NO. 5-09-0342

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Plaintiff and Counterdefendant-Appellee, v. ROBERT RISINGER and GARY STONE, Defendants, and BARBARA LeGRAND, as Executrix of the Estate of Terry LeGrand, Defendant and Counterplaintiff-Appellant.	)	Appeal from the Circuit Court of Madison County. No. 05-MR-309 Honorable Ellar Duff, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Spomer and Wexstten concurred in the judgment.

R U L E 2 3 O R D E R

Held: In this action pursuant to section 155 of the Illinois Insurance Code, the circuit court did not err in finding that the insurer's conduct was not vexatious and unreasonable where the insurer did not have actual notice of the underlying lawsuit until after the judgment had been entered but upon receiving notice promptly took action to protect its insured, and the circuit court did not violate the doctrine of the law of the case where the appellate court's finding in its order remanding the cause had been palpably erroneous.

This is an appeal from a judgment in favor of an insurance company, American Family Mutual Insurance Company (American Family), on the claim of the insured, Barbara LeGrand, as executrix of the estate of Terry LeGrand (the Estate), for damages under section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2008)), based on American Family's vexatious and unreasonable refusal to defend the insured in a suit brought against

him by an individual injured when he was rear-ended by the insured's vehicle. There is no dispute that the insurance company did fail to defend the insured in the suit brought against him until after a default judgment in the amount of $134,000 had been entered against him. The insurance company claims that it had no duty to defend because the insured failed to notify the company of the lawsuit. The insured claims that he did notify the company of the suit by hand-delivering a copy of the complaint to his insurance agent, Patrick Threlkeld, just six days after being served and that he got a signed receipt from Threlkeld. The company responds that it never received notice from Threlkeld and that the signed receipt is a forgery. There is no dispute that Threlkeld was an agent of the company and that under the law notice to Threlkeld constituted notice to the company.

On January 31, 1996, a car driven by Terry LeGrand (LeGrand) was rear-ended by a semitractor driven by Robert Risinger. LeGrand's car was forced into the rear end of a car driven by Gary Stone, who, on January 29, 1998, brought a personal injury lawsuit against Terry LeGrand. LeGrand was personally served with a summons and a complaint on July 6, 1998. The parties agree that LeGrand was not at fault in the accident and would have had no liability.

LeGrand was insured under a policy issued by American Family. Nevertheless, neither LeGrand nor American Family defended the lawsuit brought by Stone, who, on September 11, 2003, obtained a default judgment against LeGrand in the amount of $134,000.

On October 9, 2003, Stone's attorney, David Nester, sent a letter to American Family advising it of the default judgment and seeking satisfaction. American Family immediately retained an attorney to attempt to get the default judgment vacated and to defend LeGrand's interests under a reservation of rights. The attorney was unsuccessful in getting the default judgment vacated.

On June 1, 2005, American Family filed a complaint for a declaratory judgment, in which it alleged that it first learned of Stone's lawsuit when it received Nester's letter of October 9, 2003, and that Terry LeGrand had failed to comply with provisions of his insurance policy requiring him to notify American Family of the lawsuit. American Family sought a declaratory judgment that the insurance policy issued to LeGrand provided no coverage and that American Family had no duty to defend or indemnify LeGrand in the lawsuit brought against him by Stone.

On January 18, 2007, Barbara LeGrand, as executrix of the estate of Terry LeGrand, who had died of causes unrelated to the motor vehicle accident, filed a second amended counterclaim against American Family. The counterclaim alleges that on July 12, 1998, LeGrand tendered the defense of the underlying lawsuit to American Family by notifying Patrick E. Threlkeld, an agent of American Family, of his having been served with summons and complaint, thereby performing all the conditions required of him by the insurance policy. The counterclaim states that, nevertheless, American Family failed to defend the lawsuit and allowed a final judgment to be entered against LeGrand in the amount of $134,000. In addition, the counterclaim alleges that American Family had wrongfully filed a declaratory judgment action against LeGrand. The counterclaim alleged that the conduct of American Family was vexatious and unreasonable and violated section 155 of the Illinois Insurance Code (215 ILCS 5/155 (West 2008)), and it sought the maximum statutory penalty, attorney fees, and costs of suit.

