2017 IL App (1st) 163302-U
No. 1-16-3302
Order filed December 19, 2017
Second Division

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 DISTRICT

DIRECT AUTO INSURANCE COMPANY,	)	Appeal from the Circuit Court of Cook County.
Defendant and Counterplaintiff-Appellant,	)	
v.	)	No. 13 MI 20296
ROBERT GREGORY,	)	The Honorable Kathleen G. Kennedy, Judge, presiding.
Plaintiff and Counterdefendant-Appellee.	)	

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Neville and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 *Held*: Section 155 award for fees and costs proper where insurer's denial of theft coverage under insurance policy was vexatious and unreasonable 215 ILCS 5/155 (West 2012); insurer did not establish a *bona fide* coverage dispute that would vitiate the section 155 award.

¶ 2 In 2006, Robert Gregory bought a new Dodge Charger and insured it through Direct Auto Insurance Company. Six years later, the car was stolen while parked in front of Gregory's apartment. Gregory submitted a theft claim to Direct, which Direct denied. Gregory sued for

damages and Direct counterclaimed, seeking rescission of the policy. After a bench trial, the trial court ruled in Gregory's favor and awarded him attorney's fees and costs under section 155 of the Insurance Code. 215 ILCS 5/155 (West 2012), for a total of $87,160.

¶ 3 The trial court properly found that Direct's denial of coverage was against the manifest weight of the evidence and Direct failed to demonstrate a *bona fide* coverage dispute that would vitiate the section 155 award. We affirm.

¶ 4 Background

¶ 5 In 2006, plaintiff and counter-defendant Robert Gregory insured his newly purchased Dodge Charger with defendant and counter-plaintiff Direct Auto Insurance Company through Illinois Insurance Center (IIC), an independent insurance producer. After someone stole the car in 2012, Gregory submitted a theft claim to Direct. The claim was denied, and Gregory sued Direct. Asserting Gregory made a material misrepresentation on his insurance application (failure to disclose a previous car theft), Direct countersued to rescind the policy. Gregory amended his complaint, seeking damages under section 155 of the Insurance Code.

¶ 6 In discovery, Direct produced two letters dated March 12, 2013. The first was signed by Rosa Miranda and addressed to "Illinois Insurance Center" at Gregory's address; the second was signed by Mike Torello and addressed to "Robert Gregory Jr." at Gregory's address. Both letters declared the position of Direct was that the policy was "null and void from inception" due to a material misrepresentation on the policy application. Miranda's letter stated "the insured misrepresented her address on her application [*sic*]" and then stated "the insured signed an application stating" that he had not had an automobile stolen, while Torello's letter stated the misrepresentation was that Gregory "failed to disclose all household residents."

¶ 7 At trial, the parties stipulated that (i) Gregory insured his car with Direct, including coverage for theft; (ii) the car's value was $11,100, after applying the $500 deductible amount; (iii) the insurance was issued in 2006 on a "point of sale" basis by IIC, who had been given binding authority from Direct; (iv) IIC provided Direct an application marking an "X" in the box for "No" in response to Question No. 2, "Has applicant or any operator had an automobile stolen?"; (v) Gregory had a car stolen in 1996; and (vi) Direct denied Gregory's claim for the loss and was seeking a judicial declaration of rescission based on the incorrect answer.

¶ 8 Direct's underwriting manager, Rosalba Miranda, testified that IIC, one of the company's agents, had binding authority and could issue a policy online without any waiting period after the customer answers a series of questions—referred to as a "point of sale" purchase. She reviewed applications and processed incoming business from the company's agents, including IIC. Miranda had authority to make underwriting and rescission decisions and Michael Torello, claims manager for Direct, decided claims.

¶ 9 Direct used a 36-month rating period to look at any violations and determine risk. Anything occurring before 36 months was not rated and did not affect the premium. Miranda's review of Gregory's information disclosed several "at-fault" accidents and traffic citations. Gregory's 2009 at-fault accident was within the 36-month period and caused an increase in his premiums. According to Miranda, the accident could have been the basis for rescinding the policy, but Direct "chose not to."

