THIRD DIVISION
September 30, 2019

No. 1-18-2326

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DIRECT AUTO INSURANCE COMPANY,	)	Appeal from the
	)	Circuit Court of
Plaintiff and Counterdefendant-Appellant,	)	Cook County.
	)	
v.	)	No. 15 CH 14841
	)	
INDIANA FARMERS MUTUAL INSURANCE; ROBERT NIXON; and JEANNE TOFT,	)	
	)	Honorable
Defendants	)	
(Robert Nixon, Defendant and Counterplaintiff-Appellee).	)	Thomas R. Allen, Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Ellis and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the judgment of the circuit court of Cook County awarding sanctions pursuant to section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2014)); the trial court's findings that no *bona fide* dispute about coverage existed and plaintiff's conduct in rescinding defendant's insurance policy and denying coverage was vexatious and unreasonable was not against the manifest weight of the evidence and the trial court did not abuse its discretion in awarding section 155 sanctions.

¶ 2 The dispute in this case arises from an automobile insurance policy issued by plaintiff, Direct Auto Insurance Company to defendant, Robert Nixon (defendant). Plaintiff rescinded the policy after defendant was involved in a collision which resulted in a claim filed against the

policy. Plaintiff filed a complaint for declaratory judgment in the Circuit Court of Cook County seeking a determination that plaintiff appropriately rescinded defendant's automobile insurance policy and had no obligation on the policy including defending and indemnifying defendant. In response, defendant filed a two-count counter-claim for breach of contract due to plaintiff's failure to meet its obligations on the policy and further requested sanctions pursuant to section 155 of the Illinois Insurance Code as a result of plaintiff's conduct in denying coverage and rescinding the policy. After a bench trial, the trial court granted count I of defendant's counter-claim for breach of contract and denied plaintiff's request for declaratory relief. Thereafter, the trial court granted count II of defendant's counter-claim awarding sanctions pursuant to section 155 of the Illinois Insurance Code. Plaintiff appeals only the trial court's judgment awarding defendant sanctions pursuant to section 155 of the Illinois Insurance Code. For the reasons set forth below, we affirm.

¶ 3 BACKGROUND

¶ 4 In 2014, defendant, Robert Nixon, purchased a used 2003 Lincoln from a used car dealership. He was told at the dealership that he could not drive his car off the lot without insurance and was referred to "Insure On The Spot" (IOTS) an insurance broker doing business on the dealership's premises. IOTS is a third-party insurance broker selling insurance for different insurance companies, including plaintiff, which issued the policy defendant purchased. The IOTS broker completed plaintiff's electronic insurance application with defendant which contained identical language to plaintiff's paper application (collectively the "application") which defendant and the IOTS broker signed.

¶ 5 Based on defendant's application submitted by defendant and IOTS, on August 12, 2014, plaintiff issued defendant an automobile insurance policy that covered both personal injury and property damage (Policy) on his 2003 Lincoln with defendant as the named insured. The Policy

had an expiration date of February 12, 2015, an annual premium of $406, a $500 deductible, and included a duty to defend. Defendant was current in his payments on September 5, 2014 the date of the accident.

¶ 6 On September 5, 2014, defendant was involved in a collision with another driver while driving the Lincoln in Indiana. As a result of the collision two claims were made against the Policy. The first claim was a property damage claim made by defendant as a result of the approximately $300 in damages sustained by his Lincoln. However, on October 23, 2014, plaintiff notified defendant that because defendant's deductible was $500, it would not cover any part of the damage.

¶ 7 Thereafter, a second claim was made by the other driver for damages totaling approximately $2,300. In response to this claim, plaintiff commenced an investigation during which it learned that defendant had the same address as Crystal Williams, Shirley Williams, and Marvin Williams (collectively the "Williams Family") who were not listed as household members on defendant's application. As a result, plaintiff re-rated defendant's Policy estimating that it would have charged an additional premium of $1,004. Plaintiff deemed defendant's failure to list these household members on his application a "material misrepresentation" and rescinded defendant's Policy on February 10, 2015 solely on this basis. Plaintiff notified the other driver's insurance company that defendant's Policy had been rescinded and no coverage would be provided by Plaintiff.

¶ 8 On June 15, 2015, defendant was sued by the other driver's insurance company in Indiana in a subrogation suit for the damages sustained by the other driver in the September 5, 2014 collision. Plaintiff refused to defend defendant and a default judgment was entered against defendant in Indiana.

¶ 9 On October 8, 2015, plaintiff filed a declaratory judgment action in Cook County alleging there was no coverage for indemnification of defendant as claimed by the other driver's insurance company because the Policy was rescinded due to defendant's failure to disclose all household members on his application. Plaintiff sought a declaration that it owed defendant no coverage and had no duty to defend or indemnify him. Plaintiff served defendant, the other driver, and the other driver's insurance company with its declaratory action; however, neither the other driver nor her insurance company actively defended.

