NO. 4-10-0724 Filed 6/8/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

KENNETH E. RUSSELL, LORI M. RUSSELL, and JESSICA J. RUSSELL, Plaintiffs-Appellees and Cross-Appellants, v. UNITED SECURITY LIFE AND HEALTH INSURANCE COMPANY, an Illinois Corporation, Defendant-Appellant and Cross-Appellee, and THOMAS J. BICKEL, Defendant, and BRADFORD & ASSOCIATES, a Missouri Business, Respondent-in-Discovery.	) Appeal from) Circuit Court of) Macon County) No. 06L116))))))))))))) Honorable) Thomas E. Little,) Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Steigmann and Cook concurred in the judgment.

ORDER

Held: The trial court's judgment United Security Life and Health Insurance Company breached its contract with plaintiffs was not against the manifest weight of the evidence. The court did not abuse its discretion in setting the amount of damages, in awarding attorney fees, and in denying plaintiffs' request for punitive damages. The court's judgment regarding plaintiffs' negligence and consumer-fraud claims was also not against the manifest weight of the evidence.

In February 2010, the trial court held a bench trial on plaintiffs' claims defendants, United Security Life and Health Insurance Company (United Security) and Thomas J. Bickel, committed negligence, violated both the Illinois Consumer Fraud and Deceptive Business

Practices Act Practices Act (Consumer Fraud Act) (815 ILCS 505/1 *et seq.* (West 2004)) and section 155 of the Insurance Code (215 ILCS 5/155 (West 2004)), and breached a contract when United Security refused to provide coverage under a policy plaintiffs procured. The court found in plaintiffs' favor on their breach-of-contract claims and awarded attorney fees under section 155. On the remaining counts, the court entered judgment for defendants.

Both defendants and plaintiffs filed cross-appeals. We affirm.

I. BACKGROUND

In July 2006, plaintiffs, Kenneth E. Russell, Lori M. Russell, and Jessica J. Russell, filed a complaint against defendants. Kenneth and Lori are married; Jessica is their adult daughter. Jessica is not a party in these cross-appeals. In their complaint, plaintiffs alleged various causes of action after Bickel, an insurance agent, sold the plaintiffs a United Security health-insurance policy that United Security later rescinded. Two of the counts alleged Bickel breached a fiduciary duty owed to plaintiffs.

In January 2008, plaintiffs filed a first amended complaint, alleging 15 counts against defendants. The counts included alleged violations of the Consumer Fraud Act, negligence, breach of contract, and violations of section 155 of the Insurance Code (215 ILCS 5/155 (West 2004)).

In February 2010, a bench trial was held. Both Lori and Kenneth Russell testified, as well as Bickel and employees of United Security.

Lori testified before July 2005, her family had health insurance with Midwest National of Tennessee. Although she had no problems with this company, Lori agreed, through a telemarketer, to meet with Bickel about procuring health insurance. Lori and Kenneth met with

Bickel in their home on July 7, 2005.

At the meeting, Bickel asked questions about plaintiffs' health history. Lori testified Bickel recorded information both on a piece of paper and on the application:

> "If he thought it was pertinent, he was putting it onto the application itself making checkmarks in the yes or no boxes if, you know, it was relevant, and if it wasn't, or if he was undecided about it, he would jot it down on a piece of paper."

Lori testified she told Bickel she had kidney-stone surgery 12 years before and yearly mammograms. Bickel believed her kidney stones would be relevant because she had surgery. Regarding Kenneth's kidney-stone history, Bickel said because Kenneth had always passed them and did not have them regularly, his kidney stones should not be an issue.

Lori testified they also told Bickel their previous policy had an amendment for shoulder pain for Kenneth and that Kenneth had taken Vioxx for that pain. They also told Bickel Kenneth had taken Prozac for approximately one month years before for stress-related work issues. Bickel believed the Prozac use would not be an issue because he had taken it for such a short time years ago. Lori also believed she and Kenneth mentioned to Bickel the back problems United Security referenced in the rescission letter.

Before the court, Lori identified the policy Bickel completed in her presence. "Vioxx" was not written on the policy. Lori understood Bickel did not record everything on the application because Bickel was uncertain about some of the items. She understood Bickel would let them know if there were any questions about the application. Lori understood United Security would receive all of the information they provided. Lori signed the application, but Kenneth did

not.

Lori testified Bickel reported there would be no problems with the application. He believed there may be a rider. Later, Kenneth did receive an amendment from United Security. Lori understood the amendment was to keep United Security from paying anything regarding left-hand pain, Vioxx, and aspirin treatment. Lori believed Bickel must have told United Security about these matters. She also believed they were insured by United Security.

Lori testified she did not read the policy when it arrived. Lori changed insurance companies because "they had given us what they said was a better policy at a better rate."

In January 2006, Kenneth developed another kidney stone that did not pass on its own and required an operation. Lori informed the hospital to bill United Security for the treatment costs. Ultimately, United Security rescinded their policy.

In the March 2006 letter, entered into evidence, United Security stated "it was discovered that certain pertinent medical information was not disclosed in your Application for Insurance." United Security cited medical records showing a history of multiple kidney stones, reported in a September 2002 examination. United Security also noted Kenneth had been treated for chronic back pain and been prescribed Vioxx, and had been diagnosed with depression, anxiety, and obsessive-compulsive disorder. United Security further cited a scheduled stomach-tuck procedure, as well as a prescription for Wellbutrin.

