2016 IL App (1st) 153412-U

SIXTH DIVISION
September 30, 2016

No. 1-15-3412

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

AMERICAN ACCESS CASUALTY COMPANY, Plaintiff-Appellant, v. ANDREW FRANKLIN ABERNATHY; MISHA BAIR; and LIBERTY MUTUAL INSURANCE COMPANY, a/s/o PATRICIA LEWIS, Defendants-Appellees.	)))))))))))	Appeal from the Circuit Court of Cook County. No. 12 CH 32783 Honorable Rodolfo Garcia, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held*: We affirmed the circuit court's judgment against the insurer on its claim that its insured breached the assistance and cooperation clause of an automobile insurance policy by failing to appear at an arbitration hearing in the underlying suit.

¶ 2 Plaintiff, American Access Casualty Company (AACC), appeals the trial court's decision following a bench trial that AACC was obligated to provide coverage for a judgment that was entered in an underlying suit in favor of defendants, Misha Bair and Liberty Mutual Insurance Company (Liberty), and against its insured, defendant, Andrew Franklin-Abernathy (the

insured).[1] The underlying judgment was entered on an award of arbitrators after the insured failed to appear at the arbitration hearing and was barred from rejecting the award. AACC argues that the insured, by failing to appear at the arbitration hearing, breached the assistance and cooperation clause of its policy, which substantially prejudiced the defense of the underlying suit and, therefore, the trial court erred in not granting it declaratory relief. We affirm.

¶ 3 On July 16, 2010, at about 4 a.m., Ms. Bair, the driver of a Volkswagen Beetle (Volkswagen), was involved in a collision (the collision) with a Ford Explorer (the truck) driven by the insured. At that time, the Volkswagen was insured under a policy issued by Liberty, and the truck was insured under a policy issued by AACC (policy).

¶ 4 Thereafter, Ms. Bair filed a personal injury suit against the insured in the circuit court of Cook County, case number 11 M1 301492, in which the insured filed a counterclaim. Liberty filed a subrogation action against the insured, case number 11 M1 15947, in which AACC filed a counterclaim. The cases were consolidated (referred to as the municipal case).

¶ 5 During discovery in the municipal case, the parties disclosed Corey Haggard, and "Police Officer #3891—Chicago Police Department," as witnesses. The police report was produced during discovery, identified Mr. Haggard as a witness, and in the narrative section, stated that the insured "sped through the red light and struck [Ms. Bair's] vehicle." Pursuant to Illinois Supreme Court Rule 237(b) (Ill. S. Ct. R. 237(b) (eff. July 1, 2005)), Liberty issued a notice to the insured requesting his presence at trial. See Ill. S. Ct. R. 90(g) (eff. July 1, 2008)) (Rule 237 is "equally applicable to arbitration hearings as [it is] to trials.").

[1] The insured and Liberty have not participated in this appeal.

¶ 6 On November 30, 2011, the circuit court entered an order setting a discovery closure date of March 23, 2012, and assigned the municipal case to mandatory arbitration pursuant to Illinois Supreme Court Rule 89 (Ill. S. Ct. R. 89 (eff. Mar. 26, 1996)). A mandatory arbitration hearing was held on May 29, 2012.

¶ 7 A verified and signed statement of Mr. Haggard was presented at the arbitration hearing pursuant to Illinois Supreme Court Rule 90(c) (Ill. S. Ct. R. 90(c) (eff. July 1, 2008)), by both Ms. Bair and Liberty. The statement, which Mr. Haggard made on September 7, 2010, read: "I was facing in the same direction as the truck, and I saw him run the red light. The truck was going at least 40 m.p.h. when it entered the intersection. The truck entered the intersection against a solid red light. This was a very hard impact."

¶ 8 Liberty and Ms. Bair also presented the police report, records as to Ms. Bair's damages and medical treatment, and photographs of the condition of the Volkswagen after the collision, which showed significant damage to the front driver side of the Volkswagen. The insured, in his Rule 90(c) package, presented written evidence pertaining to the damages to the truck.

¶ 9 The unanimous award of the arbitrators provided:

> "Award in favor of [p]laintiff Misha Bair and against [d]efendant Andrew Franklin-Abernathy (case no. 11 M1 301492) in the amount of $18,000; award in favor of [p]laintiff Liberty Mutual a/s/o Patricia Lewis and against Andrew Franklin-Abernathy in the amount of $8,654.50 (case no. 11 M1 15947); and award in favor of Misha Bair and against [c]ounter [p]laintiff Andrew Franklin-Abernathy. Parties stipulated that [p]laintiff had 237 [n]otices for [the insured]. [The insured] did not appear in person."