¶ 10 On June 3, 2015, after securing *pro bono* representation, defendant answered the complaint and filed a two-count counter-claim for breach of contract and for sanctions pursuant to section 155 of the Illinois Insurance Code (Code). Defendant filed an amended counter-claim on August 2, 2015 also alleging breach of contract and requesting sanctions pursuant to section 155 of the Code. Defendant was granted leave to file the amended counter-claim on August 10, 2016. Plaintiff filed a motion to strike and dismiss the amended counter-claim which was denied by the trial court on January 26, 2017 and, thereafter, plaintiff filed its answer to the counter-claim.

¶ 11 Trial

¶ 12 The trial court held a bench trial which commenced on May 31, 2018. Plaintiff presented three witnesses: defendant; Mike Torello, plaintiff's claims manager; and Rosa Miranda, plaintiff's underwriting manager.

¶ 13 Defendant's Testimony

¶ 14 Defendant testified that he was 72 years old, grew up in Illinois, and worked for approximately 40 years at a decal company in Illinois. Prior to that, he served two years in the United States Army. He recently got divorced and needed a new car so he went to a used car dealer where he purchased a used Lincoln. Defendant was told he could not leave the lot with

the car unless he had insurance. He completed and signed the application with an IOTS broker and obtained an insurance policy with Plaintiff.

¶ 15 Defendant testified he lived at 2121 Tyler Street, Lynwood, Illinois (Tyler Street) for over ten years and identified photographs of the home which he stated was a single family residence. The residence is owned by the Williams Family and that defendant is their cousin. He testified that Crystal had just adopted a child and Shirley and Marvin were her parents. Defendant testified that he lived in the basement apartment of the home. The basement contained a bedroom, small living room, and a kitchen with a stove, refrigerator, sink, and cabinets. It had a separate entrance which had its own lock which defendant used to enter his apartment. He testified that he occasionally used the front door to Tyler Street if he needed to talk to the Williams Family. He pays $400 a month in rent for his apartment; however, there is no written lease. None of the members of the Williams Family drove defendant's vehicle and he has not driven a vehicle belonging to the Williams Family since he was 15 or 16. When asked whether a Williams Family member has ever driven his vehicle even just to move it out of the way so that the family's other five vehicles could get out of the residence, defendant testified that they did not and stated that he did not park his Lincoln at Tyler Street. Instead, he testified the vehicle was garaged at a nearby RV Park where the owners allowed him to park his car in front with their vehicles. Plaintiff was not aware of this information prior to defendant's trial testimony.

¶ 16 Defendant testified that he keeps completely separate finances from the Williams Family and that they do not use his apartment for their own purposes. Defendant testified that they did, however, share a mailbox and there was only one utility, water, gas, and cable bill. He testified that he did not consider himself to be a member of the Williams Family's household and, to his knowledge, the Williams Family did not consider him to be a member of their household.

¶ 17 Defendant testified about filling out the application with the IOTS broker. He stated that the insurance agent never asked him if he lived in a basement apartment or a separate apartment, only where he lived. Defendant did not recall how many questions the IOTS broker asked him. Instead, defendant testified he was only asked where he lived. Defendant testified that he answered all the questions truthfully and never lied on his application. Defendant testified that he signed the application and paid the required premium. On the application defendant did not list the Williams Family as household members, he did not list a separate apartment, nor did he indicate that the vehicle was being garaged at a location other than Tyler Street, though defendant testified that at the time the application was completed he was not aware of certain rules in the community where he lived that prevented defendant from garaging his vehicle at Tyler Street.

¶ 18 Defendant also testified that a default judgment was entered against him in Indiana when he was sued for damages sustained by the other driver involved in the collision. He testified that as a result of the judgment, defendant has been contacted by a collections agency and received bills. Additionally a lien in the amount of $2,468.01 was placed on his driver's license resulting in the suspension of his license by the State of Illinois. Defendant testified he paid over a hundred dollars to remove this lien only to have his license suspended again a few months later for the same reason. Defendant again had to pay money to get the suspension lifted.

¶ 19 Mike Torello's Testimony

¶ 20 Torello testified that he worked as a claims manager for plaintiff. He testified that the sole information relied on to issue defendant's Policy was the application. Question nine on the application specifically asked "Have all residents of household 15 years and older and all permit or other operators been listed on the application?" to which defendant answered yes. Torello testified that defendant disclosed no other household residents. While he identified a place on

the application to list the principal driver and all other drivers where defendant listed only himself, he could not identify a specific location to list other residents of the household except for stating that they could have been listed on a separate page. Torello testified that the IOTS broker was not controlled by or employed with plaintiff, but was defendant's agent. Notwithstanding, he testified that plaintiff will occasionally forego rescinding a policy as a favor to broker like those from IOTS. After the other driver involved in the collision with defendant filed a claim, Torello commenced an investigation. This investigation consisted of obtaining documents to include defendant's motor vehicle record to make sure defendant had a valid driver's license and everything was accurate on defendant's application, obtaining the police report from the collision, and running a LexisNexis search to see if defendant accurately listed the members of his household. Torello testified that he did not run a LexisNexis search before issuing defendant the Policy because it was cost prohibitive. He testified the cost of obtaining the LexisNexis report was $2 dollars and defendant's motor vehicle record was $14.