In that letter, United Security stated "no contract of insurance arose from your application" and the policy was "void and of no effect" regarding Kenneth. The letter offered Kenneth a refund of the premiums he had paid.

When asked about the letter, Lori testified they ~~had~~ provided to Bickel most of the

information used by United Security to rescind their policy. They did not inform United Security about a Wellbutrin prescription because, Lori believed, Kenneth did not take it. In the letter, United Security also referenced the recommendation for a tummy-tuck procedure, but such procedure was not done.

Under the United Security policy, Lori understood she would have to pay a $7,500 deductible, and she would have been able to pay it. United Security told her they were not going to cover the remaining medical expenses of approximately $31,000. Plaintiffs could not financially handle the full amount of the debt. Ultimately, the family filed bankruptcy. A lot of debts, including Kenneth's credit-card debt, were discharged in bankruptcy. The full amount of the medical-bill debt, not a discounted debt, was part of the debt owed at bankruptcy. Lori testified if there was a recovery in the case, she and Kenneth may recover something if any funds remain after the attorneys, the bankruptcy trustee, any creditors, and the hospital are paid.

On cross-examination, Lori testified she wrote a check for health insurance to Bickel on July 7, 2005, to cover the entire family. She knew, however, a specific application in regard to Kenneth had not yet been executed. Lori agreed the letter she received with the policy advised her to review it and the application for completeness and accuracy, but she did not review the application and she "scanned" the policy. At no time did she contact United Security to inform it the application did not contain information regarding Kenneth's health history.

Lori testified she was asked to complete an amendment to the policy, which she did in August 2005. Lori denied reading the application, but she read and signed the amendment.

Of the medical expenses incurred, $30,904.74 related to Kenneth's treatment for kidney stones. Lori negotiated a reduced charge of approximately $14,540 with Decatur

Memorial Hospital. Lori had not yet paid the $7,500 deductible before she filed bankruptcy in 2006.

On redirect examination, Lori testified she understood Bickel was at her home on behalf of United Security. He did not bring any other insurance policies from any other company. When Lori received the rescission letter from United Security, that was her first notice Bickel had apparently not conveyed to United Security all the information they provided to him.

Kenneth testified he gave Bickel all his prior health history, including his history of kidney stones. Kenneth told Bickel about Vioxx, back pain, and Prozac. Kenneth had taken Prozac for approzimately a month, and Bickel responded such information was irrelevant because Kenneth was not taking it at that time. Bickel also stated he, too, was on an antidepressant.

Regarding the previous kidney stones, Kenneth told Bickel he passed them on his own and required no surgery or treatment. Bickel recorded Kenneth's statement on a pad. Regarding the Vioxx, they discussed how it was discontinued on the market. Bickel recorded the information on the pad of paper and not on the application. Kenneth understood Bickel would take the information recorded on the pad of paper and discuss it with his superiors to see if it would be included on the new policy. At the time of this meeting, Kenneth already had health-insurance coverage.

Kenneth testified Bickel stated he would contact them if there was a problem. Bickel did not contact them, so Kenneth believed they had insurance.

Kenneth testified they received an amendment regarding arthritis, Vioxx, and back and spine disorders. Kenneth believed Bickel had thus conveyed this health-history

information to United Security. Kenneth also testified he did not sign the original application for insurance because of the following:

> "This wasn't signed because of the information that he was writing on the pad and was going to disclose the--everything to his --I call them superiors, and if there was a problem, there wasn't. My wife signed it. That's all. That's why I didn't sign it."

Kenneth testified he had kidney stones in the past but was uncertain as to the timing, whether in 1999 or 2002. Kenneth testified he did not tell Bickel about Wellbutrin and the tummy tuck. Kenneth explained he wanted to lose some weight, and his doctor prescribed Wellbutrin. Kenneth "took it for a very short period of time" because it gave him "massive headaches." He then investigated a tummy tuck, but decided against it upon learning the cost.

Kenneth testified as a result of the policy's rescission, they had to file for bankruptcy. Kenneth had not been able to get health insurance since March 2006. United Security told Kenneth he was uninsurable. The company which provided health insurance to Kenneth before United Security paid all the claims presented to them.

On cross-examination, Kenneth testified he had not sought other health insurance. Kenneth admitted he had kidney stones more than once in the three to four years before January 2006. Kenneth stated he read what Bickel was writing on the pad during their July 2005 meeting. When asked if Bickel told him he was going to insert the information from the notepad onto the application, Kenneth responded, "Mr. Bickel said if there was a problem with any information that I disclosed that he would get back to us."

Kenneth testified the previous policy he had was with Midwest National of

Tennessee, which he secured in 2002. He had a rider on that policy for his shoulder. Kenneth testified he probably did not read the policy. Kenneth testified he intended the health insurance to cover the entire family.

On redirect examination, Kenneth testified he signed the amendment that was sent by United Security. He stated he would not have signed it if it would have excluded kidney stones, back pain, shoulder pain, and drugs because he already had health insurance. An amendment excluding Vioxx, which he was not taking, and arthritis was acceptable to Kenneth.

Glen Buckley, an underwriter, testified he was employed by United Security from 2005 until 2007 and he handled the underwriting for plaintiffs' application. In performing the initial underwriting, Buckley reviewed plaintiff's application and ran a report from the Medical Information Bureau (MIB) on Kenneth Russell. The MIB report indicated Kenneth had been treated for arthritis and did not indicate Kenneth had been prescribed Vioxx. The word "arthritis" did not appear on Kenneth's insurance application. Vioxx or other ailments also did not appear on the application.