During discovery, Barbara LeGrand produced the purported receipt signed by Patrick Threlkeld indicating that he had received a copy of the complaint and summons from LeGrand on July 12, 1998. American Family promptly tendered to Stone, the plaintiff in the underlying lawsuit, the policy limit on LeGrand's insurance policy. Stone accepted the sum in full settlement of his claim against LeGrand. American Family also moved to dismiss its

complaint for a declaratory judgment against LeGrand because the dispute had been resolved by the settlement and the dismissal of the underlying lawsuit. American Family offered to pay the Estate's attorney fees and costs incurred in defending the declaratory judgment action; the offer was refused.

The counterclaim was tried before the circuit court of Madison County on January 23, 2007. The parties submitted a joint statement of undisputed facts. With respect to the purported receipt signed by Threlkeld, the stipulation states that the receipt is produced on paper which bears three printed American Family watermarks, one at the bottom of the front of the purported receipt and two on the back of the purported receipt. The receipt states as follows:

"JULY 12, 1998

TO: TERRY LeGRAND

RE: AUTO CLAIM 141-235526

TODAY, JULY 12, 1998, WE HAVE RECEIVED NOTIFICATION THAT TERRY W. LeGRAND WAS SERVED AN ALIAS SUMMONS FROM THE ABOVE MENTIONED CLAIM. THE CASE NUMBER 98 L 000078. (MADISON COUNTY)

SINCERELY,

/s/ Patrick E. Threlkeld

PATRICK E. THRELKELD"

Copies of the alias summons and the complaint served on LeGrand on July 6, 1998, were attached to the receipt. The receipt indicates that the summons and the complaint were received by Threlkeld on July 12, 1998, a Sunday. Threlkeld was the agent of American Family who had serviced LeGrand's insurance policy.

American Family had the receipt examined by an expert, who expressed the opinion

that there was no evidence of a forgery in the signature of Threlkeld on the receipt. He also opined that the watermarks on the receipt appeared to be genuine American Family watermarks. He opined that the receipt had been printed on an electric typewriter. He also opined: "The signature of Patrick Threlkeld hangs on the page almost entirely by itself other than slightly intersecting the comma. There is no definitive way to establish whether the signature or the comma was placed on the page first."

The Estate's expert document examiner expressed the opinion that the signature on the receipt is Threlkeld's genuine signature and that the watermarks thereon appear to be genuine watermarks of American Family. The receipt was most likely printed on a laser printer and certainly not on a typewriter.

Finally, the joint statement of undisputed facts stipulated that Threlkeld's secretary, Susanna Fernandez, would testify that she does not recall seeing the receipt of July 12, 1998. She did not type it, because she did not type these types of documents for Threlkeld. Her job did not entail that duty, and she was Threlkeld's only employee during the relevant time frame.

Barbara LeGrand testified that after the complaint for declaratory judgment had been filed by American Family, American Family requested that Barbara produce any evidence indicating that the summons and the complaint in the underlying case had been delivered to American Family. Because Terry LeGrand had already died, Barbara began searching through all the couple's records for any such evidence. She searched through boxes kept in a closet in the spare bedroom of their home. She searched through four or five boxes for one to two hours before finding the receipt. She identified the receipt that Terry had received from Threlkeld, who was LeGrand's insurance agent. Barbara denied that she or any of her children had fabricated the receipt. She did not remember ever seeing the receipt prior to finding it in the storage box. Catherine Keiffer, the daughter of Barbara and Terry LeGrand,

testified that she did not fabricate or forge the receipt, nor did her mother or her siblings.

Patrick Threlkeld testified as an adverse witness. He testified that he had been a captive agent of American Family. When his insureds would deliver lawsuit papers to him, he would forward them to American Family's claims office in a preaddressed, stamped envelope. He serviced LeGrand's insurance needs. He identified and described American Family stationery. The front side has two watermarks and the back side has one watermark. He acknowledged that the stationery changed over time and that not all stationery contained the same watermarks. The stationery on which the receipt was typed was consistent with American Family stationery. That stationery was not available from any source other than American Family. He testified that the signature on the receipt appeared to be his signature. He described Terry LeGrand as a very good customer.