¶ 21 As a result of the LexisNexis search, Torello learned that the Williams Family members also listed Tyler Street as their residence and concluded that they were members of defendant's household. Torello testified about the meaning of the term household members concluding that it has a common sense definition. He testified that he asked plaintiff's underwriting department to prepare an additional premium calculation worksheet based on the Williams Family members. The worksheet that came back indicated only that there would be an additional premium and based on that Torello rescinded defendant's Policy. Torello testified he did not investigate the motor vehicle reports for any of the Williams Family members, did not determine whether they were an acceptable risk, or whether they qualified for coverage. He further stated the rescission was based on a rate issue not an acceptance of the risk issue. Specifically, Torello's testified concerning the worksheet as follows:

"Q. And up at the top it says – somebody re-rated the policy to add undisclosed household drivers with a 300 percent surcharge. Rated driver as Crystal Williams. Additional premium, $1,004.00.

A. Yes.

Q. And *** your basis for rescission is that this is the additional premium that you would have charged had she been disclosed and not excluded, right?

A. Yes.

Q. So it's a rate issue, not an acceptance of the risk issue, right?

A. That's what this is based on, that's correct."

¶ 22 He testified that plaintiff almost always rescinded a policy where there would be an increased premium. Torello was also questioned about the Illinois Department of Insurance administrative rule change which became effective after defendant's Policy was rescinded.

¶ 23 Rosa Miranda's Testimony

¶ 24 Miranda testified that she was employed as an underwriting manager for plaintiff. She testified that IOTS was defendant's agent and not controlled or employed by plaintiff though they talk to the agents and advise them that "everybody needs to be listed on the Policy *** [w]hether they are driving or not, they need to be listed as an operator or excluded. They are very well versed on that." She testified the application contained all of plaintiff's underwriting standards and required all members of the household 15 years and older to be listed and included and if there is a misrepresentation plaintiff will rescind the policy. She testified that if a residence is a single home everybody residing in that home needs to be listed or excluded on the application, but if the residence is a separate apartment that would be a separate household. She testified that familial relationships are not determinative of whether an individual is a member of one's household. Miranda testified that plaintiff conducts no investigation into the facts disclosed in

an application prior to issuing a policy. Miranda testified that the Williams Family members were not disclosed on defendant's application and Crystal Williams would have been the highest rated driver resulting in a considerably higher premium. She testified that had these individuals been disclosed a different policy would have been issued by plaintiff. She also testified that had defendant disclosed on his application that he principally garaged his vehicle away from Tyler Street plaintiff would have refused the risk because plaintiff's underwriting manual does not permit a vehicle to be principally garaged away from the primary residence.

¶ 25 Trial Court's Ruling

¶ 26 At the conclusion of plaintiff's three witnesses' testimony both sides rested. On the following day, June 1, 2018, the parties gave closing arguments on plaintiff's request for declaratory relief and defendant's claim for breach of contract during which plaintiff argued that it properly rescinded the Policy and had no obligation thereon. In its argument plaintiff focused on its position that defendant misrepresented the household members on his application warranting a rescission of the Policy. With respect to defendant's garaging the vehicle away from his residence despite the application stating otherwise which came to light during the trial testimony, plaintiff only noted witness testimony that this would be considered an unacceptable risk such that plaintiff would not have issued the Policy. Immediately thereafter, the trial court gave its oral ruling granting defendant's breach of contract claim and denying plaintiff's action for declaratory relief which was memorialized in a written order. In its oral ruling, the trial court discussed the application noting its small print making the document difficult to read. The trial court further described the application and the fact that it had not been modified over the years stating: "[a]nd its obvious why it continues to be around, from the perspective of Direct Auto, is because you can drive a truck through this thing. It's as clear as mud. It's murky, it's unreadable, and that is the way it is. *** [I]t gives them a lot of wiggle room, and they like wiggle room."

The trial court found defendant credible, that defendant was the only member of his household, and there was no material misrepresentation. As a result plaintiff's "rescission was not proper and the policy is still in effect, and Direct Auto has a duty to defend and indemnify Mr. Nixon for his damages."

