at the time the faxes were transmitted. The total coverage under the policies was $6 million. The settlement was coincidentally for an amount two cents short of the total coverage. This bears directly on the reasonableness of the settlement. *Id*. ¶ 76.

¶ 44 Second, the court did not address the fact that, of the $5.99 million settlement, any unclaimed money would be distributed through *cy pres*, which in this case amounted to over half the settlement. This raises a question as to whether a prudent uninsured would have agreed to over half of the settlement being distributed to charity. As stated in *Central Mutual*: "In this context, the hypothetically prudent uninsured's decision to settle on terms that allowed millions of dollars in anticipated residual settlement funds to be donated to charity strikes us as extraordinarily generous and extremely helpful to class counsel's quest for attorney fees." *Central Mutual*, 2014 IL App (1st) 123339, ¶ 73.

¶ 45 Finally, little evidence was presented as to whether Crotty considered the possibility of at least reducing the settlement amount. Crotty testified that he would not have recommended that his client accept the proposed settlement if defendant's own assets had been placed at risk and Burns testified that the "most important" aspect of the settlement to him was the fact that "[defendant] would have no further liability." This evidence raises a question bearing on

whether defendant's counsel conducted a meaningful investigation into the likely value of the case were it litigated to judgment, a consideration under both reasonableness theories that is not subject to resolution on summary judgment.

¶ 46 *Central Mutual* identified several factual issues concerning the reasonableness of the settlement and the potential for collusion and fraud, which are present here. They include: (1) the parties' ability to identify the fax recipients (*Central Mutual*, 2014 IL App (1st) 123339, ¶ 70); (2) the predicted claimant response rate (*Id.*); (3) whether it was reasonable to consider the staggering maximum exposure (*Id.* ¶ ¶ 70-72, 83); (4) the reasonableness of a large *cy pres* distribution (*Id.* ¶ 73); (5) whether the settlement was the product of an arm's length transaction (*Id.* ¶ 75); (6) whether there was an abdication of a true defense (*Id.* ¶ 76); and (7) whether there were strategic efforts to implicate coverage up to the policy limits (*Id*).

¶ 47 Although we have determined that the court must conduct a *Guillen* hearing, other issues that were presented in this appeal may arise on remand. Therefore, we address them briefly.

¶ 48 The first issue concerns the admission of the broadcast summary. MIC argues that the trial court erred in considering the broadcast summary in granting plaintiff summary judgment. Even assuming the accuracy of the information in the broadcast summary, we determine that material questions of fact have been presented that preclude summary judgment. On remand, plaintiff will be required to properly authenticate the broadcast summary at a reasonableness hearing. Also, should plaintiff argue that the summary is a business record, plaintiff must establish an adequate foundation.

¶ 49 MIC argues that, if the broadcast summary was improperly considered, we should grant summary judgment in its favor. We disagree, as there remains a question of material fact as to how many faxes were sent and how many were received based on the evidence surrounding the

list on the CD, the invoice from Village E, and Richard's testimony attempting to correlate the numbers on the invoice to the broadcast summary.

¶ 50 MIC also raises an issue concerning the entry of a judgment against it in excess of its policy limit of $2 million. Without a showing of bad faith or where the breach of the duty to defend caused the excess judgment, the policy limit cannot be exceeded. See *Conway v. Country Casualty Insurance Coverage Company*, 92 Ill. 2d 388, 397-99 (1982).

¶ 51 Because we are reversing summary judgment, we need not address the issue raised in plaintiff's cross appeal regarding postjudgment interest.

¶ 52 III. CONCLUSION

¶ 53 Based on the above, we reverse the order of the circuit court of McHenry County granting summary judgment in favor of plaintiff and remand the cause for further proceedings consistent with this opinion.

¶ 54 Reversed and remanded.