

No. 1-14-0687

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 JUDICIAL DISTRICT

AMERICAN ACCESS CASUALTY COMPANY,)	Appeal from
Plaintiff-Appellant,)	the Circuit Court of
)	Cook County.
v.)	
)	
ENTERPRISE RENT A CAR,)	
Defendant-Appellee)	No. 11 CH 35544
)	
(Kathy Rossell, Nancy Gray, Christopher Rousseau, Lena)	
Wallace, and Latea Horne as Next Friend of Raven Watts)	Honorable
(a minor),)	Peter Flynn,
Defendants).)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Trial court's finding, after bench trial in automobile insurance coverage dispute, that insurer could not establish substantial prejudice resulting from insured's alleged lack of cooperation with its coverage investigation, was not against the manifest weight of the evidence. Thus, the insurer was not entitled to a declaratory judgment that the insured's lack of cooperation relieved the insurer's obligation to defend claims arising from the insured's automobile accident. The trial court could reasonably conclude that the insurer's potential defenses to coverage were speculative, and thus any purported lack of cooperation by the insured did not cause substantial prejudice to the insurer.

¶ 2 Plaintiff-appellant American Access Casualty Company (AACC) appeals from the February 21, 2014 order of the circuit court of Cook County, following a bench trial, that AACC was obligated to defend third-party claims against its insured, defendant Kathy Rossell, notwithstanding Rossell's alleged failure to cooperate in AACC's investigation as to whether AACC owed coverage on such claims.

¶ 3 **BACKGROUND**

¶ 4 This insurance coverage dispute arises from a July 27, 2010 automobile accident in Dolton, Illinois, involving a vehicle driven by Rossell that she had rented on July 2, 2010 from defendant-appellee Enterprise Leasing Company of Chicago, LLC¹ (Enterprise). According to Rossell, she had rented the Enterprise vehicle to use as a substitute for her primary vehicle, a 2004 Chevrolet Malibu (the Malibu), because the Malibu's power steering had been malfunctioning for several weeks.

¶ 5 According to a police report from the accident, as well as Rossell's subsequent testimony, Rossell fainted while driving the Enterprise vehicle, which then struck another vehicle. The accident also involved vehicles operated by defendants Nancy Gray, Christopher Rousseau and Lena Wallace. Defendant Raven Watts, a minor, was a passenger in the vehicle driven by Wallace.

¶ 6 At the time of the accident, Rossell held a "Personal Automobile Insurance Policy" issued by AACC. In that policy, AACC agreed "[t]o pay on behalf of the insured, but only to the extent of the applicable limits, all sums which the insured shall become legally obligated to pay as compensatory damages" due to "[b]odily injury" or "[p]roperty damage caused by accident

¹ Enterprise was erroneously sued under the name "Enterprise Rent A Car."

arising out of the ownership, maintenance or use of the owned automobile or any non-owned automobile." AACC also agreed to "defend any suit alleging such bodily injury or property damage *** with attorneys hired and paid by [AACC]."

¶ 7 The policy defined the term "owned automobile" to include not only a private vehicle owned by the insured but also "a temporary substitute automobile," a term which was separately defined to mean "an automobile not owned by the named insured *** while temporarily used as a substitute for the owned automobile when withdrawn from normal use because of its breakdown, repair, servicing, loss or destruction ***."

¶ 8 A separate policy provision, entitled "Assistance and Cooperation of the Insured," obligated Rossell to cooperate with AACC in its investigation of any claim. That provision specified: "The insured shall cooperate with the Company and, upon the Company's request *** the insured must:

"(b) assist in making settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of any legal proceedings in connection with the subject matter of this insurance;

(g) authorize the Company to obtain medical and any other records we deem pertinent to a claim investigation;

(h) provide any written proofs of loss the Company requires;

(i) allow the Company to take signed and recorded statements and answer all questions we may ask when and as often as we may require;

(j) submit to examinations under oath as often as the Company requires."

This policy provision further specified that AACC "has no duty to provide coverage under this policy unless there has been full compliance with these responsibilities."

¶ 9 The parties do not dispute that, shortly after the accident, Rossell contacted AACC by telephone and reported the incident, including that she had fainted while driving a rental car. According to a July 29, 2010 call record from AACC, Rossell informed AACC that she had been driving a rental car because "her power steering was out." However, over the next several months, despite several additional telephone calls, AACC's attempts to receive documentation from Rossell to support its coverage investigation were unsuccessful.

¶ 10 AACC primarily sought information from Rossell on two particular topics, both of which were aimed to assess potential defenses to coverage. First, in order to determine whether the Enterprise rental vehicle qualified as a "temporary substitute vehicle" under the policy, AACC sought documentation to corroborate Rossell's claim that her primary vehicle, the Malibu, had been unavailable due to a power steering issue. Second, as Rossell had fainted just before the accident, AACC sought medical records in order to determine whether Rossell may have failed to disclose a related pre-existing medical condition when she applied for insurance from AACC.

¶ 11 Excerpts of AACC business records between July 2010 and March 2011 document AACC's multiple attempts to gather information from Rossell. On July 29, 2010, after Rossell indicated she was driving a rental car at the time of the accident, she "was asked to include a

copy of the repair bill and rental agreement with her accident report." Although AACC mailed an accident report request to Rossell on that date, Rossell claimed that she never received it.