¶ 10 Miranda testified that a Dodge Charger was "high risk" for theft (this testimony was heard subject to Gregory's objections based on hearsay, discovery violations, lack of expert qualifications, and lack of foundation; the trial court never ruled on the objections). Direct would decline to insure anyone with a "high risk" vehicle and a previous auto theft. Miranda stated an

undisclosed theft could serve as the basis for rescission, even if it happened 30 years before. At the same time, Direct's underwriting manual did not list as an "unacceptable" risk previous auto thefts, and Miranda had no personal knowledge of a correlation between a theft and the likelihood of a later theft or offer any statistical support.

¶ 11 Miranda did not remember the March 12, 2013 letter she "issued" from Direct Auto to IIC rescinding Gregory's policy. Direct had no proof that the letter was mailed. The letter referenced Gregory's policy number as well as references to "her" address and "her" signed application, which Miranda claimed to be mistakes. Also, Direct had no insurance application signed by Gregory in its files, and Miranda stated that IIC, as agent, was expected to retain the signed application. Miranda's letter also referenced a letter from Mike Torello's March 12 letter "that was mailed to the insured," giving a different reason for the rescission.

¶ 12 Direct's claims adjuster Rich Grabowski testified that Direct's claims practice involved asking an insured a standard set of questions and the adjuster filled out the form. Included was "Have you ever had a car stolen," which was answered "yes" with "1996" in brackets. Gregory told Grabowski that his mother owned that car and Gregory co-signed for it. Grabowski told Gregory that Direct was denying his claim because of the previously undisclosed stolen car. On February 7, 2013, Grabowski informed Gregory via a letter that Direct was denying the claim because Gregory "failed to disclose pertinent information" on his application. The letter provided no specifics regarding the "pertinent information." Grabowski did not recall telling Gregory, "Send me $11,000 and we'll pay your $11,000 claim" and claimed he "wouldn't say something like that."

¶ 13 Direct's claims manager, Michael Torello, testified he was not an underwriter, but the multiple tickets and accidents on Gregory's record from as early as 1999 were not sufficiently

serious or material to decline coverage. The February 7, 2013 letter from Grabowski to Gregory was not a rescission letter, and Torello made the decision to rescind Gregory's policy. On March 12, 2013, Torello sent Gregory a form letter rescinding the policy for failure to disclose all the household residents in the application. Torello said the letter, for which Direct had no proof of mailing, was mistaken as it failed to mention the nondisclosure of the theft as a reason for the rescission.

¶ 14 In an affidavit filed March 31, 2016, Torello stated he was the claims manager for Direct "and [had] co-management responsibilities over [Direct's] underwriting department." According to Torello, Direct had no proof of mailing for the March 12, 2013 letter because it was not sent via certified mail. Further, Direct did not computerize its files and lacked the resources to search manually for an application that was denied based on a prior theft.

¶ 15 The president of IIC, Thomas Uebele, testified as an adverse witness. Uebele stated that neither the cancellation notice nor the March 12, 2013 letter from Miranda to IIC were in his file. Nor was IIC aware that the Direct policy had been rescinded until March 2014. In April 2014, IIC refunded Gregory's premiums plus interest. Uebele's records from March 2013 did not include any activity for Gregory.

¶ 16 Gregory testified that he lived in a basement apartment in a building in which his mother and stepfather lived in an upstairs apartment. When he bought the Dodge Charger in 2006, the dealer called the insurance company to obtain insurance. Gregory did not speak to IIC and he was not asked whether he had ever had a car stolen. Gregory did not fill out a written application and received his insurance card in the mail. Gregory never received a cancellation or rescission letter.

¶ 17 Gregory called Direct to submit a claim the day he discovered his car was stolen. He spoke to Grabowski, and Grabowski asked whether he had ever had a car stolen. Gregory told Grabowski that he had in 1996. After this call, Gregory heard nothing from Direct. About two weeks later, he called Grabowski, who suggested the loss should be handled by the company whose alarm system had been installed in the car. Gregory received a letter from Grabowski, dated February 7, 2013, stating Gregory "failed to disclose pertinent information" on his application. Gregory called Grabowski again. Grabowski told Gregory that Direct was denying the claim and mentioned the previous car theft and that Gregory's mother and stepfather lived upstairs. Grabowski was "very rude" and told Gregory that Direct would pay the $11,000 claim if Gregory sent them $11,000. Grabowski did not tell Gregory the policy was being rescinded or mention a refund of the premiums. Gregory did not receive any further letters from Direct.