¶ 10 Under Illinois Supreme Court Rule 93 (Ill. S. Ct. R. 93 (eff. Jan. 1, 1997)), the insured filed a notice of rejection of the award. Ms. Bair and Liberty each moved to bar the rejection for the insured's failure to appear at the arbitration hearing despite the Rule 237 notice. In response, the insured argued his attorney "attended and participated in the [arbitration] hearing by giving opening and closing statements and cross examining witnesses, and presenting evidence on [the insured's] Third Party claim against Misha Bair." On August 15, 2012, the circuit court granted the motion to bar the rejection and entered judgment on the award of the arbitrators (judgment).

¶ 11 On August 29, 2012, AACC filed its complaint in this suit against the insured, Ms. Bair, and Liberty seeking a declaration that it was not obligated to provide coverage for the judgment due to the insured's breach of the policy's assistance and cooperation clause as he failed to appear at the mandatory arbitration hearing. The policy was attached to the complaint and showed the insured's address as 2018 N. Milwaukee Avenue, Chicago, Illinois.

¶ 12 On October 30, 2014, AACC served requests to admit pursuant to Illinois Supreme Court Rule 216 (Ill. S. Ct. R. 216 (eff. July 1, 2014)), on Ms. Bair and Liberty. Those requests sought, for example, admissions that the insured had made various statements at his deposition in the municipal case including statements that he entered the intersection on a green light, and that Ms. Bair "disregarded a traffic control device." Ms. Bair, in her responses to the requests, objected in part that "[t]he giving of a deposition is not a 'specified relevant fact' as required for use of Rule 216." AACC moved to strike her objections and to deem the factual assertions admitted. The circuit court, on December 9, 2014, overruled certain of Ms. Bair's objections and directed her to file amended responses.

¶ 13 Ms. Bair subsequently filed amended responses to the requests to admit that were signed only by her attorney. Ms. Bair attached, as an exhibit to her amended responses, a one-page excerpt from the insured's deposition in the municipal case. The excerpt included the insured's deposition testimony that the light "was green turning to yellow" as he passed the crosswalk, and that he kept going because he "was already coasting." Then, he changed his testimony to: "when I was crossing the crosswalk it was green," but then, again, said the light was green "turning to yellow." The insured said he was "just coasting at 30 [m.p.h.]." The insured testified that he did not see Ms. Bair's Volkswagen prior to the impact.

¶ 14 On November 9, 2015, a bench trial was held on AACC's request for a declaration that the insured breached the assistance and cooperation clause.

¶ 15 Prior to the presentation of evidence, AACC maintained that Ms. Bair, by not signing her amended responses to the requests to admit, must be deemed to have admitted the factual matters set forth in the requests. The trial court remarked that the requests to admit statements made by the insured during his discovery deposition in the municipal case appeared unnecessary as the insured was present to testify at the trial. The court concluded that it would hear the evidence and decide the question at the end of the trial.

¶ 16 Richard Lionello, a litigation specialist at AACC, testified that AACC, pursuant to its obligation under the policy, asked attorney, Joseph Giamanco, of the law firm of Giamanco & Ooink (the firm), to represent the insured in the municipal case pursuant to the policy. After receiving communications from Mr. Giamanco about the progress of the municipal case, AACC, on March 2, 2012, sent a reservation of rights letter to the insured informing him that it would continue to provide a defense for the municipal case, but that there was "no guarantee of

coverage" because of his noncooperation with AACC and his counsel. The reservation of rights letter was mailed to the insured both to the Milwaukee Avenue address listed on the policy and to 3379 Flat Shoals Road, Decatur, Georgia.

¶ 17 After the arbitration hearing was set, AACC sent a letter dated May 22, 2012, to the insured at two different addresses: 7530 West 63rd Place, Summit, Illinois, and 1126 South Central Park Avenue, Chicago, Illinois. The letter informed the insured of the May 29, 2012, mandatory arbitration hearing date and advised him that, if he failed to appear, he would be in violation of the policy's assistance and cooperation clause. The letter addressed to the Summit address was returned to AACC after the arbitration had been held.

¶ 18 Mr. Lionello believed that there was a "liability defense" to the municipal case that was not presented at the arbitration hearing because of the insured's failure to appear.