Buckley testified, upon reviewing the MIB report, he contacted Bickel. On July 22, 2005, Bickel informed Buckley that Kenneth had suffered left-hand pain through 2004, which he treated with Vioxx and then aspirin as needed. Buckley also made a note, "all info from agent." It did not concern Buckley this information was not on the application.

Buckley testified he initially gathered no medical records regarding Kenneth. Buckley would have expected Bickel to inform him of any other health concerns or ailments Kenneth had disclosed.

Buckley also testified United Security engages in post-claim underwriting.

Buckley defined "post-claim underwriting" as "[r]eviewing medical information after a claim has been submitted in order to determine the validity of the claim." A post-claim review of Kenneth's policy was conducted after his claim was submitted for the kidney-stone surgery. At that time, Buckley reviewed the original application and the medical records that had been gathered and determined coverage would have been denied to Kenneth. Buckley recommended the policy be rescinded.

On cross-examination, Buckley testified he had no independent recollection of the conversation with Bickel, but his testimony was based on the information in his file. Buckley testified his notes regarding his recommendation indicate Kenneth suffered back or muscle pain treated with Vioxx, as well as a depression diagnosis and anxiety, OCD treated with Prozac, and multiple kidney stones per a September 2002 examination. Other reasons for his examination included a December 2003 visit in which a tummy tuck was scheduled and the treatment with Well-butrin in December 2003 and November 2004.

Buckley further testified had he known of the kidney-stone history that would have been sufficient to recommend a rider excluding kidney stones from coverage.

On redirect examination, Buckley testified if he had collected these medical records for Kenneth when the first underwriting was done, he would have decided not to issue the policy.

Bickel testified he was employed by an insurance brokerage firm, Bradford and Associates, when he met with plaintiffs in July 2005. Bickel testified he recorded on the application all of the information plaintiffs gave him regarding their health care. Bickel stated Kenneth never told him about Vioxx, or that he had left-hand pain to be treated with aspirin, or a

history of kidney stones. He denied telling plaintiffs because Kenneth passed those stones it was "not a big deal."

Bickel testified Kenneth did not tell him about Prozac and he did not recall telling Kenneth about his anxiety issues. Bickel testified, however, he had been taking Zoloft for anxiety since he was 21. Bickel denied telling anyone at United Security that Kenneth took Vioxx. Bickel assumed Kenneth signed the application, but he did not remember seeing it. He agreed testifying in his deposition that he saw Kenneth sign the application. Bickel denied talking to Buckley about plaintiffs' application. Bickel further denied printing Kenneth's name in the signature line on the application.

Bickel testified he presented to plaintiffs only one application for one health-insurance company. Bickel discussed the highlights of the United Security policy but did not discuss any potential drawbacks. Bickel testified he was contracted with United Security.

Bickel testified United Security had a two-year period in which they would investigate claims, but he did not remember telling plaintiffs that. In his nine years of selling insurance, this was the one instance the insurance company "hasn't been there."

On cross-examination, Bickel testified he spoke with Lori after plaintiffs' claim was denied. He told Lori he would look into the situation. Bickel stated he did not take a notebook to take notes during his meeting with plaintiffs.

James Roberts, a supervisor in the special investigation unit (SIU) of United Security, testified he had that position in February 2006. In February 2006, his position was to review claims to insure they were eligible for benefits. Roberts was not involved in the initial underwriting. He became involved after a claim was made. When a claim came in from the

field, it went to the processing department. The processing department processed the claims under the terms of the policy. Contestable claims were sent to SIU for review. A type of claim that would end up in his department was one like Kenneth's, which arose in month five of the policy, and be a type of claim the claims department might think could relate to a preexisting condition. If, however, the same claim came in after two years, SIU would not receive it.

Roberts testified after SIU made the determination it could be a preexisting condition, SIU would send a claim form and an authorization form, which is basically a notice to the insured. Then, SIU might order information, perhaps in the form of medical records. Upon receiving medical information, SIU reviewed the records and compared the information to the claim and the application.

If the medical records indicated a preexisting condition not mentioned on the application or in an appendix, SIU would send it for further review by the underwriting department to determine what its action would have been had it known of the information. Roberts called this a claim investigation. Roberts was involved in the investigation of plaintiffs' claim. He determined kidney stones could have been a preexisting condition, as kidney stones were often chronic.

Roberts testified he heard Buckley testify the decision not to order medical records for the initial underwriting was financial. Roberts stated it was not particularly expensive to obtain medical records. The underwriting department recommended rescission. Roberts testified United Security had a grievance and appeal process for when an insured is dissatisfied with the way a claim was processed. Roberts was not involved in the Russell appeal.

On cross-examination, Roberts testified he secured medical records from Decatur

Memorial Hospital, Dr. Brian Telle, and Dr. Robert Smith. The January 16, 2006, letter from Dr. Telle indicated a history of numerous kidney stones over the previous three or four years. It indicated Kenneth had six or seven stones he was aware of. The medical record from Decatur Memorial Hospital indicated the same history. Another record, dated September 2002, indicated complaints of pain in the right groin area, pain similar to kidney-stone pain. That same record indicated Kenneth complained of chronic back pain that he treated with Vioxx. Other records indicated Wellbutrin for weight loss. Roberts agreed he would have written a letter for rescission.