¶ 12 On August 22, 2010, less than a month after the July 2010 accident, AACC mailed a notice to Rossell that it was cancelling her policy, effective on September 25, 2010. Under "Reason(s) for cancellation," the notice stated: "Underwriting Reasons CIRCUMSTANCES SURROUNDING THE LOSS 7/27/10."

¶ 13 Nevertheless, even after cancelling the policy, AACC continued its attempts to gather information. On August 27, 2010, Rossell "left [a] voice message after business hours indicating she never received [the] original request for Accident Report," and thus AACC mailed her another accident report form on that date. However, in a September 3, 2010 telephone call, Rossell again "claim[ed] she never received any of the Accident Report forms." An AACC business record dated September 7, 2010 states that the "Accident Report was returned by post office as 'Unable to Forward' despite Rossell confirming the listed address."

¶ 14 On December 20, 2010, AACC again called Rossell. According to AACC records, "Rossell indicated that she was not cooperating because she never got the Accident Report, despite multiple copies being mailed out and despite confirmation of her mailing address." According to AACC's notes, during that call "Rossell indicated she would not provide medical records regarding her purported fainting."

¶ 15 Additional business records from December 2010 and January 2011 reflect that AACC's counsel sent letters and called Rossell multiple times in an attempt to schedule Rossell to testify at an examination under oath (EUO) but received no response. According to AACC records, on February 15, 2011, Rossell "hung up the phone" after another attempted call. On that date, AACC sent "[d]enial letters sent via regular and certified mail to both addresses confirmed by

Rossell." However, subsequent AACC records state that both letters sent to Rossell by certified mail were returned by the postal service as undeliverable.

¶ 16 On October 13, 2011, AACC initiated this case, filing a complaint seeking a declaratory judgment that it did not owe coverage for any potential claims arising from the July 2010 accident, due to Rossell's failure to cooperate in its investigation. In addition to Rossell, AACC named as defendants Enterprise and individuals involved in the accident: Gray, Rousseau, Wallace and Latea Horne (as next friend of the minor Raven Watts). Other than Rossell and Enterprise, those defendants were later defaulted or non-suited.²

¶ 17 In its complaint, AACC alleged that it had "made numerous written and oral requests to Rossell for assistance and cooperation regarding the July 27, 2010 loss," including "requesting a claim report, requesting medical invoices, and requesting that Rossell submit herself to an examination under oath," and that Rossell's failure to respond "materially breached" her obligations to cooperate under the policy. As a result, AACC claimed that it was "unable to determine whether there is coverage under the policy." The complaint's prayer for relief requested that the court find Rossell in breach of the policy; declare that AACC had no duty to defend or indemnify Rossell in any claim or lawsuit that may be brought by the defendants; and declare that the defendants "are not entitled to any monies whatsoever under the AACC policy in connection with" the July 2010 accident.

¶ 18 On December 19, 2011, Enterprise filed an answer admitting that it had rented to Rossell the vehicle that she operated at the time of accident. Enterprise also raised affirmative defenses,

² On January 6, 2012, Wallace, Horne and Gray were defaulted for failing to appear or respond to the complaint. On May 10, 2012, AACC moved to voluntarily dismiss with respect to Rousseau. That motion was granted on June 7, 2012.

including that AACC failed to allege any prejudice resulting from Rossell's failure to cooperate in its investigation. Enterprise's pleading requested a finding that Rossell did not materially breach the policy, that AACC was required to defend and indemnify Rossell, and a declaration "that Enterprise is entitled to benefits under the relevant policy of insurance issued by [AACC] for property damage" to its rental vehicle. Enterprise alternatively sought a declaration that "even if Kathy Rossell breached the relevant insurance policy, said breach did not substantially prejudice [AACC], and it still owes third-party liability coverage."

¶ 19 On December 26, 2011, Rossell was served with AACC's complaint. On January 31, 2012, AACC moved to default Rossell for failure to appear. On February 14, 2012, the court granted Rossell's *pro se* application to defend as an indigent person, and subsequently struck AACC's motion to default Rossell.

¶ 20 Separate from this declaratory judgment action, two separate actions were commenced against Rossell arising out of the July 2010 accident, including a property damage and medical payment subrogation suit by Gray's insurer, Allstate Insurance Company, and a second lawsuit by Wallace and Watts. AACC, while reserving its rights pursuant to its declaratory judgment action, hired separate counsel to defend Rossell in those lawsuits.

¶ 21 In the meantime, for over a year, from December 2010 until March 2012, AACC's attorney (a different attorney from AACC's counsel in the declaratory judgment action) made continued attempts to schedule Rossell to appear for an EUO. According to Rossell's trial testimony, the reason for the lengthy delay was that AACC's counsel repeatedly failed to provide her more than 24 hours notice for a date to set up the EUO: "[H]is secretary said his schedule is so busy. She could only give me a day notice. *** And that's why it was such a conflict us getting together." Rossell testified that due to her work schedule, she "needed to have more than

24-hour[s] notice," and that it was not until March 2012 that AACC's counsel provided her with sufficient notice for her to attend.

¶ 22 On March 28, 2012, Rossell testified at an EUO conducted by AACC's counsel. The transcript of that EUO does not appear in the appellate record, but was referred to extensively during Rossell's subsequent trial testimony. At trial, Rossell testified that, during the EUO, she answered numerous questions from AACC's counsel regarding her medical history, identified her medical providers, and described the treatment she received after the accident.