¶ 19 On cross-examination, Mr. Lionello admitted that a skip trace had shown that, in December 2011, the insured was living in Georgia. On December 27, 2011, AACC received a request from the insured that all mail should be sent to him at the Milwaukee Avenue address listed on the policy. AACC did not send the May 22, 2012, letter informing the insured of the arbitration date to the Milwaukee address or to Georgia. On redirect examination, Mr. Lionello stated that AACC when sending the May 22, 2012, letter used a skip trace report to determine the insured's most "current" addresses. The report was not admitted into evidence.

¶ 20 The insured testified that he was involved in the collision with Ms. Bair which took place at a three-way stop or, "T" intersection, at Western Avenue and Marquette Street in Chicago. He did not recall the date of the collision. The intersection was controlled by a traffic light. The insured described what happened as follows:

"Q. And what direction were you travelling?

A. Southbound [on Western Avenue].

***

Q. And what direction was the other vehicle on -- what -- excuse me, what road was the other vehicle on?

A. Well, on Marquette, heading eastbound but waiting at the light.

Q. Okay. And did you see the vehicle stopped at the light?

A. The vehicle was already stopped when I was entering the intersection. By the time I got to the side where she [was] going eastbound, by the time I got right there, the car took off right as I was leaving the intersection.

Q. When you entered -- is the intersection, are there white lines in the intersection where there possibly is a crosswalk --

A. Yes.

Q. -- for you to stop?

A. Yes.

Q. Okay. When you crossed over the white line heading towards the light, which would have been right directly underneath the light --

A. It was green. It was turning yellow when I was right going in the exact middle of it.

Q. Okay. So when you hit the white line, it was green?

A. Yes.

Q. And then it turned yellow --

A. Yes.

Q. -- as your car was in the intersection --

A. Yes.

***

Q. And then what did [Ms.] Bair's car do?

A. Take off.

Q. And what happened?

A. Because as the light was changing, I guess that light's going to eventually turn green in moments, and it took off and hit my front end."

¶ 21 The insured moved to Georgia in 2010 and returned to Illinois to live in late 2013, or 2014. Specifically, during 2012, the insured was residing in Georgia, was incarcerated for a time in that state for a traffic matter, and did not reside in Illinois. He did not recall receiving any mail from the firm, but did remember getting mail of some type from AACC. In 2012, the insured did not check his email address: AFranklin0224@yahoo.com; had stopped using that email address because it had been hacked "a long time ago;" and had another email address. The insured specifically denied receiving any letter sent by the firm to the Central Park Avenue address in Chicago and stated that he had never stayed at that address. He did live at the Flat Shoals Road, Georgia address for two to three years before returning to Illinois.

¶ 22 Mr. Giamanco testified that, initially, he had difficulties locating the insured and had done a "couple of" skip traces. The insured had given him a Yahoo email address: AFranklin0224@yahoo.com. The firm spoke to the insured before his deposition in the municipal case and "confirmed [his] contact information." At his deposition in April 2012, the

insured signed answers to interrogatories and requests for document production. The firm had prepared the answers. In an answer to interrogatories, the insured's home address was listed as the Central Park Avenue address in Chicago.

¶ 23 Mr. Giamanco testified that, while at the insured's deposition on April 24, 2012, he told the insured it was important that he stay in contact, as an arbitration hearing date would soon be set. At that time, the insured again confirmed his email address, home address, and telephone number. According to Mr. Giamanco, the insured said that the Summit address "was some kind of family residence," and the "best address to deliver mail" because "he moves around."

¶ 24 After learning that the arbitration had been set for May 29, 2012, "[s]omeone" from the firm reached the insured by telephone on May 1, 2012, told him about the date and confirmed that he would attend the arbitration hearing. Mr. Giamanco had no recollection as to who may have called the insured. Mr. Giamanco testified that, on May 1, 2012, the firm also sent the insured a letter concerning the arbitration hearing by email to the Yahoo address and by regular mail to both the Summit and the Central Park addresses. The letter to the Summit address was later returned as undeliverable. The body of the letter erroneously stated that the arbitration hearing was May 25, 2012, but the May 29 date was also included in the subject line of the letter. The firm contacted the insured by telephone on May 22 to confirm that he would attend the arbitration hearing. During that phone call, the insured said that he had received the email about the arbitration hearing. Mr. Giamanco did not identify who had spoken to the insured.