¶ 18 The trial court found Gregory's testimony "entirely credible." Without ruling on the objections to Miranda's testimony, the trial court gave it little weight due to a lack of any supporting documents, including underwriting standards relating to auto theft claims, losses related to such claims, or classification of high risk vehicles. The trial court also found that based on his demeanor, Grabowski was "for the most part" not credible.

¶ 19 The trial court found no *bona fide* coverage dispute to protect Direct from section 155 liability. Direct's attitude was "irritating, exasperating, and provoking," and the staff was unhelpful and rude to Gregory. The trial court also found Grabowski attempted to dissuade Gregory from filing a claim, trying to place responsibility for the loss on the alarm company.

¶ 20 Gregory was awarded actual damages of $11,100. Applying section 155, the trial court concluded Direct's actions were vexatious and unreasonable and imposed a statutory penalty of $6,600 under section 155; prejudgment interest of $2,190; and $67,270 in attorney's fees.

¶ 21 Analysis

¶ 22 Alleged Misrepresentations

¶ 23 A misrepresentation can be the basis to void a policy; however, under Section 154 of the Illinois Insurance Code, no misrepresentation made by the insured in the negotiation for an insurance policy "shall defeat or avoid the policy" unless the misrepresentation appears in the policy and was "made with actual intent to deceive or materially affects either the acceptance of the risk or the hazard assumed by the company." 215 ILCS 5/154 (West 2012). *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 464 (2003) (two-pronged test for voiding policy). *Id.*

¶ 24 In an application for insurance, a misrepresentation is "a statement of something as a fact which is untrue and *affects the risk taken by the insurer*." (Emphasis in original) *Direct Auto Insurance Co. v. Beltran*, 2013 IL App (1st) 121128, ¶ 47 (quoting *Northern Life Insurance Co. v. Ippolito Real Estate Partnership*, 234 Ill. App. 3d 792, 801 (1992)). We determine materiality of an insured's statements "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*." (Emphasis in original.) *Id.* The party raising the misrepresentation has the burden of proving the misrepresentation was made with actual intent to deceive, or that it was material to the hazard assumed or to the acceptance of the risk. *Crest v. State Farm Mutual Automobile Insurance Co.*, 20 Ill. App. 3d 382, 385 (1974).

¶ 25 Direct claims that the trial court erred in finding Direct breached the insurance contract, rejecting the testimony of Direct's employees and finding Gregory's failure to disclose the previous car theft was immaterial. The materiality of a misrepresentation ordinarily presents a fact question. *Fitzgerald v. MFA Mutual Insurance Co.*, 134 Ill. App. 3d 1007, 1010 (1985). The

trial court's findings of fact will not be reversed unless the judgment is against the manifest weight of the evidence, that is, an opposite conclusion is apparent or findings appear to be unreasonable, arbitrary, or not based on evidence. *Staes and Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35 (reviewing court defers to trial court's findings of fact in bench trial unless contrary to manifest weight of evidence).

¶ 26 Direct increased Gregory's premium in July 2012 when Direct discovered an at-fault accident and traffic ticket from 2009. Direct's attempt to rescind came only after Gregory submitted the theft claim in December 2012, Direct denied the claim, and Gregory sued Direct. Then, Direct counterclaimed, attempting to rescind. Direct contends that it would not have issued the policy as written both because of the risk of theft associated with Dodge Chargers and the previous auto theft.