Robert Dial, vice president and secretary and chief compliance officer of United Security, testified he was also part owner of the company. In July 2005, Dial was vice president and secretary responsible for the day-to-day operations of United Security. In July 2006, United Security collected approximately $32 million in premiums. Dial agreed Buckley would not have been able to determine Kenneth had taken Vioxx simply by looking at the MIB report. Dial did not see the words Vioxx or arthritis on the Russell application.

The following questions and answers occurred during Dial's examination:

"Q. *** What happens to create the binding of coverage?

A. There is no policy in effect until the underwriter approves the decision and a policy is signed off and received by the insured.

Q. So when the insured gets a policy in the mail, --

A. Correct.

Q. --coverage is bound?

A. Correct."

Dial testified because there was an amendment to the policy, Kenneth had to sign the amendment and return it as a precondition of the contract. Dial agreed once Kenneth did that, he was an insured of United Security. Another precondition of the United Security policy is it will not become effective until other health insurance is canceled. Dial testified Illinois law provided United Security the right to review the accuracy of applications for two years.

On cross-examination, Dial testified a letter was sent to plaintiffs telling them to read the application for accuracy. Plaintiffs did not send corrections. The cover letter with the policy also indicated the application was part of the policy. No amendment other than the one referencing the left-hand pain and the Vioxx was sent to plaintiffs.

Dial testified the contestability of a claim can be limited if the insured assures that his or her preexisting history was recorded on the application. Dial agreed despite Bickel's involvement, plaintiffs had the opportunity to review the application and correct its contents.

In May 2010, the trial court entered judgment. The court concluded "[p]erhaps the most significant factual dispute in this case relates to precisely what occurred and what was said at this meeting on July 7, 2005." The court explicitly found plaintiffs' testimony credible, concluding plaintiffs did reveal the prior health history to Bickel. The court concluded plaintiffs were already insured when they met with Bickel and thus lacked motive to misrepresent their health history. The court also explicitly found Bickel's testimony not credible. The court focused on Buckley's testimony he learned about the arthritis diagnosis and Vioxx from Bickel and found Bickel's testimony "not believable."

The court entered judgment for plaintiffs on counts VII (breach of contract against Kenneth) and IX (breach of contract against Lori) in the amount of $30,904.74. On counts XIII

(Insurance Code by Kenneth) and XIV (Insurance Code by Lori), the court also entered judgment in plaintiffs' favor for reasonable attorney fees. The court determined "United Security's failure to honor the policy and pay the claims made by Plaintiffs was unreasonable and vexatious." The court emphasized the fact Bickel was an agent of United Security, a fact not contested on appeal.

On the remaining counts, the court entered judgment in defendants' favor.

In July 2010, a hearing was held on the issue of attorney fees. In August 2010, the trial court entered its order for attorney fees and costs. The court determined the total time necessary to prosecute the claim successfully was 325 hours and concluded a reasonable hourly fee was $150. The court thus awarded plaintiffs $48,750 in attorney fees, but denied plaintiffs' request for recovery of costs upon concluding the costs plaintiffs sought were expenses of litigation and were not recoverable.

The cross-appeals followed.

II. ANALYSIS

A. Breach-of-Contract Claims

Defendants first argue the trial court erroneously found them liable to plaintiffs for breach of contract. Defendants maintain no contract was formed and, in the alternative, a material misrepresentation in the offer invalidated United Security's assent to insure Kenneth.

When a factual dispute exists, the issue of whether a contract was formed is one for the trier of fact to determine. We will not overturn a trial court's finding of fact unless the appellant proves the finding was against the manifest weight of the evidence. *Quinlan v. Stouffe*, 355 Ill. App. 3d 830, 836, 823 N.E.2d 597, 602 (2005). If the facts are uncontroverted, we review the trial court's judgment *de novo*. *Quinlan*, 355 Ill. App. 3d at 836, 823 N.E.2d at 602.

1. *Was an Enforceable Contract of Insurance Formed between Kenneth and United Security?*

Defendants argue Kenneth admitted before trial and during trial he did not propose to be insured. Defendants point to Kenneth's admissions in discovery and at trial he did not sign the application as establishing Kenneth made no offer to be insured. Plaintiffs contend the lack of an offer is irrelevant as a counteroffer, the amendment, was made and accepted, forming a contract.

An insurance contract is formed when one party to the contract proposes to be insured and the other party agrees to insure, and the subject, amount, and rate of insurance are determined or understood and the premium paid when demanded. *Zannini v. Reliance Insurance Co. of Illinois, Inc.*, 147 Ill. 2d 437, 454, 590 N.E.2d 457, 464 (1992).

We find no error in the trial court's implicit decision a contract was formed. Although Kenneth did not sign the application, the record contains facts from which the court could infer he made an offer. Kenneth testified although he did not sign the application, he provided Bickel all the information necessary for the application with the understanding the "superiors" would first respond to the information on Bickel's notepad, a contingent offer. Kenneth also paid for the insurance and signed the counteroffer, the amendment, sent by United Security. As Dial's testimony establishes, a contract for coverage was formed.