¶ 25 During the pendency of the municipal case proceedings, the insured told Mr. Giamanco that he approached the intersection on a green light, "at the time of collision his light was yellow, and Misha Bair had run the red light coming from a different location." This evidence was not

presented at the arbitration hearing and the rejection of the award was barred because the insured had failed to appear. On May 29, 2012, after the arbitration hearing, the firm sent a letter to the Central Park and Summit addresses seeking to determine the reasons for his failure to appear at the arbitration hearing. There was no evidence presented as to whether the insured received or responded to this letter.

¶ 26 On cross-examination, Mr. Giamanco admitted that, in December 2011, the firm was aware that the insured was living in Decatur, Georgia. In fact, on March 22, 2012, the firm sent a letter by certified mail to the insured to 3379 Flat Shoals Road, Decatur, Georgia and he signed for the letter at the time of its delivery. The firm did not send the May 1, 2012, letter informing the insured of the arbitration hearing date to that Georgia address. Because of the difficulties in reaching the insured, Mr. Giamanco had considered the possibility of seeking leave of court for the insured to appear by telephone at the arbitration hearing but did not do so. Mr. Giamanco believed the insured would not cooperate in providing an affidavit in support of such a request. Mr. Giamanco acknowledged that the insured testified at his deposition that he did not observe the Volkswagen prior to the impact.

¶ 27 AACC recalled the insured as a witness. When shown the answers to interrogatories in the municipal case, he reiterated that he never "stayed or lived" at the Central Park address. He did not recall whether he gave the Central Park Avenue address as his residence at his deposition. The insured acknowledged that at times he "was receiving mail" at the Summit address because his family stayed there.

¶ 28 At the close of the evidence, the trial court denied AACC its requested declaratory relief, finding there was "[a] lack of diligence as well as [a] lack of any real prejudice." After ruling on

the merits, the trial court rejected AACC's request to deem admitted the factual assertions set forth in its requests to admit. AACC now appeals.

¶ 29 On appeal, AACC argues that the trial court erred in not granting it declaratory relief as it had established both that the insured breached the assistance and cooperation clause by failing to appear at the arbitration hearing, and that the breach prejudiced AACC.

¶ 30 The policy contains the following provision:

> "**Assistance and Cooperation of the Insured**. The insured shall cooperate with the Company and, upon the Company's request or through attorneys selected by the Company to represent the insured must:
>
> (a) attend hearings and trials as the Company requires;
>
> (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;
>
> * * *
>
> The Company has no duty to provide coverage under this policy unless there has been full compliance with these responsibilities." (Bolded text in original.)

¶ 31 We have recognized that an assistance and cooperation provision "'enables an insurer to prepare its defense to a loss claim and prevents collusion between the insured and injured party.'" *United Automobile Insurance Co. v. Buckley*, 2011 IL App (1st) 103666, ¶ 26 (quoting *Founders Insurance Co. v. Shaikh*, 405 Ill. App. 3d 367, 374 (2010)). When an insurer raises a claim that the insured has breached this provision, " 'the burden of proof is upon the insurer to prove what

in law constitutes the breach.' " *Id*. (quoting *M.F.A. Mutual Insurance Co. v. Cheek*, 66 Ill. 2d 492, 496 (1977)).

¶ 32 To establish the breach, " 'the insurer must show that it exercised a reasonable degree of diligence in seeking the insured's participation and that the insured's absence was due to a refusal to cooperate.' " *Id*. ¶ 27 (quoting *Shaikh*, 405 Ill. App. 3d at 374). The insurer must also show that the insured's refusal to cooperate was wilful. *Id*. (citing *Mazzuca v. Eatmon*, 45 Ill. App. 3d 929, 933 (1977)). These determinations are made based on an examination of the particular facts of the case and must be supported by a preponderance of the evidence. *Id.*

¶ 33 Further, the insurer must prove that it was " 'substantially prejudiced by the insured's actions or conduct in regard to its investigation or presentation or defense of the case.' " *Id*. ¶ 28 (quoting *Shaikh*, 405 Ill. App. 3d at 375). To meet its burden of proving substantial prejudice, "the insurer has the burden 'to demonstrate that it was actually hampered in its defense by the violation of the cooperation clause.' " *Id*. (quoting *M.F.A.*, 66 Ill. 2d at 500). A presumption of prejudice does not exist where a claim of a breach of the assistance and cooperation clause has been made. *Id*.