¶ 27 The trial court found Gregory's testimony credible. See *Golden Rule Insurance Co.*, 203 Ill. 2d at 467. While discussing the claim with Grabowski, Gregory told him about the 16-year-old auto theft. Gregory testified that the car belonged to his mother, although he was a co-signor. Direct did not prove that Gregory was ever asked about prior thefts, or that he lied. Gregory testified he never saw or signed an application for insurance and no signed application was produced at trial. Hence, Direct's attempt to characterize as a misrepresentation the checked box on the application generated by IIC does not have merit. Also, none of the multiple witnesses established an intent to deceive on Gregory's part. See *Farmers Automobile Insurance Ass'n v. Pursley*, 130 Ill. App. 2d 980, (1971) (under statute, application must be made part of policy to form basis for claim of fraud).

¶ 28 Gregory lived in an apartment that was separate from his parents' apartment upstairs, with his own entrance and utilities. Gregory testified that he never received the March 12, 2013

letters, and Direct had no proof of mailing them to Gregory. Moreover, Gregory purchased insurance for six years from Direct, supplying his address and other required information.

¶ 29 Direct relies on *Styzinski v. United Security Life Insurance Co. of Illinois*, 332 Ill. App. 3d 417 (2002), where the insured's material misrepresentation on his application denying motorcycle usage warranted rescission of the medical insurance policy. But *Styzinski* is inapposite. The written application asked about the applicant's use of motorcycles "in the last two years" and the plaintiff answered "no." *Id.* at 419. Had the applicant answered "yes" on the insurance application, the insurer would have asked follow-up questions and issued an elimination endorsement excluding coverage for motorcycle injuries. *Id.* The plaintiff at his deposition "unambiguously established that he did operate a motorcycle during that time period and thus established that there was no genuine issue of fact regarding whether his 'no' answer was a misrepresentation." *Id.* at 423.

¶ 30 Unlike in *Styzinski*, Gregory testified he never saw or signed a written application and neither IIC nor Direct produced one. The stipulation regarding a computer printout generated after Gregory submitted his theft claim did not establish that Gregory misrepresented the 1996 theft. The assertion that a 16-year-old car theft sufficed to establish a material misrepresentation comes solely on Miranda's testimony, which is contradicted by Direct's underwriting guidelines. In any event, the trial court determined that Miranda's testimony was not credible.

¶ 31 Finally, Gregory and Direct agree that the trial court misstated the evidence when it found Direct "knew or should have known" about the undisclosed 1996 theft since July 2012 when it ran the motor vehicle report. The report showed the 2009 accident, nothing about the 1996 theft. Direct argues that the trial court's misstatement was not harmless and compounded other errors. We conclude that the trial court's misstatement was not determinative or especially

relevant to the ultimate ruling based on the fact that the evidence shows that the 1996 theft had nothing to do with Direct issuing the policy to Gregory, nor, in light of the evidence adduced at trial, a mere pretext for denying the claim. Further, Direct characterizes Miranda's testimony as "unrebutted." Whether "unrebutted" or not, the trial court found her testimony lacks credibility.

¶ 32 The trial court properly held that no *bona fide* dispute existed. At every turn, Direct resisted paying Gregory's claim. In the initial conversation with Grabowski, Gregory answered all questions, but Direct changed its stance on the reason for denying the claim. At trial Direct produced a letter signed by Miranda, cancelling the policy effective June 27, 2012. That letter stated Gregory signed an application with a "material misrepresentation" regarding a stolen car. Gregory never received a copy of the letter. Direct produced another letter from claims manager Torello stating the policy was rescinded because Gregory "failed to disclose all household residents." Gregory never received this letter either and Direct had no proof of mailing it. We affirm.

¶ 33 Section 155

¶ 34 Section 155 of the Illinois Insurance Code is the legislature's remedy for an insured "who encounters unnecessary difficulties when an insurer withholds policy benefits." *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 468 (2003). Direct argues there was a *bona fide* coverage dispute which should have precluded the trial court from finding a violation of section 155 and awarding attorney's fees and costs to Gregory.

¶ 35 Section 155 provides "an extracontractual remedy to policyholders" (*Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 520 (1996)) in actions by or against a company raising issues involving the liability of the insurer, the amount of the loss, or a delay in settling.