¶ 23 At trial, Rossell was also asked about information she had provided during her EUO regarding her Malibu's power steering problem and the automobile repair shops where she had taken the vehicle for inspection. Rossell testified that during the EUO she had informed AACC that she had taken the Malibu to several places to assess the problem, including a Pep Boys repair shop, as well as a separate repair shop recommended by a friend, Floyd Robinson. Rossell admitted that, during the EUO, she had not been able to recall the names or the "exact addresses" of the other repair shops where she had taken her vehicle. However, she testified that she had provided AACC's counsel with street intersections for those locations, including "a place on 127th and Halsted" and a "place on 159th and Kedzie." She also testified that she had provided Robinson's telephone number at the EUO. Rossell acknowledged that she had not brought any documents regarding the Malibu to the March 2012 EUO.

¶ 24 Following Rossell's EUO, AACC continued to pursue this declaratory judgment action based on her alleged lack of cooperation. On July 25, 2012, the court denied a second motion by AACC to default Rossell due to her failure to file an answer. On that date, the trial court granted Rossell (who remained *pro se*) leave to file her answer *instanter*, in which she denied breaching the cooperation provisions of the insurance policy.

¶ 25 On August 1, 2012, AACC served interrogatories and requests for documents to Rossell. Those discovery requests sought details of Rossell's communications with AACC since the accident and related documents, including "repair invoices and estimates" for the Malibu and medical records regarding any prior "fainting episodes."

¶ 26 Rossell responded to AACC's discovery requests on August 27, 2012. In her responses, Rossell stated that she had called AACC the day after the accident and was told "I would be mailed out a claimant report to fill out. However, a week later I had still not received the form, so I called again to request a claimant report form, and was told they would send out another one," which she did not receive. Rossell stated that she "called again and gave [AACC] a different address to send it to, [but] it never arrived." Rossell's discovery responses also stated that she had called AACC "about 6 more times in the month following the accident" but that she had never received a claimant form. In response to AACC's requests for the Malibu's repair invoices and medical records related to fainting episodes, Rossell stated that she no longer had such documents in her possession.

¶ 27 Rossell's interrogatory responses acknowledged that Enterprise's legal counsel "assisted me with questions on the procedure for me to use in responding" to AACC's discovery requests and "the procedure for me to use in preparing and filing my answer to the complaint." On August 28, 2012, AACC responded by moving to disqualify Enterprise's counsel for providing legal advice to Rossell. The trial court denied that motion on September 18, 2012.

¶ 28 On October 12, 2012, Enterprise filed a motion to dismiss AACC's declaratory judgment suit as "premature" or to stay proceedings, due to the pendency of the two separate lawsuits related to the July 2010 accident. Enterprise argued that the court could not make a finding as to AACC's "duty to indemnify, since that would be premature" while the suits remained pending.

Enterprise further argued that "it is premature to even make an assessment of prejudice" to AACC from the purported lack of cooperation, as the court could not predict how the lawsuits would be resolved or whether Rossell would cooperate in those actions. On October 23, 2012, the court denied Enterprise's motion to dismiss or stay proceedings.

¶ 29 On January 15, 2013, AACC filed a motion for summary judgment, requesting that the court find as a matter of law that Rossell's failure to cooperate breached her insurance policy and relieved AACC of any duty to defend or indemnify Rossell for claims related to the July 2010 accident. In support of that motion, AACC submitted an affidavit of its litigation adjuster, Ian Brod, which described business records reflecting AACC's attempts to obtain documents from Rossell between July 2010 and March 2011. Brod's affidavit did not reflect any records of contact after March 2011, but did note that "Rossell finally sat for her examination under oath in March of 2012." Brod's affidavit further averred that AACC had never received requested documentation from Rossell, including an accident report, repair bills for the Malibu, and medical records.

¶ 30 AACC's motion for summary judgment argued that Rossell had failed to provide any substantive responses to AACC's discovery requests and emphasized that "Rossell only sat for her examination under oath in March 28, 2012, only *after* this declaratory judgment was filed and after numerous telephone calls and letters were sent" to Rossell. AACC contended that it needed documents regarding the condition of Rossell's Malibu "because coverage under AACC's policy is only available for a rental vehicle in certain, limited circumstances." Similarly, AACC argued that since Rossell had fainted immediately prior the accident, it needed her medical records "to ascertain whether Rossell had an undisclosed medical condition that would have affected the risk rating." AACC contended that due to Rossell's lack of cooperation, AACC had

been prejudiced in its ability to gather information "to enable [AACC] to decide upon [its] obligations and to protect [AACC] against false claims."

¶ 31 On January 29, 2013, Enterprise filed an affidavit averring that AACC had failed to respond to certain discovery requests, including refusing to produce the transcript of Rossell's EUO testimony, and that such information was necessary for the court's consideration of AACC's motion for summary judgment or a potential cross-motion by Enterprise. On February 8, 2013, the court ordered AACC to produce the EUO transcript and set a briefing schedule on ACC's motion for summary judgment.

¶ 32 On May 6, 2013, Enterprise filed its response to AACC's motion for summary judgment and filed a cross-motion for summary judgment. Enterprise's cross-motion argued that the "undisputed facts," including Rossell's participation in the EUO, demonstrated that, regardless of her alleged failure to cooperate with AACC *before* any third-party lawsuits had been filed, Rossell had since cooperated in the defense of those actions. In opposition to AACC's motion for summary judgment, Enterprise also argued that AACC failed to meet its burden of establishing "substantial prejudice" from Rossell's alleged lack of cooperation.