2. *Did a Material Misrepresentation in the Offer To Insure Invalidate United Security's Agreement To Insure Kenneth?*

Defendants next argue, in the alternative, a material misrepresentation invalidated United Security's agreement to insure Kenneth. Defendants maintain Kenneth misrepresented his prior medical history regarding kidney stones, which defendants argue was material to the

contract. Defendants focus on the fact Kenneth's medical history did not appear on the application. Defendants also contend Kenneth did not know the particulars of his history of kidney stones and question how Kenneth could have told Bickel a history he did not recall.

In contrast, plaintiffs maintain this issue is a question of credibility, which is one of fact resolved in their favor by the trial court. Both Kenneth and Lori testified they informed Bickel of Russell's kidney-stone history. The court believed them, not Bickel, and found Bickel was not credible. The court believed they told Bickel of Kenneth's kidney-stone history, and there was no misrepresentation to United Security.

We agree with plaintiffs: there was no misrepresentation. The trial court decided credibility in favor of plaintiffs. That decision is entitled to great deference. The court had the superior position from which to view witness testimony and mannerisms to ascertain credibility. We will not reverse it unless it is against the manifest weight of the evidence. See *Construx of Illinois, Inc. v. Kaiserman*, 345 Ill. App. 3d 847, 858, 800 N.E.2d 1267, 1276-77 (2003).

We find the court's decision is not against the manifest weight of the evidence. A reasonable and direct inference from the testimony of Buckley, a United Security underwriter, was that Kenneth and Lori did inform Bickel, and thus United Security, of Kenneth's Vioxx, as well as kidney-stone, history. Kenneth and Lori believed Bickel's statements the history was not relevant and understood Bickel was checking with his superiors. Their belief Bickel did as he said he would was confirmed when some of the information given and recorded on Bickel's notepad appeared in the amendment to the policy. There was no misrepresentation by plaintiffs, much less a material one.

United Security's case, *Small v. Prudential Life Insurance Co.*, 246 Ill. App. 3d

893, 895-96, 617 N.E.2d 80, 82 (1993), is distinguishable. In *Small*, the trial court found, and the appellate court affirmed this finding, a "credibility gap" in the insured's testimony. *Small*, 246 Ill. App. 3d at 896, 617 N.E.2d at 82. Here, the trial court believed the insureds.

3. *Is United Security Estopped from Asserting a Material Misrepresentation To Defeat Coverage of Plaintiffs' Claims*?

Defendants contend the trial court erroneously concluded they were estopped from arguing Kenneth's misrepresentation in the application defeated coverage for his claims. Because we have found no misrepresentation by plaintiffs, we need not discuss this issue.

4. *Is the Payment of the Deductible a Condition Precedent to United Security's Liability Under the Policy?*

Defendants next argue because plaintiffs did not pay the $7,500 deductible, United Security had no obligation under the terms of the policy to pay the remaining costs of the kidney-stone surgery. We disagree.

Under the doctrine of equitable estoppel, this claim is barred. "Equitable estoppel applies when a person, by his or her statements or conduct, induces a second person to rely, to his or her detriment, on the statements or conduct of the first person." *Babcock v. Martinez*, 368 Ill. App. 3d 130, 142-43, 857 N.E.2d 911, 921 (2006). The reliance must be reasonable. *Babcock*, 368 Ill. App. 3d at 143, 857 N.E.2d at 921.

United Security told plaintiffs it rescinded Kenneth's policy and would not pay the balance of Kenneth's medical bills. Plaintiffs, with a significant debt load, could reasonably rely on such assertion, and opt not to continue paying on the $7,500 deductible, because they were facing bankruptcy. Under the equitable-estoppel doctrine, United Security, having rescinded the policy, cannot argue the failure to pay the $7,500 deductible to the hospital somehow nullifies its

obligations.

5. *Did Plaintiffs Sustain Damages as a Result of the Breach and Were the Damages Excessive?*

Defendants next maintain plaintiffs sustained no damages and thus cannot recover under their breach-of-contract claims. United Security contends plaintiffs, who did not pay the $7,500 deductible, paid no amount of the remaining $30,904.74 and, because these debts were discharged in bankruptcy, would never pay those debts. Moreover, United Security, citing an email from the bankruptcy trustee, further emphasizes no medical provider that provided treatment to Kenneth filed a claim in bankruptcy.

Plaintiffs maintain they were damaged in that when United Security refused to pay Kenneth's medical bills they became obligated to pay $30,904.74. Plaintiffs further contend any recovery belongs to the bankruptcy estate and will be used to pay plaintiffs' creditors.

We begin by examining the email defendants cite, an email from plaintiffs' bankruptcy trustee. Defendants, while stating no medical provider had filed a claim with the bankruptcy trustee, left out the information that such claimants were not yet foreclosed from doing so in the future:

> "The issue of whether the doctors or hospitals will receive any portion of a distribution from the bankruptcy depends on whether they have filed a proof of claim or elect to file a proof of claim in the future. I can only pay those creditors which file proofs of claim. The initial time for filing proofs of claim in this case expired November 16, 2007. I now have about $20,000.00 in allowed proofs of claim, no of which are from hospitals or other

medical providers. However, *claimants can file late proofs of claim until the time the Court approves my proposed distribution*."

(Emphasis added.)

Nevertheless, in making its argument, defendants, in violation of supreme court rules, cite no authority supporting their claims. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) (mandating the argument section of the brief "shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities ***.").