215 ILCS 5/155 (West 2012). Attorney's fees and "other costs" may be awarded to the insured-plaintiff if "it appears to the court that such action or delay is vexatious and unreasonable." 215 ILCS 5/155 (West 2012); *Employers Insurance of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 159-61 (1999). An insurer's delay in settling the claim does not necessarily violate section 155. *Mobil Oil Corp. v. Maryland Casualty Co.*, 288 Ill. App. 3d 743, 752 (1997). This Section does not apply where there is a *bona fide* dispute about coverage. *Morris v. Auto-Owners Insurance Co*., 239 Ill. App. 3d 500 (1993).

¶ 36 Generally, this court applies an abuse of discretion standard in reviewing a decision to award attorney's fees and costs under section 155. *Illinois Founders Insurance Co. v. Williams*, 2015 IL App (1st) 122481, ¶ 29. Under Illinois law, wrongful denial of coverage, without more, is insufficient to allow an insured to recover attorney's fees and statutory penalty. See *Matsushita Electric Corporation of America and Home Indemnity Co.*, 907 F.Supp 1193, 1200 (N.D. Ill. 1995). At minimum, there must be "some evidence" that denial of coverage was unreasonable and vexatious. *Id*.

¶ 37 The trial judge determines what constitutes vexatious and unreasonable refusal under the statute. *Richardson v. Illinois Power Co.*, 217 Ill. App. 3d 708, 711 (1991). The trial court considers the totality of the circumstances, including "the insurer's attitude." *Area Erectors, Inc. v. Travelers Property Casualty Co. of America*, 2012 IL App (1st) 111764, ¶ 33 (quoting *Statewide Insurance Co. v. Houston General Insurance Co.*, 397 Ill. App. 3d 410, 426 (2009). Other factors include whether the insured was forced to file suit to recover, and whether an insured was deprived of the use of its property. *Mobil Oil Corp.*, 288 Ill. App. 3d at 752. All of these factors are present.

¶ 38 Direct argues that simply denying a claim, even if that denial is wrongful, is not "in, and of, itself" vexatious and unreasonable conduct, citing *Morris v. Auto-Owners Insurance Co.*, 239 Ill. App. 3d 500 (insurer's denial of fire loss claim was not vexatious in light of evidence establishing incendiarism, financial motive, and access), Direct further claims the trial court erred in finding Direct acted vexatious and unreasonable where Gregory admitted to having a previous car theft. We find this case does not support Direct's contention.

¶ 39 First, in *Morris*, unlike here, the totality of the circumstances indicated that the insurance company was correct in its reasons for refusing to pay the claim. Here, however, the totality of the circumstances established that (i) when Gregory purchased the insurance, he was asked about accidents and tickets on his driving record, but not about thefts; (ii) Gregory did not fill out a written application; (iii) Gregory received an insurance card in the mail; (iv) until 2012, Direct collected premiums from Gregory, and in 2012 increased his premium to adjust for the additional risk after discovering Gregory's 2009 accident and ticket; and (v) Direct denied Gregory's claim, giving different reasons at different times for the denial.

¶ 40 Next, Direct not only declined coverage, it attempted to cancel the policy, forcing Gregory to sue to recover on his claim, and Direct counterclaimed for rescission.

¶ 41 Finally, Direct's actions unquestionably deprived Gregory of the use of his property and prevented him from recovering on his insurance policy.

¶ 42 As the party seeking to avoid liability for the claim, Direct had the burden to prove materiality of the alleged misrepresentation. See *Crest,* 20 Ill. App. 3d at 385. Miranda's and Torello's less than credible testimony did not meet this burden. And Direct's claims manager,

Grabowski, handled the claim in an unprofessional, inconsistent manner, gave contradictory information, didn't return Gregory's calls, and gave a glib response about paying the claim.

¶ 43 Direct's persistence in refusing to cover Gregory's claim serves the purposes of the statute—to aid the insured and discourage insurers from profiting by their superior financial positions while delaying the payment of contractual obligations. See *Hall v. Svea Mutual Insurance Co.*, 143 Ill. App. 3d 809, 812-13 (1986) (attorney fee award proper where totality of the circumstances surrounding dispute between insurer and insured demonstrate matter could have been settled but for the insurer's unreasonable conduct). The award of attorney's fees and costs adequately serves these purposes.

¶ 44 We affirm.