¶ 33 AACC filed its reply on May 20, 2013. In that submission, AACC argued that in her EUO testimony, Rossell had failed to provide any "forthright, complete answer," and did not provide sufficient information to allow AACC to conduct any further investigation regarding the Malibu's condition. AACC noted that although Rossell indicated that she had taken the Malibu to multiple repair shops, she could not recall their names or addresses and failed to produce any corresponding invoices. AACC emphasized that Rossell failed to submit a written accident report and failed to participate in an EUO "until the instant action was filed almost 2 *years* after

the initial request." AACC urged that it had been prejudiced as it was "unable to complete its claims investigation."

¶ 34 On June 6, 2013, the trial court denied the cross-motions for summary judgment and set a December 2013 trial date. On October 11, 2013, Enterprise filed an "emergency motion to stay the coverage action" or postpone the trial date, because the separate personal injury actions arising from the July 2010 accident had yet to proceed to trial. On October 25, 2013, the trial court denied Enterprise's motion to stay the declaratory judgment action.

¶ 35 The court conducted a bench trial on December 12, 2013. The trial court heard testimony from only two witnesses, Brod and Rossell. First, Brod testified on behalf of AACC regarding its attempts to gather information from Rossell in the months following the July 2010 accident. Brod acknowledged that he had no personal communications with Rossell, but relied on business records documenting efforts by AACC claims adjusters who had contacted Rossell.

¶ 36 Brod testified that on July 29, 2010, an AACC adjuster called Rossell, who told AACC that her power steering was out and that she had been driving a rental car. On August 27, 2010, after Rossell told AACC that she had not received an accident report form, AACC sent another accident report form. However, that form was returned by the post office.

¶ 37 Brod testified regarding multiple business records from December 2010 reflecting that AACC had not received an accident report or "proof that [Rossell's] vehicle was out of service or the medical records that show why she fainted." According to the AACC adjuster's note from December 20, 2010: "I called insured, [she] told me no co-op[eration] because she never got the accident report. *** Has proof car out of service, but refused to get the medical records for us. Four times I explained why needed. She doesn't seem to care."

¶ 38 Brod further testified that a February 15, 2011 note from an AACC adjuster stated that Rossell had hung up on the adjuster. On that date, "non-cooperation letters" were sent to Rossell at two different addresses, each by regular and certified mail. However, Brod acknowledged that both of those certified letters were returned by the post office as undelivered.

¶ 39 Brod further testified that beginning in December 2010, AACC's attorney began attempting to reach Rossell to schedule an EUO and that, despite numerous written requests and telephone calls, the EUO did not occur until March 2012. Brod testified that after the EUO, in April 2012, AACC sent another letter to Rossell again asking for an accident report form, "the power steering repair invoice," and medical records. However, Brod testified that AACC had never received such documentation.

¶ 40 Asked to explain the significance of medical records sought, Brod stated: "Because it had been noted that she had fainted prior the impact, we wanted to see if she possibly had any prior medical conditions that weren't disclosed to us that would have, possibly could have affected the policy." Brod explained that the policy "would have been underwritten at a different premium *** and possibly the risk may not have been accepted" if Rossell had such a condition. Regarding AACC's requests for records of the Malibu's condition, Brod explained that "since the vehicle that she was driving at the time of the accident wasn't on her policy, we were trying to determine if the vehicle qualified" for coverage, that is, "[i]f it would fit the definition of either a temporary substitute, or a non-owned vehicle."

¶ 41 Brod testified that he had reviewed the transcript of Rossell's March 2012 EUO. Asked if Rossell had been able to answer questions regarding the condition of the Malibu at the EUO, Brod stated: "She alleged that there was a problem with her power steering, but she wasn't able to provide any repair work, any invoices for the repairs, the exact names or locations of the shops

that she was going to take the vehicle to. She alleged that she took the vehicle to multiple places to have work done, but never had the work done and wasn't able to provide the names or addresses of these locations." Brod further testified that AACC's claims investigation was "prejudiced" by Rossell's failure to provide such documentation. Upon questioning by the trial court, Brod agreed that AACC's inquiries to Rossell did not affect AACC's defense of any third-party claims arising from the accident, but instead pertained only to whether AACC owed coverage under its policy.

¶ 42 On cross-examination by Enterprise's counsel, Brod clarified that Rossell's claim file was transferred to him only in June 2012, after the separate personal injury litigation had been commenced, and acknowledged that he was unaware of anything to suggest that Rossell had been uncooperative in the defense of those personal injury actions. Brod acknowledged that AACC, through a letter sent August 22, 2010, had canceled Rossell's policy, but was unable to elaborate on the reason for the cancellation. Brod also agreed that certain of the letters sent to Rossell by AACC, including all letters sent by certified mail, had been returned by the post office as undelivered.

¶ 43 With respect to Rossell's EUO testimony, Brod admitted on cross-examination that Rossell had stated that she took the Malibu to a Pep Boys repair shop and that she had provided street intersections for other locations where she had taken the vehicle. Brod agreed that Rossell had consistently told AACC that her Malibu was out of service due to a power steering issue, and that Rossell stated that she had not fixed the problem because it was too costly. Brod admitted he knew of no basis to suggest that this was not true, and admitted that AACC did not attempt to follow up with Robinson or any of the repair shops that Rossell had referred to.

¶ 44 Brod acknowledged that at the EUO, Rossell claimed that she had mailed to AACC estimates for work on the Malibu, although Brod testified that AACC never received such documents. Brod also admitted that AACC had not sent authorizations to Rossell for the release of her medical records, and acknowledged he was not aware of anything to suggest that Rossell had a pre-existing medical condition that she had failed to disclose.