¶ 27 After ruling that plaintiff did not have grounds to rescind the Policy, the trial court then moved to the issue of whether to allow section 155 sanctions requested in count II of the counter-claim. Arguments concerning the appropriateness of section 155 sanctions were presented by both parties. At no time during its argument did plaintiff raise the issue of defendant's having garaged his vehicle at the RV Park as a basis for avoiding sanctions. Instead, plaintiff argued that because defendant did not have leave to file his amended counter-claim, the request for section 155 sanctions in defendant's prior counter-claim was the claim to be considered by the court. Plaintiff argued that the Illinois Department of Insurance's promulgation of section 941.20 of Title 50 of the Administrative Code (50 Ill. Adm. Code 941.20) in April of 2017, which arguably would have precluded the type of rescission that occurred here, was inapplicable having been enacted after the Policy was rescinded with no retroactive applicability. Finally, plaintiff argued the term "household" in the application was ambiguous and plaintiff had a good faith basis for believing that defendant's failure to include the Williams Family members as part of his household justified its rescission of the Policy because these individuals increased the risk to plaintiff. Here the trial court again commented on the application stating:

> "The application is a pile of garbage. It's mud – mud against the wall. It's ridiculous. You – well, any reasonable objective person would agree with that statement. It's garbage. It's garbage. For someone sitting here six and a half years and following these things and seeing them, and you can't read it. It's intentionally vague. It's intentionally wide up. *** It's a game of gotcha."

¶ 28 Following argument, the trial court gave the parties an opportunity to brief the issue of section 155 sanctions prior to ruling on the issue. Plaintiff submitted its brief on July 24, 2018 in which it addressed only defendant's listing of himself as the only member and driver within his "household" on the application and the inapplicability of section 941.20 of Title 50 of the Administrative Code. Again, plaintiff makes no mention of defendant's garaging his vehicle at the RV Park being a basis for denying defendant's request for relief pursuant to section 155.

¶ 29 Thereafter, on October 18, 2018, the parties again appeared before the trial court who welcomed further argument from both parties as to section 155 sanctions. Here plaintiff argued (1) it was permitted to rescind the Policy based on misrepresentations as to the number of members within a household listed on the application; (2) section 941.20 of Title 50 of the Administrative Code had no applicability; (3) there was a factual dispute as to the term "household" on the application and thus plaintiff's rescission of the policy was not "in bad faith;" and (4) issues with how the application was completed must be raised with IOTS with whom defendant completed the application not plaintiff. Plaintiff, once again, made no mention of defendant's garaging his vehicle at the RV Park being a basis for denying defendant's request for relief pursuant to section 155.

¶ 30 After the arguments, the trial court entered an order awarding defendant $60,000 in damages for section 155 sanctions. In its oral ruling, the trial court discussed principles of equity at length. The trial court also discussed factors to be considered under section 155 of the Code to include the insurer's attitude, whether there was a *bona fide* dispute concerning coverage, the extent of the insurance company's evaluation and investigation of the claim, and the requirement that the totality of the circumstances be considered by the court. The trial court cited the Second District's decision in *Vadovinos v. Gallant Insurance Company*, 314 Ill. App. 3d 1018, 2021

(2000), highlighting a quote from our supreme court's decision in *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 520-21 (1996), stating:

> " 'Section 155 should guard against situations where the holder of a small policy may see practically his whole claim wiped out by expenses if the company compels him to resort to court action. Although the refusal to pay the claim is based upon the flimsiest sort of a pretext' [the trial court goes on to quote from *Vadovinos* stating] 'Section 155 of the Code is intended to discourage the insure[r] from using [its] superior financial position to profit at the insured's expense.' "

¶ 31 The trial court again noted defendant's credibility and found plaintiff's conduct in rescinding defendant's Policy based on his answers in the application to be unreasonable and vexatious.

¶ 32 Plaintiff timely appealed. This appeal followed.

¶ 33 ANALYSIS

¶ 34 Section 155 of the Illinois Insurance Code

¶ 35 Plaintiff appeals only from the trial court's order granting count II of defendant's counter-claim for relief pursuant to section 155 of the Code. Plaintiff argues the trial court's finding that plaintiff's behavior in denying the claim and rescinding defendant's Policy was vexatious and unreasonable was improper because there was a *bona fide* dispute as to coverage. Defendant does not contest the trial court's calculation of the section 155 sanctions.

¶ 36 Standard of Review

¶ 37 The parties dispute the standard of review. Defendant argues that a trial court's determination as to whether the insurer's behavior is vexatious and unreasonable is a question of fact reviewed under the manifest weight standard citing *Buckner v. Causey*, 311 Ill. App. 3d 139, 150 (1999), and the decision to ultimately award section 155 sanctions is reviewed for abuse of