¶ 34 After a bench trial, " 'we defer to the trial court's factual findings unless they are contrary to the manifest weight of the evidence.' " *Staes and Scallan, P.C. v. Orlich*, 2012 Il App (1st) 112974, ¶ 35 (quoting *Nokomis Quarry Co. v. Dietl*, 333 Ill. App. 3d 480, 484 (2002)). See also *1350 Lake Shore Associates v. Mazur-Berg*, 339 Ill. App. 3d 618, 628 (2003). Our review requires that "we give great deference to the [trial] court's credibility determinations 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.' " *Orlich* (quoting *Samour, Inc.*

v. Board of Election Commissioners, 224 Ill. 2d 530, 548 (2007)). A finding of fact will not be overturned unless " 'the opposite conclusion is clearly evident or the finding is arbitrary, unreasonable, or not based in evidence.' " *Id*. (quoting *Samour, Inc.*, 224 Ill. 2d at 544)).

¶ 35 AACC identifies the insured's failure to appear at the arbitration hearing as his breach of the assistance and cooperation clause. Therefore, the issues presented are: (1) whether AACC exercised reasonable diligence to secure the insured's attendance at the arbitration hearing and his failure to appear constituted a wilful refusal to cooperate; and (2) if there was a breach of the assistance and cooperation clause, whether AACC was substantially prejudiced by the failure to appear at the arbitration hearing "to justify the extinguishment of its responsibilities under the policy." *Buckley*, 2011 IL App (1st) 103666, ¶29,

¶ 36 AACC was required to show, by a preponderance of the evidence, that it exercised "a reasonable degree of diligence in seeking the insured's participation," (*American Access Casualty Co. v. Alassouli*, 2015 IL App (1st) 141413, ¶ 25), and that it acted "in good faith to secure the insured's cooperation." *Id*. Upon review of the evidence as a whole, we find that the trial court's decision that diligence was not established was not against the manifest weight of the evidence.

¶ 37 At the time the arbitration hearing was scheduled, the insured testified that he was living in Georgia. AACC and the firm sent him notice of the arbitration hearing by email to his Yahoo email address and by regular mail to the Summit and the Central Park addresses in Illinois. Notice of the arbitration date was not sent to the address on the policy, the address to which the insured requested AACC send his mail in December 2011, or to the Decatur, Georgia address where the insured testified he lived in 2012 and where the evidence showed the firm had previously been successful in sending him mail.

¶ 38 Although Mr. Giamanco testified that the insured told someone in the firm on the phone that he had received the email about the arbitration, the insured testified that he was not using or checking his Yahoo email address at that time. The letters to the Summit address were returned to AACC and the firm as undeliverable after the hearing. The insured said he never lived or stayed at the Central Park address but his signed answers to interrogatories listed that address as his home. The discovery answers were prepared by the firm. The body of the May 1 letter from the firm included an incorrect date for the arbitration hearing.

¶ 39 Mr. Giamanco testified that the firm spoke to the insured by phone and confirmed that he would attend the arbitration hearing. However Mr. Giamanco did not identify the individual who spoke to the insured.

¶ 40 The evidence as to diligence was contradictory and inconclusive. We also note that Mr. Giamanco did not seek leave of court for the insured to appear at the arbitration by phone having concluded, without attempting to do so, that he would be unsuccessful in obtaining the necessary affidavit from the insured. We are not convinced that the trial court's finding, that there was a lack of diligence, is "arbitrary, unreasonable, or not based in evidence" or that the opposite conclusion is clearly evident. *Orlich*, 2012 IL App (1st) 112974, ¶ 35.

¶ 41 Moreover, even if AACC had established that it exercised diligence in its efforts to assure that the insured attended the arbitration hearing, we conclude that AACC did not prove willfulness on his part. There was no evidence presented as to the reasons or motivation for the insured's nonattendance, or that the insured had knowledge of or fully understood his responsibilities under the assistance and cooperation clause. The insured had cooperated with the defense of the municipal case by traveling to Illinois to attend his deposition in April 2012,

and by signing the answers to interrogatories and document production at that time. Even if AACC acted diligently, and assuming the insured had notice of the arbitration date, AACC did not prove, by a preponderance of the evidence, that his failure to return to Illinois in May 2012 one month later was done in willful violation of the assistance and cooperation clause.

¶ 42 Finally, AACC was required to prove that the alleged breach of the assistance and cooperation clause caused it substantial prejudice or actually hampered its defense. *Alassouli*, 2015 IL App (1st) 141413, ¶ 39. AACC contends that it was hampered in its defense as to liability because the insured was not present to give his version of the collision at the arbitration hearing. AACC does not argue that it was harmed in its defense as to the damages claims. The insured was represented at the arbitration hearing by counsel who presented arguments and cross examined the witnesses.