¶ 45 Following Brod's testimony, Enterprise's counsel conducted a direct examination of Rossell. Rossell testified that she had rented the Enterprise vehicle because the "power steering just went out" on her Malibu several weeks prior to the accident.

¶ 46 Rossell testified at trial that she had taken the Malibu to several places to have the problem examined. First, she took it to a Pep Boys location, but she stated that did not have it fixed there because "they weren't sure that they could fix it because they needed a certain part" that was unavailable. Rossell also stated she took the Malibu to a shop called Quinn's Auto, where an employee indicated that he could fix the Malibu, but that she declined to have the work done there: "[H]e got so technical about it, and by me not really knowing, I called someone else. He wanted to take the steering wheel off, the steering column ***. And I was told that he was doing too much." She then testified that a friend, Floyd Robinson, recommended a third repair shop, and that she also eventually brought the Malibu to yet another shop on 159th and Kedzie. However, Rossell could not recall the names of those locations. She further testified that the power steering problem had never been fixed, because it was "too costly."

¶ 47 Also at trial, Rossell was shown the July 2010 rental agreement with Enterprise, which reflected that she had declined to purchase insurance offered by Enterprise for the rental vehicle. She testified that she had informed Enterprise that she already had insurance through AACC. According to Rossell, Enterprise told her that because she declined Enterprise's insurance, "the

only way they could rent the vehicle to me [was] they had to speak to someone from my insurance" and so Enterprise telephoned AACC in her presence. Rossell testified that she also spoke with an AACC representative at that time: "After [AACC] finished speaking with one of the representatives from Enterprise, [AACC] wanted to speak to myself, because they needed to prove that I was there, and what reason why I was there [sic] was to rent a car." According to Rossell, she explained to AACC that she was renting a car because "my vehicle was damaged and it was on its way to the shop," and AACC "said that was fine; as long as my vehicle was going to the shop, it was no problem."

¶ 48 Rossell further testified that, on the day after the July 2010 accident, she had telephoned AACC and informed them that "I fainted in my vehicle, and that I ran into the back of another vehicle." She stated that she had informed AACC of the hospital where she had been treated on the day of the accident. Rossell denied that she had ever been diagnosed with any medical condition related to fainting and claimed that she had only fainted once before, approximately ten years before the accident.

¶ 49 Rossell also testified regarding her prior EUO testimony, and explained that although she was not able to provide specific names of the locations where she had brought the Malibu (other than Pep Boys), during the EUO she had provided street intersections and Robinson's contact information. Rossell further testified that she had received documentation from two or three of the repair shops where she had taken the Malibu and claimed that she had mailed such documents to AACC. However, she claimed that she no longer had copies of these documents.

¶ 50 Rossell's testimony also suggested why certain letters from AACC were not successfully delivered. Rossell stated that she had moved to her current address in September 2010, after the July 2010 accident. Although she claimed that she informed AACC of this address change, she

acknowledged that her application for insurance with AACC reflected a prior address. In addition, Rossell explained that a separate address (to which AACC had also sent letters intended for Rossell) was her mother's previous address. Rossell acknowledged that this was the address she provided on her Enterprise rental contract, explaining that this was the address on her driver's license at the time she rented the vehicle. According to Rossell, Enterprise had instructed her to use that address to complete the rental agreement.

¶ 51 On cross-examination, Rossell maintained that she had not received any of the letters referenced by AACC. Rossell denied that she had refused to cooperate, denied that she had ever refused to provide medical records, and denied that she had hung up on anyone at AACC.

¶ 52 At the conclusion of the bench trial, the court requested that counsel provide briefing on "the question of whether the prejudice which is necessary to support an insurer's claim of non-cooperation is limited to prejudice in defending the underlying case, or on the other hand, can include prejudice *** to the insurer in challenging coverage." The court remarked that in this case, "the entire duty to cooperate argument is that [AACC] was prejudiced in its attempt to investigate coverage," while there was "no argument that any conduct by Miss Rossell *** has impeded [AACC] in its efforts to defend the underlying litigation." Thus, the court requested counsel to address "whether the duty to cooperate extends to a duty to cooperate in the insurer's defense to second guess coverage."

¶ 53 On December 18, 2013, AACC filed a memorandum arguing that the insured's duty of cooperation is broad and includes the duty to cooperate in the insurer's investigation of whether it is obligated to provide coverage. AACC argued that the insured's cooperation in all respects of the claims investigation is a condition precedent to coverage under its policy, as "the insurer has the right to protect itself from claims that may not fall within the terms of the relevant policy."

¶ 54 On January 6, 2014, Enterprise filed its post-trial brief, in which it argued that the duty to cooperate "does not extend to an insurer's pre-suit investigation conducted for the sole purpose of denying coverage to the insured" and that AACC's investigation was "conducted for the sole purpose of denying Ms. Rossell's coverage *** without any meaningful connection to developing defenses" for third-party claims arising from the accident. Separately, Enterprise argued that, even if Rossell had a duty to cooperate, AACC had failed to demonstrate either a lack of cooperation or "substantial prejudice." Enterprise argued that any lack of cooperation by Rossell "was fleeting and timely corrected." Enterprise separately contended that AACC could not establish prejudice because there was no "legitimate good faith basis to deny coverage" based either on the condition of Rossell's Malibu, or an undisclosed medical condition.