discretion citing several cases to include *Charter Properties, Inc. v. Rockford Mutual Insurance Co.*, 2018 IL App (2d) 170637, ¶ 33. Plaintiff argues that this court should parse out each of the trial court's findings noting that factual determination may be reviewed under the manifest weight standard while legal conclusions are reviewed *de novo*; however, plaintiff ultimately concludes that "the Court essentially granted relief on the papers, i.e., in the context of summary disposition, and review *** should be *de novo* citing *Employers Insurance of Wausau v. EHCO Liquidating Trust*, 186 Ill. 2d 127, 158-61 (1999). We agree with defendant's recitation of the appropriate standard of review. This was not a case in which the trial court granted judgment on the pleadings. Here the trial court conducted a trial on plaintiff's declaratory action and defendant's counter-claim for breach of contract and section 155 sanctions. At the conclusion of trial involving three witnesses the court denied plaintiff's complaint and granted defendant's claim for breach of contract. That same day, the court also heard argument with respect to defendant's request for section 155 sanctions contained in count II of his counter-claim. Ultimately the trial court continued the matter requesting that the parties' arguments on the sanctions issue be further briefed. Plaintiff and defendant referenced trial testimony in their briefs submitted pursuant to the trial court's request as well as during oral argument in support of their respective positions on the appropriateness of section 155 sanctions. The trial court also was clear that this issue was a continuation of the trial stating it was "familiar with the trial that we had here. So we got the evidence at trial" prior to inviting final arguments from plaintiff and defendant on the sanctions issue. The trial court also referenced the trial testimony in support of its oral ruling granting defendant's request for section155 sanctions. This was not a ruling "based on the papers" as plaintiff suggests, but a decision following an evidentiary bench trial. Accordingly, we review the trial court's determination as to whether the insurer's behavior was vexatious and unreasonable, a question of fact, under the manifest weight standard. *Buckner*,

311 Ill. App. 3d at 150. The decision of the court is against the manifest weight of the evidence only when the opposite conclusion is clearly evident or is unreasonable, arbitrary, and not based on the evidence. *Redmond v. Socha*, 216 Ill. 3d 622, 651 (2005).

¶ 38 We review the trial court's decision to ultimately award section 155 sanctions under the abuse of discretion standard. *Charter Properties, Inc.*, 2018 IL App (2d) 170637, ¶ 33. A trial court has abused its discretion when no reasonable person would take its view, improperly applies recognized principles of law, applies the wrong legal standard, or reaches conclusions unsupported by the law. *Cirrincione v. Westminster Gardens Limited Partnership*, 352 Ill. App. 3d 755, 761 (2004). Having determined the appropriate standard of review, we next turn to the merits of plaintiff's appeal.

¶ 39 Vexatious and Unreasonable Denial of Coverage

¶ 40 As noted above, plaintiff appeals only the trial court's finding that plaintiff's conduct in rescinding defendant's Policy and denying claims thereon was vexatious and unreasonable and the award of section155 sanctions. Section 155 of the Code provides a remedy for an insured against an insurer liable on a policy who encounters unnecessary difficulty in obtaining policy benefits and states in relevant part as follows:

> "(1) In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus an amount not to exceed any one of the following amounts ***." 215 ILCS 5/155 (West 2018).

We again note here that plaintiff contests only the award of section 155 sanctions not the amount of the sanction awarded.

¶ 41 The purpose of section 155:

> "is to punish insurance companies for vexatiously delaying or rejecting legitimate claims by holding insurers responsible for the 'expense resulting from the insured's efforts to *prosecute* the *claim*,' and discouraging them from using their 'superior financial position by *delaying payment* of legitimate contractual obligations' to profit at the insured's expense. [Citation omitted.]" *Cook v. AAA Life Insurance Co.*, 2014 IL App (1st) 123700, ¶ 47; see also *O'Conner v. Country Mutual Insurance Co.*, 2013 IL App (3d) 110870, ¶ 13 ("The purpose of the statue is to provide a remedy for insurer misconduct and to make actions by policyholders economically feasible.").

¶ 42 An insurance company does not violate section 155 of the Code merely because it unsuccessfully litigates a dispute involving the scope of coverage. *McGee v. State Farm Fire and Casualty Co.*, 215 Ill. App. 3d 673, 681 (2000). Instead, the court must consider the totality of the circumstances in determining whether an insurer's conduct is "vexatious and unreasonable" and no single factor including the length of time or the amount of money involved taken by itself is dispositive. *Rosalind Franklin University of Medicine v. Lexington Insurance Co.*, 2014 IL App (1st) 113755, ¶ 110. The totality of the circumstances to be considered includes 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. *Statewide Insurance Co. v. Houston General Insurance Co.*, 397 Ill. App. 3d 410, 426 (2009). Court's have also considered "whether there is a *bona fide* dispute concerning coverage, the extent of the insurance company's evaluation and investigation of the claim, and the adequacy of communication between the

insurance company and the insured. *Cook*, 2014 IL App (1st) 123700, ¶ 48. However, if a *bona fide* dispute as to coverage exits, an insurer's delay in settling a claim will not be deemed "vexatious or unreasonable" for purposes of section 155 of the Code. *Statewide Insurance Co.*, 397 Ill. App. 3d at 426. " '*Bona fide'* is defined as "[r]eal, actual, genuine, and not feigned." ' " *Cook*, 2014 IL App (1st) 123700, ¶ 49.

¶ 43 On appeal, plaintiff argues it cannot be subject to 155 sanctions because a *bona fide* dispute existed as to coverage justifying its rescission of defendant's Policy for two reasons. First, plaintiff argues that it had "a more than *bona fide* basis to support the DAI rescission" because defendant "in his signed application misrepresented as to the garaging address" stating his automobile was not garaged for a substantial part of the time away from Tyler Street when, in fact, defendant parked the vehicle at an RV park. Plaintiff argued the misrepresentation of where the car was garaged materially affected the acceptance of the risk assumed by plaintiff. Second, plaintiff argues that there was a *bona fide* dispute as to coverage because a factual dispute existed as to whether the Williams Family members were members of defendant's "household" such that defendant's failure to list them on his application permitted plaintiff to rescind the Policy.