This is problematic in the realm of bankruptcy law, which exists under federal law and which is enforced in federal courts. United Security has not cited any bankruptcy-related decisions to support its argument. United Security has dumped the burden of research of bankruptcy law on this state appellate court. We are not a depository where such a burden may be dumped. See *People v. Hood*, 210 Ill. App. 3d 743, 746, 569 N.E.2d 228, 230 (1991). Defendants have forfeited this argument. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived ***."); *Elder v. Bryant*, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 522 (2001) ("By failing to provide proper argument and citations of authority, defendants forfeited these arguments.").

Defendants make a similar mistake when arguing the award of damages was excessive. Defendants maintain the award of $30,904.74 is excessive because United Security would only have been obligated to pay $19,171.08. Defendants contend the $30,904.74 award places plaintiffs in a better position than if United Security had made payments under the policy. In addition, defendants point to the fact Lori negotiated an agreement to satisfy the debt for Kenneth's surgery for approximately $14,000. We note, adding to these considerations, Lori

testified the *full* amount of the medical debt went into the bankruptcy estate.

While citing state law that discusses damages generally and the general duty to mitigate damages, defendants ignore bankruptcy law that would help this court ascertain the true amount of damages, the effect of discharging debt, the rights of the bankruptcy estate, and so on. We will not undertake this burden. This argument, too, is forfeited. See *Elder*, 324 Ill. App. 3d at 533, 755 N.E.2d at 522.

C. Attorney Fees

Defendants next argue the trial court abused its discretion in awarding attorney fees under section 155 of the Insurance Code (215 ILCS 5/155 (West 2006)). Defendants maintain a *bona fide* dispute existed, and thus the trial court erroneously concluded its conduct was vexatious or unreasonable. Defendants point to the arguments it made in this appeal and the fact it prevailed on most counts in the litigation as proof of a *bona fide* dispute.

Plaintiffs contend there was no reasonable or *bona fide* dispute in this case. Plaintiffs maintain United Security knew from the beginning Bickel's statements plaintiffs had not given him medical information were not true, as Buckley learned from Bickel about Kenneth's Vioxx use, information that did not appear on the application. In addition, according to plaintiffs, despite learning Bickel's version was unbelievable, United Security continued to refuse to settle, forcing them into bankruptcy.

Section 155 allows attorney fees if one's conduct is "vexatious and unreasonable" in settling a claim:

> "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 ***." 215 ILCS 5/155(1) (West 2006).

Section 155 does not render an insurer liable for attorney fees simply because that insurer litigated and lost on the issue of insurance coverage. Section 155 authorizes fees and costs if the court finds the insurer was vexatious and unreasonable in refusing to process a claim. *Valdovinos v. Gallant Insurance Co.*, 314 Ill. App. 3d 1018, 1021, 733 N.E.2d 886, 889 (2000). When considering allegations an insurer's actions were vexatious and unreasonable, a court must consider the totality of the circumstances. "Factors to consider are 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." *Valdovinos*, 314 Ill. App. 3d at 1021, 733 N.E.2d at 889. If the record reveals a *bona fide* dispute over the scope of the insurance coverage, an insurer's delay may not be vexatious and unreasonable. *Stevens v. Country Mutual Insurance Co.*, 387 Ill. App. 3d 796, 804, 903 N.E.2d 733, 739 (2008). The question of whether an insurer's conduct in delaying or denying payment is vexatious and unreasonable is one of fact. A trial court's decision on this ground will be upheld unless it is an abuse of discretion. *West Bend Mutual Insurance v. Norton*, 406 Ill. App. 3d 741, 744, 940 N.E.2d 1176, 1179 (2010).

We find no abuse of discretion in the trial court's decision to award attorney fees under section 155. The court's findings of fact reveal United Security was or should have been aware Bickel, its undisputed agent, had information he was not disclosing as early as his

conversation with Buckley. That United Security attempted to "independently" secure a history has no bearing, because Bickel, an agent of United Security, thwarted such efforts with his statements to plaintiffs. As this case and the litigation developed, United Security knew these facts. Despite such knowledge, United Security continued to deny coverage. United Security now argues there was a *bona fide* dispute based on its arguments in this appeal. We find no abuse of discretion in the court's conclusion these arguments were not *bona fide* disputes before it and in concluding United Security's conduct in not settling the claim was vexatious and unreasonable.

Defendants, citing *Mohr v. Dix Mutual County Fire Insurance Co.*, 143 Ill. App. 3d 989, 1000, 493 N.E.2d 638, 645 (1986), further contend the attorney fee awarded pursuant to section 155 is excessive. Defendants argue the attorney-fee arrangement approved by the bankruptcy court shows plaintiffs' counsel agreed to a sum of $7,500 plus 20% of any settlement or judgment in this case. Defendants contend, because of this arrangement, plaintiffs' counsel should only be permitted to receive that amount as payment and thus the $48,750 in fees awarded in this court is excessive.

As plaintiffs maintain, the Fifth District, in *Keller v. State Farm Insurance Co.*, 180 Ill. App. 3d 539, 557, 536 N.E.2d 194, 205-06 (1989), rejected the same argument defendants make here. The *Keller* court held section 155 authorizes payment of "reasonable" attorney fees and courts are not "constrained by the contingent fee agreement from reducing that amount to a reasonable fee under section 155." *Keller*, 180 Ill. App. 3d at 557, 536 N.E.2d at 205. This court, in *McNiff v. Mazda Motor of America, Inc.*, 384 Ill. App. 3d 401, 406, 892 N.E.2d 598, 603 (2008), favorably cited *Keller* and concluded "[t]he presence of a fee agreement does not

impose a ceiling on the award of fees."