¶ 55 On January 24, 2014, AACC moved to strike Enterprise's post-trial brief because it included arguments other than the single issue for which the trial court had requested briefing. The trial court declined to strike Enterprise's brief but granted AACC leave to submit a response. On February 5, 2014, AACC filed a response in which it contended it did not have the burden to prove the merits of a coverage position whose viability could not be assessed due to Rossell's failure to provide relevant information. AACC contended that Rossell's lack of cooperation was established by her failure to provide documentation, her failure to submit to an EUO until after the initiation of the declaratory judgment action, and her failure at the EUO to provide information helpful to AACC's investigation.

¶ 56 The trial court issued its decision on February 21, 2014. In that order, the trial court first concluded that Rossell cooperated in the defense of the underlying personal injury cases. The court then held that "[AACC] correctly asserts that Rossell has a duty to cooperate in this coverage dispute." However, the court additionally held: "Because [AACC] canceled the policy

after the accident, Rossell had no duty to cooperate before a claim was made." Apart from whether Rossell had a duty to cooperate, the court additionally held: "Even if Rossell failed to cooperate, [AACC] did not meet its burden at trial to show substantial prejudice by Rossell's failure to provide the information sought as prejudice would be speculative." Thus, the court ruled against AACC and concluded that AACC was obligated to defend Rossell in claims arising from the July 2010 accident.

¶ 57 On March 5, 2014, AACC filed a notice of appeal.

¶ 58 ANALYSIS

¶ 59 We note that we have appellate jurisdiction pursuant to Supreme Court Rule 303(a), as AACC filed its notice of appeal within 30 days from the trial court's final post-trial order. Ill. S. Ct. R. 303(a) (eff. May 30, 2008).

¶ 60 Before reaching the merits, we address the contention raised in AACC's reply brief that Enterprise's appellate brief violates Supreme Court Rule 341(h)(6), which requires appellate briefs to contain a "Statement of Facts, *** stated accurately and fairly without argument or comment, and with appropriate reference to the pages of the record on appeal." Ill. S. Ct. R. 341(h)(6) (eff. July 1, 2008).³ AACC complains that Enterprise's "statement of facts" fails to include sufficient citations and contains inappropriate argument or comment, particularly because it references proceedings in the third-party lawsuits arising from Rossell's accident, which are not part of the record on appeal. Although AACC's complaints have some merit, we

³ Notably, Rule 341(h)(6) explicitly refers to the *appellant's* brief, whereas Enterprise is the appellee in this case. However, Rule 341(i) specifies that: "The brief for the appellee *** shall conform to the foregoing requirements [of Rule 341], except that items (2), (3), (4), (5), (6), and (9) of paragraph (h) of this rule need not be included except to the extent that the presentation by the appellant is deemed unsatisfactory." Ill. S. Ct. R. 341(i) (eff. July 1, 2008).

do not believe that such improprieties warrant striking this portion of Enterprise's brief. See *Friends of Parks v. Chicago Park District*, 203 Ill. 2d 312, 319 (2003) ("While we decline to strike the plaintiffs' factual summary, we admonish counsel to be mindful in the future of the requirement to eschew argument."). Rather, we "simply disregard the offending portions" of Enterprise's brief that lack support in the record on appeal. See *Hamilton v. Conley*, 356 Ill. App. 3d 1048, 1052-53 (2005). AACC likewise complains that the "Argument" portion of Enterprise's brief "is lacking in numerous citations to the Record" and thus violates Supreme Court Rule 341(h)(7). Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). We likewise decline AACC's request to strike this portion of Enterprise's appellate brief, but reiterate that, in deciding this appeal, we disregard any assertions lacking a basis in the record.

¶ 61 We proceed to address the applicable standard of review, which is disputed by the parties. AACC contends that the questions of whether Rossell had a duty to cooperate after the policy was canceled, whether her conduct constituted cooperation, and whether ACC was prejudiced are "questions of law" that are reviewed *de novo*. On the other hand, Enterprise argues that we should defer to the trial court's findings if they are not against the manifest weight of the evidence.

¶ 62 In this case, the trial court's February 21, 2014 judgment contained both legal conclusions and factual determinations. To the extent the court reached conclusions regarding the extent of Rossell's duty of cooperation, including its holding that Rossell had no duty to cooperate after the cancellation of her policy but before a claim was made, such determinations are questions of law. On such legal questions, we agree with AACC that *de novo* review would apply.

¶ 63 However, *de novo* review does *not* apply to the trial court's factual determinations, including the questions of whether Rossell cooperated with AACC and whether AACC was

substantially prejudiced by any lack of cooperation. As factual findings, those conclusions are entitled to a high level of deference. "When a party challenges a trial court's bench-trial ruling, we defer to the trial court's factual findings unless they are contrary to the manifest weight of the evidence. [Citation.] Under this standard of review, we give great deference to the [trial] court's credibility determination and we will not substitute our judgment for that of the [trial] court because the fact finder is in the best position to evaluate the conduct and demeanor of the witnesses. [Citation.] *Staes and Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35. Thus, the trial court's factual determinations, including whether AACC could establish prejudice, will not be overturned unless "the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." (Internal quotation marks omitted). *Id.*

¶ 64 On appeal, AACC challenges both the legal conclusion that Rossell had no duty to cooperate after AACC canceled the policy until a subsequent claim was filed, as well as the trial court's separate factual finding that AACC did not establish substantial prejudice resulting from the alleged lack of cooperation. As explained below, the court's finding that AACC could not establish substantial prejudice was not against the manifest weight of the evidence. That conclusion warrants affirming the trial court, regardless of whether the court correctly decided the independent legal question of whether Rossell's duty to cooperate was affected by cancellation of her policy. Similarly, our deference to the trial court's finding that AACC failed to prove prejudice warrants affirmance regardless of whether Rossell, in fact, cooperated with AACC's investigation.