¶ 44 Plaintiff relied on section 154 of the Code (215 ILCS 5/154 (West 2014)) as its authority for rescinding the Policy. Section 154 allows for the rescission of an automobile insurance policy in effect for less than one year where an insured makes a misrepresentation in a written application which materially affects the acceptance of the risk or the hazard assumed by the company. See *id*.

¶ 45 Section 154 of the Code allows an insurer to rescind a policy for misrepresentations of the insured only in the first year of the policy and only if the misrepresentations were made with the intent to deceive or materially affects the risk assumed by the insured. See *id*.

> "No misrepresentation or false warranty made by the insured or in his behalf *** shall defeat or avoid the policy or prevent its attaching unless such misrepresentation, false warranty or condition shall have been stated in the policy or endorsement or rider attached thereto, or in the written application therefor. No such misrepresentation or false warranty shall defeat or avoid the policy unless it shall have been made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company. With respect to a policy of insurance ***, a policy or policy renewal shall not be rescinded after the policy has been in effect for one year or one policy term, whichever is less." 215 ILCS 5/154 (West 2014).

¶ 46 "The statute establishes a two-pronged test to be used in situations where insurance policies may be voided: the statement must be false and the false statement must have been made with an intent to deceive or must materially affect the acceptance of the risk or the hazard assumed by the insurer. [Citations.] Under the statute, therefore, a misrepresentation, even if innocently made, can serve as the basis to void a policy. [Citation.]" *Golden Rule Insurance Co. v. Schwarts*, 203 Ill. 2d 456, 464 (2003). "Whether an insured's statements are material is determined by 'whether reasonably careful and intelligent persons would have regarded the facts stated as substantially increasing the chances of the events insured against, so as to cause a rejection of the application.' " *Direct Auto Insurance Company v. Koziol*, 2018 IL App (1st) 171931, ¶ 86. An insurer may rely on the testimony of its employees or the underwriter of the policy to establish the materiality of a misrepresentation which is a question of fact. *Id*. We address each of plaintiff's arguments in turn.

¶ 47 Misrepresentation as to Where the Automobile was Garaged

¶ 48 Plaintiff argues it had an independent basis to rescind the Policy because plaintiff garaged his car at an address different than the address of his residence. Therefore plaintiff argues it should not be sanctioned under section 155. We disagree.

¶ 49 At trial, plaintiff learned that defendant garaged his vehicle at a different address than his residence. Plaintiff's witness testified if defendant's misrepresentations about where he garaged his vehicle were known by plaintiff it would not have issued the Policy because it materially increased the risk under section 154. After the trial, the trial court entered a finding that plaintiff did not have a valid ground to rescind the Policy. Therefore, the court implicitly found that any alleged misrepresentation regarding the garaging of the vehicle did not increase the risk accepted by plaintiff. Plaintiff did not appeal from the finding that it did not have a valid basis to rescind the Policy, but only appealed from the finding that its actions were vexatious and unreasonable warranting section 155 sanctions.

¶ 50 During the section 155 proceedings, plaintiff never argued that garaging the car at a different address was grounds for rescinding the Policy. "It is well established that an appellant's failure to raise an issue in the circuit court results in waiver of that issue." *In re Shauntae P.*, 2012 IL App (1st) 112280, ¶ 93. Instead, plaintiff argued that the term "household" in the application was ambiguous and plaintiff had a good faith basis for believing that defendant's failure to include the Williams Family members as part of his household justified its rescission of the Policy. However, at no time during its argument did plaintiff raise defendant's having garaged his vehicle at the RV Park as a basis for avoiding section 155 sanctions.

¶ 51 Following argument, the trial court gave the parties an opportunity to further brief the issue of section 155 sanctions prior to the court ruling. Plaintiff submitted its brief on July 24, 2018 in which it addressed only defendant's listing of himself as a member of and driver within his "household" on the application and the inapplicability of section 941.20 of Title 50 of the

Administrative Code. Again, plaintiff made no mention of defendant's garaging his vehicle at the RV Park being a basis for denying defendant's request for relief pursuant to section 155.

¶ 52 Thereafter, on October 18, 2018, the parties again appeared before the trial court who welcomed further argument from counsel on the sanctions issue. Here plaintiff argued (1) it was permitted to rescind the Policy based on misrepresentations as to the number of members within defendant's household listed on the application; (2) section 941.20 of Title 50 of the Administrative Code had no applicability; (3) there was a factual dispute as to the term "household" on the application and thus plaintiff's rescission of the Policy was not "in bad faith;" and (4) issues with how the application was completed must be raised with the IOTS with whom defendant completed the application not with plaintiff. Plaintiff, once again, made no mention of defendant's garaging his vehicle at the RV Park being a basis for denying defendant's request for relief pursuant to section 155. Because plaintiff failed to raise this argument in the trial court the issue is forfeited. *In re Shauntae P.*, 2012 IL App (1st) 112280, ¶ 93.