At this point, the Estate rested and American Family moved for a judgment in its favor at the close of the plaintiff's case. American Family argued that its actions had not been vexatious and unreasonable. The court agreed, finding that there was no evidence of an intent on the part of American Family to refuse to pay the claim. Regardless of the existence of the purported receipt, as soon as American Family learned of the default judgment, it took every step to resolve the matter while protecting LeGrand. The court felt that something more than the mere lapse of time was required to establish vexatiousness. The court found that American Family's conduct had not been vexatious or unreasonable, and the court granted its motion for a judgment in its favor.

The Estate's posttrial motion was denied and a notice of appeal was filed on June 4, 2007. The appellate court then issued its mandate and order reversing the judgment of the circuit court and remanding the cause with directions to proceed as though American Family's motion for a judgment in its favor at the close of the Estate's case had been denied. *American Family Mutual Insurance Co. v. Risinger*, No. 5-07-0310 (2008) (unpublished

order under Supreme Court Rule 23 (eff. May 30, 2008)). The court made clear that because the judgment had been entered at the close of the Estate's case, on remand American Family would have the opportunity to present its defense.

In its order, the appellate court found that the Estate had presented sufficient evidence to sustain a *prima facie* case for an unreasonable and vexatious refusal to provide a defense under the policy and that the circuit court had erred in holding otherwise. In reaching its decision, the appellate court relied on its finding that David Nester, the attorney for the plaintiff in the underlying case, had sent a letter in January 2001 notifying American Family of the entry of the initial order of default and that American Family had "actual knowledge, as least by January 2001, that a lawsuit had been filed against its insured and that an order of default had been entered on a claim that it considered defensible." *Risinger*, order at 12-13.

Upon our review of the evidence before the circuit court at the trial held January 23, 2007, we find no evidence regarding a letter sent from attorney Nester to American Family in January 2001 notifying it of the entry of the initial default order. The evidence presented at the trial indicates only that Nester sent American Family a letter on October 9, 2003, notifying it of entry of the default judgment in the amount of $134,000. We note that the letter of January 2001 does exist in the record on appeal in the form of an exhibit to a motion filed by Gary Stone, the plaintiff in the underlying lawsuit, for a summary judgment in his favor in American Family's declaratory judgment action. We emphasize, however, that no evidence regarding this letter was ever presented to the circuit court in the trial on the Estate's counterclaim.

The trial of this cause recommenced in the circuit court on April 15, 2009. The following evidence was adduced. Patrick Threlkeld testified on behalf of American Family. He had been a captive agent of American Family and had sold and serviced LeGrand's

insurance policy. He acknowledged that the signature on the receipt looks like his signature, but he denied that he had signed the receipt. He did sometimes receive summonses and complaints from his customers and would take them and forward them to American Family's claims office. American Family supplied him with preaddressed and stamped envelopes for this purpose. Threlkeld did have a secretary in July 1998, but he handled all the claims; his secretary would not have received a summons and complaint. Threlkeld explained that American Family stationery has two watermarks on the front of the page and one watermark on the back of the page. The receipt was actually typed on the back of what appeared to be American Family stationery, the side with only one watermark. Threlkeld knew the proper way to use the stationery. Threlkeld also noted that the receipt was dated on a Sunday and that he never worked on Sundays. His office was closed and he would not have received a summons and complaint on a Sunday. Threlkeld finally noted that the receipt was typed in all-capital letters, which he would certainly not have done. He had received an "F" in high school typing class for having typed a paper in all-capital letters and had had to retype the paper.

Threlkeld did not believe that his secretary would have typed the receipt. Thelkeld handled all the claims. Further, his secretary was Filipino and did not speak English very well. She would not have been able to draft the receipt, which contained legal terms. If a document such as the receipt had come out of his office, Threlkeld, and not his secretary, would have been the one to type it. Furthermore, Threlkeld's secretary did not have the authority to sign his name to documents.