¶ 65 In a recent decision—coincidentally, involving an AACC policy with a cooperation clause identical to that in this case—this court explained the principles governing resolution of an insurer's claims that an insured has breached a cooperation clause. See *American Access*

Casualty Co. v. Alassouli, 2015 IL App (1st) 141413. In that case, we recognized that, as "[g]eneral principles of contract law govern insurance contracts," the contract's terms "define and control the scope of duties imposed on an insurer and the insured" and that "[c]ourts should enforce clear and unambiguous provisions of insurance contracts according to their plain meaning." *Id.* We explained that "[a] cooperation clause prevents collusion between the insured and injured and enables an insurer to prepare its defense to a claim." *Id.* ¶ 17 (quoting *M.F.A. Mutual Insurance Co. v. Cheek*, 66 Ill. 2d 492, 496 (1977)). Because "[t]he insurer usually has little or no knowledge of the facts surrounding a claim, while the insured has knowledge of the facts," "the insurer depends on the insured for fair disclosure." [Citations omitted.] *Id.* Although "[t]he insured has no duty to assist the insurer in any effort to defeat a proper claim," a "cooperation clause does obligate the insured to disclose all of the facts within his [or her] knowledge and otherwise to aid the insurer in its determination of coverage under the policy." (Internal quotation marks omitted). *Id.*

¶ 66 We further explained that "[t]o establish a breach of the cooperation clause, the insurance company must show that it exercised a reasonable degree of diligence in seeking the insured's participation and the insured's failure to participate was due to a refusal to cooperate." [Citation.] *Id.* "These determinations depend on the facts and circumstances of the particular case." *Id.*

¶ 67 In addition—and key to the resolution of this appeal—we recognized that "to be relieved of its contractual obligations under the policy, an insurer must show that the insured's refusal to cooperate in its investigation caused it substantial prejudice." *Id.* ¶ 18 (citing *Cheek*, 66 Ill.2d at 500-01). The prejudice requirement stems from recognition that "[a]utomobile insurance policies present more than private agreements between the insured and the insurer," and that "[p]ublic policy considerations underlying insurance contracts seek to afford protection to

members of the public, generally innocent third parties." *Id.* (citing *Cheek*, 66 Ill.2d at 500-01). That is, permitting an insurer to be relieved of its contractual obligation to provide coverage, "absent a showing of prejudice, would be tantamount to a questionable windfall for the insurer at the expense of the public." *Id.* (quoting *Cheek*, 66 Ill.2d at 501).

¶ 68 "To establish substantial prejudice, the insurer needs to show the insured's violation of the cooperation clause hampered its investigation [Citation.] Courts do not presume prejudice when the insurer invokes a breach of the cooperation clause." *Id.*

¶ 69 In this case, the trial court made a factual determination, after a bench trial, that even if Rossell failed to cooperate, AACC "did not meet its burden at trial to show substantial prejudice by Rossell's failure to provide the information sought as prejudice would be speculative." As set forth below, we cannot say, under the applicable standard of review that "the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence." *Staes and Scallan, P.C.*, 2012 IL App (1st) 112974, ¶ 35. Thus, the trial court's finding of a lack of substantial prejudice was not against the manifest weight of the evidence.

¶ 70 As the trial court noted, AACC made no assertion that Rossell failed to cooperate in the *defense* of any claims arising from the July 2010 accident. Rather, AACC's action was premised on Rossell's failure to cooperate with AACC's investigation as to whether its policy provided *coverage* for claims arising from the accident. The trial court also appropriately recognized that what AACC was asking it to do was to penalize Rossell for failing to actively assist AACC in identifying a reason to deny coverage for the accident. Thus, the trial court properly recognized that the determination of "substantial prejudice" to AACC from Rossell's alleged lack of cooperation depended, in part, upon the viability of the claimed potential coverage defenses.

Thus, the trial court's inquiry as to whether AACC demonstrated the requisite prejudice properly considered whether such defenses were "speculative."

¶ 71 Especially since, after a bench trial, we defer to the trial court's credibility determinations and other findings of fact, we cannot say that the trial court was unreasonable in finding that "prejudice would be speculative" with respect to both of the two potential coverage defenses asserted by AACC. In particular, AACC's action was premised on two specific proposed defenses to coverage: (1) that the Enterprise rental vehicle did not qualify as a "temporary substitute vehicle" under Rossell's policy because she failed to prove that her primary vehicle was out of use due to a mechanical issue; and (2) that Rossell's fainting at the time of the accident indicated that she had failed to disclose a medical condition that, if disclosed, may have precluded her eligibility for coverage. Notably, both of these potential defenses implied that Rossell had been dishonest in her communications to AACC, either by failing to disclose a medical condition before she obtained the policy, or that, after the accident, she was untruthful regarding the existence of a mechanical problem with her primary vehicle. However, other than Rossell's failure to produce corroborating documents, there was simply no evidence presented at trial to suggest that Rossell had misrepresented her reason for renting the Enterprise rental car, or that she had concealed any medical condition. Thus, the trial court could reasonably conclude that ACC's potential coverage defenses were speculative.