Following *Keller* and *McNiff*, we find section 155 is not limited by the fee arrangement plaintiffs' counsel made in the bankruptcy court.

Mohr is factually distinguishable. In *Mohr*, the parties stipulated the fee arrangement was reasonable. *Mohr*, 143 Ill. App. 3d at 1000, 493 N.E.2d at 645. No such stipulation exists here.

D. Negligence

Turning to the cross-appeal, plaintiffs maintain the trial court improperly ruled against them on their claims of negligence, counts IV and V of their amended complaint. Plaintiffs argue section 2-2201 of the Code of Civil Procedure (735 ILCS 5/2-2201 (West 2006)) placed upon Bickel, an insurance producer, the duty of exercising ordinary care when "procuring, binding, or placing coverage requested by the insured or proposed insured." Plaintiffs argue the facts show Bickel did not meet this duty when he failed to include Kenneth's entire health history on the application and in leading plaintiffs to believe such information would be relayed to his superiors. Plaintiffs contend this breach resulted in Kenneth's claims being denied and in forcing plaintiffs into bankruptcy.

Defendants argue the trial court did not err in ruling in their favor on the negligence counts. Defendants contend the record reveals the court's decision may be properly sustained in a number of ways, including lack of proof regarding the elements of proximate cause and breach.

The negligence cause of action contains the following elements: a duty owed by the defendant to the plaintiff, a breach of that duty, an injury, and proximate cause. See generally

Coole v. Central Area Recycling, 384 Ill. App. 3d 390, 396, 893 N.E.2d 303, 309 (2008). While the question of duty is one of law, the questions of proximate cause and breach are questions of fact. *Benner v. Bell*, 236 Ill. App. 3d 761, 765, 602 N.E.2d 896, 899 (1992). Defendants do not contend no duty was owed to plaintiffs. Instead, they maintain the trial court's holdings may be sustained on grounds of the absence of a breach and of proximate cause. These questions of fact will be upheld unless they are against the manifest weight of the evidence. *Quinlan*, 355 Ill. App. 3d at 836, 823 N.E.2d at 602.

The record reveals plaintiffs, in asserting negligence, sought compensation for Kenneth's medical expenses as well as approximately $62,000 for damages as a result of the bankruptcy filing. Upon review of the record, we find the court's ruling was not against the manifest weight of the evidence. The testimony establishes Lori and Kenneth were already in financial straits. They carried credit-card debt and had difficulty paying toward the $7,500 deductible. Given these facts, the court may have properly concluded plaintiffs did not prove Bickel's action was the proximate cause of their bankruptcy. In addition, the trial transcripts do not reveal *any* proof of damages sufficient to support the award requested.

Having concluded the trial court's decision regarding the bankruptcy-related damages is not against the manifest weight of the evidence, the only question that remains is whether Bickel's alleged negligence led to the $30,904.74 in damages. Given our decision upholding the court's decision on the breach-of-contract counts, our decision would have no effect on the outcome of the case. We need not decide it. *In re Alfred H.H.*, 233 Ill. 2d 345, 351, 910 N.E.2d 74, 78 (2009) ("As a general rule, courts in Illinois do not decide moot questions, render advisory opinions, or consider issues where the result will not be affected regardless of

how those issues are decided.").

E. Breach of Fiduciary Duty

We note plaintiffs have withdrawn their breach-of-fiduciary-duty arguments. As defendants pointed out in their brief, plaintiffs failed to replead the breach-of-fiduciary-duty counts in their amended complaint and, have therefore, forfeited them.

F. Deceptive Practices

Plaintiffs next contend the trial court erroneously entered judgment against them on their claims under the Consumer Fraud Act (815 ILCS 505/2 (West 2006)). Plaintiffs argue United Security violated the Consumer Fraud Act by engaging in the practice of "post-claim underwriting." Plaintiffs assert, under post-claim underwriting, insurance companies do minimal, if any, underwriting before issuing a policy and wait until a claim is filed to underwrite the claim to see if an omission permits rescinding the policy and denying a claim.

Plaintiffs maintain under this process, individuals are not really covered as the policy is actually "probationary." Plaintiffs assert, as a matter of policy, the insurance company is in the better position to ameliorate the risk of negligence or fraud on the part of an agent, requiring insurance companies to underwrite before issuing a policy. Plaintiffs, before the trial court, sought approximately $280,000 in punitive damages under the Consumer Fraud Act and ask this court to remand for a damages determination.

Defendants, citing *Brandt v. Time Insurance Co.*, 302 Ill. App. 3d 159, 704 N.E.2d 843 (1998), contend post-claim underwriting does not offend the Consumer Fraud Act. Defendants claim the better policy is to rely on proposed insureds, who know their own medical history, to provide their information instead of giving the burden to insurance providers.

Defendants emphasize the Consumer Fraud Act was not meant to apply to all breach-of-contract claims and United Security did perform some underwriting and seek additional information upon learning the underwriter found Kenneth had a prior history.