¶ 43 The collision occurred at a three-way intersection controlled by a traffic control device. Ms. Bair had denied that she was negligent as claimed by the insured and AACC and appeared in person at the arbitration hearing. At the arbitration hearing, she also presented photographs showing the significant damage to the front driver side of her Volkswagen as a result of the collision and the sworn statement of the independent eyewitness. That statement revealed that the insured travelled through the intersection at a speed of *at least* 40 m.p.h. and went through a "solid" red light. The eyewitness described the impact as "very hard."

¶ 44 The insured testified at the trial in this case that, as he entered the intersection, Ms. Bair was stopped at a red light facing east. He said that, at the time he passed the crosswalk line, his light for southbound traffic was green, but then testified that it had turned yellow. The insured said that Ms. Bair "took off," and stated "the light was changing." The insured's testimony was

contrary to the statement of the neutral witness as to the color of the insured's light when he entered the intersection. Further, the insured's testimony at his discovery deposition, that he did not see Ms. Bair's Volkswagen prior to the collision, was contrary to his trial testimony that, as he entered the intersection, Ms. Bair was stopped at her light. Therefore, if the insured had testified at the arbitration hearing, and that testimony was consistent with his trial testimony in this case, that testimony would have been contrary to, not only Ms. Bair's position but, also, that of the independent witness, and would have been subject to impeachment by his own deposition testimony. Therefore, it is not likely that the award as to liability would have been different if the insured had appeared at the arbitration hearing. The trial court's finding that AACC failed to establish substantial prejudice by the insured's failure to appear at the arbitration hearing was not against the manifest weight of the evidence.

¶ 45 AACC argues that, because Ms. Bair did not verify her amended responses, the factual assertions set forth in its Rule 216 requests should have been deemed admitted at trial. AACC argues that those admissions would have supported its claim that the insured breached the assistance and cooperation clause and that it was substantially prejudiced.

¶ 46 Rule 216(a) allows a party to serve another party with a written request for the admission "of the truth of any specified relevant fact set forth in the request." Ill. S. Ct. R. 216(a) (eff. July 1, 2014)). A party responding to a request to admit must provide, within 28 days of service "(1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why the party cannot truthfully admit or deny those matters or (2) written objections." Ill. S. Ct. R. 216(c) (eff. July 1, 2014)).

¶ 47 Ms. Bair's failure to sign and verify the amended responses violated Rule 216(c) and such violation may result in the admission of those facts which cannot be disputed later. *Robertson v. Sky Chefs, Inc.*, 344 Ill. App. 3d 196, 199 (2003). However, AACC had a duty to raise its objection to the amended responses to the requests to admit with "prompt notice and motion." Ill. S. Ct. R. 216(c) (eff. July 1, 2014)). Instead, AACC raised its objections orally on the day of the trial and without notice. For this reason, we would find the trial court did not err in denying AACC's tardy objection to the amended responses. See *La Salle National Bank of Chicago v. Akande*, 235 Ill. App. 3d 53, 67 (1992) (where court noted that party objecting to defective response to request to admit "had a concomitant duty to raise the issue of the objection in a motion before the trial court pursuant to the provision of Rule 216(c)").

¶ 48 Even if the trial court erred in denying AACC's tardy request to deem facts admitted, we disagree that the admission of the factual matters set forth in the Rule 216 requests would have changed the outcome of this case or our decision to affirm the trial court's order. The factual assertions set forth in the requests to admit are as follows. The insured was covered by the policy on the date of the collision. The collision involved the Volkswagen and occurred at a three-way intersection with a traffic light. The insured gave a deposition where he testified that his light was green when he entered the intersection and Ms. Bair "disregarded a traffic control device immediately prior to the time of the [collision]." The firm represented the insured in the municipal case. An arbitration hearing was held on May 29, 2012. The firm notified the insured of the arbitration by calling him on May 1 and May 22, 2012, and he confirmed that he would be there. The firm sent letters and emails to the insured and left him a voice message on May 17, 2012 "regarding the arbitration." The insured failed to appear at the arbitration hearing, an award

was entered against him, and he was barred from rejecting the award. These admissions are duplicative or cumulative of the evidence and testimony at trial, and do not require a finding that the trial court's decision was against the manifest weight of the evidence.

¶ 49 For the reasons stated above, we affirm the decision of the trial court denying the requested declaratory relief as AACC did not establish a breach of the cooperation and assistance clause or substantial prejudice.

¶ 50 Affirmed.