¶ 72 First, AACC's efforts to seek records reflecting the condition of Rossell's primary vehicle were admittedly aimed at establishing that the Enterprise rental car did not meet the definition of a covered "temporary substitute automobile," in order to deny her coverage. However, AACC presented nothing to suggest that Rossell fabricated her stated reason for renting the Enterprise vehicle. To the contrary, the business records relied on by AACC at trial indicated that shortly

after the accident, Rossell told AACC she had rented the vehicle because "her power steering was out" in her Malibu. The record on appeal reflects that Rossell consistently maintained this assertion over the ensuing months of communications with AACC, her EUO testimony in March 2012, and her December 2013 trial testimony, including detailed testimony that she sought several opinions on the power steering issue.

¶ 73 Although Rossell could not recall specific names and addresses of each location where she had brought the Malibu for inspection, the record reflects that she testified consistently during her EUO and at trial that she had brought the vehicle to several repair shops, including a shop recommended by Robinson, and offered the street intersections for the locations as well as Robinson's contact information. AACC introduced nothing to suggest that Rossell's testimony was untruthful; indeed, Brod's testimony indicated that AACC made no effort to contact Robinson or otherwise ascertain any of the locations that Rossell had referenced.

¶ 74 We acknowledge that Rossell and Brod offered conflicting testimony as to whether Rossell had submitted any documentation to AACC regarding the condition of the Malibu. Rossell testified that she mailed such records, yet Brod testified that AACC never received them. It is noteworthy that AACC's own records show that at least two pieces of correspondence which it sent to Rossell were returned as undeliverable. So it can be inferred that correspondence which is mailed may not reach its intended addressee. However, notwithstanding the lack of supporting documentation, the trial court could have credited Rossell's otherwise uncontradicted trial testimony that the Malibu had, in fact, suffered a power steering problem, which led to her rental of the Enterprise vehicle. "[W]e give great deference to the circuit court's credibility determinations *** because the fact finder is in the best position to evaluate the conduct and demeanor of the witnesses." *Staes and Scallan, P.C.*, 2012 IL App (1st) 112974, ¶ 35.

Especially as there is nothing in the record to suggest that Rossell was untruthful on this topic, the trial court could reasonably find that AACC's potential defense to coverage on this ground was "speculative." In turn, the trial court could conclude that AACC could not demonstrate substantial prejudice from Rossell's failure to provide related documents.

¶ 75 We similarly conclude that the trial court could reasonably determine that AACC's second potential defense to coverage, premised on a hypothetical medical condition that Rossell failed to disclose, was equally speculative. AACC admittedly sought medical records from Rossell in order to discover if she had a medical condition that, if previously disclosed, could have affected AACC's decision to offer her coverage. However, Rossell specifically denied such a condition, and, as Brod conceded, there was no evidence such a condition actually existed. Although Rossell acknowledged that she had fainted while driving the Enterprise vehicle just before the July 2010 accident, there was nothing to suggest that this was the result of a chronic medical condition, let alone one that she had concealed from AACC.

¶ 76 Despite the lack of medical records, the trial court, as the trier of fact, was nevertheless free to credit Rossell's otherwise uncontradicted testimony that she had no such medical condition. "As the trier of fact, the trial judge was in a superior position to judge the credibility of the witnesses and determine the weight to be given to their testimony." *Chicago's Pizza, Inc. v. Chicago's Pizza Franchise, Ltd. USA*, 384 Ill. App. 3d 849, 859 (2008). If the court believed Rossell's testimony, the court could conclude that this second potential defense to coverage was speculative and, in turn, that Rossell's alleged failure to cooperate with AACC's investigation did not cause AACC substantial prejudice.

¶ 77 As this court does not second-guess the trial court's credibility determinations, we cannot say that the trial court was unreasonable in finding that "prejudice would be speculative" with

respect to AACC's claims of Rossell's lack of cooperation. Especially as there was no affirmative evidence to contradict Rossell's testimony, in which she denied the bases for AACC's two proposed defenses to coverage, we cannot say that the trial court's conclusion that prejudice was speculative was against the manifest weight of the evidence.

¶ 78 In turn, the determination that AACC could not establish substantial prejudice was fatal to its attempt to avoid its coverage obligations. See *American Access Casualty Company*, 2015 IL App (1st) 141413, ¶ 39 ("To be a defense under an insurance policy, the alleged breach of the cooperation clause needs to substantially prejudice the insurer."). Thus, upon concluding that AACC could not establish prejudice, the trial court did not need to decide whether Rossell had, in fact, cooperated with AACC's investigation regarding its potential defenses to coverage.

¶ 79 Similarly, because we conclude that the finding regarding AACC's failure to establish substantial prejudice was not against the manifest weight of the evidence, we need not review the trial court's separate determination that Rossell had no duty to cooperate between the time that AACC canceled her policy and the filing of a third-party claim arising from the accident. Notably, the parties' arguments on appeal do not cite any case law that has explicitly addressed that question. In any event, regardless of whether Rossell's contractual duty to cooperate remained in effect, AACC's failure to establish resulting substantial prejudice precluded such an alleged lack of cooperation from relieving AACC of its duties to defend and indemnify Rossell. Thus, we affirm the trial court's conclusion that AACC could not avoid its coverage duties to Rossell on the basis of her purported lack of cooperation.

¶ 80 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 81 Affirmed.