¶ 53 Waiver aside, plaintiff's argument that it had an independent basis to rescind the Policy fails. A hearing under section 155 is a fact based determination of whether plaintiff's actions were vexatious and unreasonable based on the totality of the circumstances. *Cook*, 2014 IL App (1st) 123700, ¶ 49. In this case the plaintiff was unaware of where defendant garaged his vehicle when it rescinded the Policy. The record shows the issue of garaging had no bearing on plaintiff's decision to rescind the policy. Instead, plaintiff's claims manager, Torello, testified that his post-collision investigation revealed that three individuals had the Tyler Street address whereupon the underwriting department determined that if these individuals were part of the Tyler Street household there would have been an additional premium. Torello testified on that basis alone, plaintiff rescinded defendant's Policy. Therefore when plaintiff rescinded the Policy, the issue of the garaging could not have been the basis of a *bona fide* dispute about coverage nor

could it excuse plaintiff's actions in rescinding the Policy. Therefore the garaging issue is not relevant to the court's factual determination of whether plaintiff's conduct at the time it rescinded the Policy was vexatious and unreasonable.

¶ 54 Misrepresentation as to Listing of Household Members

¶ 55 We also reject plaintiff's contention that there was a *bona fide* dispute as to coverage because plaintiff believed defendant misrepresented the number of household members on his application. The trial court's finding that defendant made no omissions or misrepresentations on his application is supported by the evidence. Moreover, we find that the award of section 155 sanctions was justified by the evidence adduced at trial given the totality of the circumstances as considered by the trial court.

¶ 56 Plaintiff argues that the trial court found the term "household" in the application to be ambiguous. We disagree that such a finding was made by the trial court. As pointed out earlier, the trial court, on several occasions, noted the intentionally opaque nature of the application designed to insulate plaintiff from liability on policies which target vulnerable consumers.

¶ 57 The trial court found defendant accurately stated that he was the only member of his household on the application noting defendant's testimony which the court found credible. Specifically, the trial court discussed defendant's testimony that he lived by himself in the basement for the past ten to twelve years and identified pictures of the basement introduced into evidence showing concrete walls, a kitchen, a bathroom, a separate entrance with concrete steps going down, the door, and a lock. The trial court's finding that defendant was the only member of his household was not against the manifest weight of the evidence because we cannot say an opposite conclusion is evident. See *Buckner*, 311 Ill. App. 3d at 150 (findings of fact in a bench trial are subject to a manifest weight standard of review). Nevertheless, whether the term

'household' is ambiguous or whether the trial court believed the term to be ambiguous does not impact our analysis as to the appropriateness of section 155 sanctions.

¶ 58 We find that there is no merit to plaintiff's argument that its perceived misrepresentation on an application as to the members of defendant's household created a *bona fide* dispute as to coverage in this case such that section 155 sanctions would be improper. See *Statewide Insurance Co.*, 397 Ill. App. 3d at 426 (if a *bona fide* dispute as to coverage exists sanctions pursuant to section 155 of the Code are improper). This is because plaintiff, even if it believed there was a misrepresentation as to defendant's household members on the application, still could not have properly rescinded the Policy unless that misrepresentation also was intentionally deceptive or materially affected the acceptance of the risk or the hazard assumed by plaintiff. 215 ILCS 5/154 (West 2014). When plaintiff rescinded defendant's Policy it did not allege it was rescinded because defendant was intentionally deceptive. There is no evidence in the record that defendant was intentionally deceptive. Instead, plaintiff argued the alleged misrepresentation materially affected the acceptance of the risk or the hazard assumed by plaintiff. However, this was not the case and plaintiff was aware that no *bona fide* dispute as to coverage existed. Notwithstanding, plaintiff rescinded defendant's Policy.

¶ 59 The issue is plaintiff's rescission of defendant's Policy based on an alleged misstatement as to the members of defendant's household on his application and whether this perceived misstatement created a *bona fide* dispute as to coverage. While the trial court determined that defendant accurately listed the members of his household, even if defendant had not, the misstatement would have to be made with either (a) an intent to deceive or (b) the misstatement must materially affect the acceptance of risk before plaintiff could rescind the policy. *Golden Rule Insurance Co.*, 203 Ill. 2d at 464.