To prevail on a private claim under the Consumer Fraud Act, a plaintiff must prove the following: "(1) a deceptive act or practice by the defendant, (2) the defendant's intent that the plaintiff rely on the deception, (3) the occurrence of the deception in the course of conduct involving trade or commerce, and (4) actual damage to the plaintiff (5) proximately caused by the deception." *Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 180, 835 N.E.2d 801, 850 (2005). When determining whether a course of conduct violates the Consumer Fraud Act, we consider three factors, all of which do not have to be satisfied: "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [and] (3) whether it causes substantial injury to consumers." *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417-18, 775 N.E.2d 951, 961 (2002). "A breach of contractual promise, without more, is not actionable under the Consumer Fraud Act." *Avery*, 216 Ill. 2d at 169, 835 N.E.2d at 844.

The General Assembly did not intend the Consumer Fraud Act to apply to each contract dispute or to supplement breach-of-contract claims with redundant remedies. *Avery*, 216 Ill. 2d at 169, 835 N.E.2d at 844. Generally, a decision of the trial court as to whether the elements have been proved is reviewed under the manifest-weight-of-the-evidence standard. *Avery*, 216 Ill. 2d at 191, 835 N.E.2d at 856.

The First District, in *Brandt*, affirmed the dismissal of counts that alleged post-claim underwriting violates the Consumer Fraud Act. *Brandt*, 302 Ill. App. 3d at 163-64, 704

N.E.2d at 846. The *Brandt* court concluded it had been long held in Illinois that insurers had "no general duty to investigate the truthfulness of answers given to questions asked on an application for insurance." *Brandt*, 302 Ill. App. 3d at 164, 704 N.E.2d at 846. The court then held the following:

> "Since Illinois law imposes no duty on an insurer to conduct an independent investigation of insurability before issuing an insurance policy and [the insurer] made no representation as to when, or if, it would investigate the truthfulness of the information contained in Brandt's application, Brandt cannot predicate her claims for fraud and violation of the Consumer Fraud Act on the allegation that Time engaged in post-claim or retroactive underwriting." *Brandt*, 302 Ill. App. 3d at 164, 704 N.E.2d at 846-47.

The trial court's judgment for defendants on these claims is not against the manifest weight of the evidence. Plaintiffs asked the trial court to rule the process of post-claim underwriting violates the Consumer Fraud Act. The evidence heard at trial shows insurance companies in Illinois are permitted to investigate the truthfulness of statements in the application for two years. Plaintiffs have not shown this evidence was erroneous. The court also heard testimony regarding the process: if applicants provide the full medical history and are later insured, there is no basis for denying claims on this ground. Coverage is "probationary," as plaintiffs refer to it, only when information is missing from the application. We find no error on this ground.

Plaintiffs, attempting to distinguish *Brandt*, state *Brandt*'s holding would not

apply here where Bickel's misrepresentations led to an incomplete application and the denial of the application as a result of post-claim underwriting. We find no error. When one considers Bickel's acts in addition to the process of post-claim underwriting, the issue becomes a simple breach-of-contract issue. It is not a deceptive practice or act meant to be prevented by the Consumer Fraud Act.

Plaintiffs' case law, from other jurisdictions, simply does not apply. See *Blue Cross of California, Inc. v. Superior Court*, 102 Cal. Rptr. 3d 615, 629-30 (2009) (applying a California law that prohibits post-claim underwriting); *White II v. Continental General Insurance Co.*, 831 F. Supp. 1545, 1557 (D. Wyo. 1993); *M. Meyer v. Blue Cross & Blue Shield cf Minnesota*, 500 N.W.2d 150, 153-54 (Minn. App. Ct. 1993).

G. Punitive Damages

Plaintiffs next argue the trial court, though awarding attorney fees under section 155, improperly failed to award punitive damages under the same section. Plaintiffs maintain this failure is an abuse of discretion. Plaintiffs, citing *Hall v. Svea Mutual Insurance Co.*, 143 Ill. App. 3d 809, 812, 493 N.E.2d 1102, 1105 (1986), argue the purposes of section 155 must be considered when determining damages. These purposes include helping the insured and discouraging insurers from profiting by delaying the payment of contractual obligations. See *Hall*, 143 Ill. App. 3d at 812-13, 493 N.E.2d at 1105. Plaintiffs contend no reasonable underlying factual dispute existed and, thus, there was no reason to delay settlement of these claims and United Security should be punished to prevent insurers from engaging in this attrition.

Section 155 states the following:

"[T]he court may allow as part of the taxable costs in the action

reasonable attorney fees ***, plus an amount not to exceed any one of the following amounts:

(a) 60% of the amount which the court or jury finds such party is entitled to recover against the company, exclusive of all costs;

(b) $60,000;

(c) the excess of the amount which the court or jury finds such party is entitled to recover, exclusive of costs, over the amount, if any, which the company offered to pay in settlement of the claim prior to the action." 215 ILCS 5/155 (West 2006).

We find the trial court did not abuse its discretion. United Security relied on representations by its agent, Bickel, both in issuing the policy and in fighting coverage of Kenneth's claims. In so doing, United Security, which would have had to pay approximately $19,000 under the agreement, incurred a judgment of almost $31,000 in damages plus $48,750 in plaintiffs' attorney fees, in addition to its own costs in defending the suit. We find not further punishing United Security was a proper exercise of the trial court's discretion.

We commend the trial judge for his thorough review of the issues. We found the written order helpful in addressing the issues in this case.

III. CONCLUSION

For the reasons stated, we affirm the trial court's judgment.

Affirmed.