¶ 60 We consider a number of cases involving plaintiff, including *Direct Auto Insurance Co. v. Beltran* (2013 IL App (1st) 121128) which was decided prior to plaintiff's rescission of defendant's Policy. There the court held "an increase in premium, standing alone, without any actual evidence of an increased risk to the insurer, is insufficient to justify rescission of an automobile insurance policy under section 154 of the Code." *Direct Auto Insurance Co. v. Koziol*, 2018 IL App (1st) 171931, ¶ 46 (holding an insured's failure to disclose in an application his parent's car kept at his home address was not material so as to justify rescission of the policy where the inclusion of the omitted information would merely result in an increased premium); see also *Direct Auto Insurance Co. v. Sinclair*, 2018 IL App (1st) 172857-U (holding an insured's failure to disclose in an application a household resident over the age of 15 not involved in the incident giving rise to the claim with no evidence the individual drove the vehicle was not material so as to justify rescission of the policy where the inclusion of the omitted information would only result in an increased premium).

¶ 61 In *Beltran*, plaintiff, referred to as DAI, filed an action seeking declaratory judgment arguing that Beltran's automobile insurance policy with DAI was null and void, *ab initio*, and thus it had no obligation on the policy because Beltran made a material misrepresentation in her application for insurance submitted to DAI, through a broker. *Beltran*, 2013 IL App (1st) 121128, ¶¶ 5, 13. The insurance was for Beltran's 2006 Ford to be driven solely by her brother, Mario. *Id.* at ¶ 5. However, in response to the application's request for a list of known drivers in her household, only Beltran was named. *Id*. at ¶ 15. After the policy was issued, the Ford was in a collision while Mario was operating the vehicle. *Id.* ¶ 16. DAI sought to avoid obligation on the policy arguing that the omission of Mario's name as a driver of the Ford was a material misrepresentation allowing DAI to rescind the policy. *Id.* ¶ 13. The trial court granted summary judgment finding coverage. *Id*. ¶ 1. In affirming the trial court, this court discussed the two-

pronged test under section 154 of the Code whereby a misrepresentation allows rescission provided that the statement is false and the false statement was made with an intent to deceive or materially affected the acceptance of the risk or hazard assumed by the insurer. *Id.* ¶ 47. While noting the discrepancy within the application as to the drivers within the household, this court focused on the second prong determining that Beltran did not intend to deceive the insurance company. *Id.* ¶ 62. This court further determined that the misrepresentation did not materially affect the acceptance of risk or hazard assumed by the insurer. *Id.* The rational for this conclusion was that DAI would not have denied Beltran coverage had it been aware of the misrepresentation, but would only have required a higher premium. *Id.* ¶ 60. Additionally, where the number of drivers is accurately listed, risk relevant to the status, number, and character of the potential drivers in Beltran's residence was not material. *Id.* ¶ 62. Thus the misrepresentation as to the actual drivers in Beltran's household did not substantially increase the chances of the events insured against and rescission would be inappropriate. *Id.* ¶¶ 51-62.

¶ 62 In this case plaintiff alleged that failure to disclose all members of defendant's household resulted in increased risk to the insured. The evidence established that this would only have increased the premium that would be charged on the Policy. However, no notice of increased premium was sent to defendant before his Policy was rescinded. There is no evidence that defendant, when he filled out his application, intended to deceive the insured. Based on *Beltran* and section 154 of the Code, even if plaintiff believed there was a misrepresentation on defendant's application, the Policy could not be rescinded unless defendant intended to deceive or the misstatement materially affected the acceptance of the risk or hazard assumed by plaintiff. *Id.* ¶ 62; see also 215 ILCS 5/154 (West 2014). As noted above, Torello testified that he did not rescind the Policy because defendant intentionally deceived plaintiff on the application. Accordingly, to properly rescind, the misrepresentation had to materially affect the acceptance of

risk or hazard assumed by plaintiff and notice had to be sent to the defendant. *Id.*; see also Be*ltran*, 2013 IL App (1st) 121128, ¶62. However, *Beltran* is clear, evidence of an increased premium alone without any actual evidence of an increased risk to the insurer is insufficient to justify rescission of an automobile insurance policy under section 154 of the Code. *Id.* ¶¶ 51-62.

¶ 63 Here, the trial court made a determination that plaintiff's rescission of the Policy was vexatious and unreasonable. We will not reverse the trial court's decision unless it is against the manifest weight of the evidence. *Buckner*, 311 Ill. App. 3d at 150. A decision is against the manifest weight of evidence when the opposite conclusion is clearly evident. *Redmond*, 216 Ill. 3d at 651. Here we cannot say the trial court's decision was against the manifest weight of evidence nor do we find the trial court abused its discretion in awarding section 155 sanctions. *Charter Properties, Inc.*, 2018 IL App (2d) 170637, ¶ 33. The trial court abuses its discretion when it enters an order or makes a finding that no reasonable judge would make. *Cirrincione*, 352 Ill. App. 3d at 761. Looking at the totality of the circumstances and the law, we cannot say the trial court's finding that plaintiff's actions were "vexatious and unreasonable" was against the manifest weight of the evidence such that the opposite conclusion is clearly evident. Nor can we say that the trial court's award of section 155 sanctions was an abuse of discretion such that no reasonable judge would make the same finding.

¶ 64 CONCLUSION

¶ 65 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 66 Affirmed.