Threlkeld testified he did not type the receipt. It referred to an "alias summons"; Threlkeld did not even know what an alias summons was. The language in the receipt is not language he would have used. The receipt is more legal in form than he would have used. Threlkeld did not believe that he drafted or signed the receipt. He did not believe that he

received the summons and complaint from LeGrand.

On cross-examination, Threlkeld testified that there were things about the signature on the receipt that did not look like his: it appeared to have been written very quickly and was very "loopy." Threlkeld did believe that the paper on which the receipt was printed was genuine American Family stationery, available only from American Family.

We note that when the trial recommenced, the Estate did not ask to reopen the proofs to introduce any evidence regarding the letter sent from attorney Nester to American Family in January 2001 notifying it of the entry of the initial default order. At this trial, both parties and the court acknowledged that the January 2001 letter had never been introduced into evidence at the trial.

After taking the matter under advisement, the circuit court entered its judgment on May 7, 2009, again in favor of American Family. The court found Patrick Threlkeld's testimony that he did not sign the receipt to be credible. The court found that the January 2001 letter from Nester to American Family had never been introduced into evidence at the trial. The court found that, based on the totality of the circumstances, the conduct of American Family was not vexatious and unreasonable in that the insurer did not have actual notice of the underlying lawsuit; upon learning that there was a possibility that Threlkeld had signed a receipt for the summons and complaint, American Family made efforts to reach a resolution that would make the insured whole; American Family successfully resolved the situation and offered to pay the Estate's attorney fees and costs incurred in the declaratory judgment action, which offer was refused; and the Estate did not suffer any loss as a result of the delay and was not forced to file suit to recover any loss, nor was the Estate deprived of any right or the use of any property as a result of the delay.

The Estate's posttrial motion was denied and it now brings this appeal. The Estate first argues that the circuit court's finding that Patrick Threlkeld did not sign the receipt was

contrary to the manifest weight of the evidence.

In a bench trial such as the one at bar, the circuit court must weigh the evidence and make findings of fact. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002). In close cases, where findings of fact depend on the credibility of the witnesses, it is particularly true that a reviewing court will defer to the findings of the circuit court unless they are against the manifest weight of the evidence. *Eychaner*, 202 Ill. 2d at 251. In a bench trial, the circuit court, as the trier of fact, is in an optimum position to observe the demeanor of the witnesses while testifying, to judge their credibility, and to determine the weight their testimony should be given. *Brody v. Finch University of Health Sciences/The Chicago Medical School*, 298 Ill. App. 3d 146, 153 (1998). Accordingly, the circuit court's findings must be given great deference. *Brody*, 298 Ill. App. 3d at 153.

A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Eychaner*, 202 Ill. 2d at 252. The court on review must not substitute its judgment for that of the trier of fact. *Eychaner*, 202 Ill. 2d at 252.

The evidence regarding the genuineness of the receipt and its signature is truly conflicting. While Threlkeld admitted that the signature "looked like" his, he adamantly denied that it was his. The circuit court explicitly found Threlkeld to be credible. Neither expert could find any indication that the *signature* was forged, but the genuineness of the document itself was in question. Threlkeld testified that neither he nor his secretary typed the document, that it was mistakenly typed on the wrong side of the paper, that it was dated on a Sunday, a day when his office was closed, and that it was typed in all-capital letters and used language neither he nor his secretary would have used. We cannot conclude that a conclusion opposite to that reached by the circuit court is clearly apparent or that the circuit court's finding that Threlkeld did not sign the receipt and did not receive the summons and

complaint is unreasonable, arbitrary, or not based on the evidence. Accordingly, the circuit court's finding is not contrary to the manifest weight of the evidence.

We reject the Estate's argument that American Family had admitted by its words and actions that the receipt and its signature are genuine by settling the case with Stone after its document examiner found no evidence of forgery in the signature and by stating in its response to the Estate's posttrial motion after the first hearing and judgment that the signature was authentic. The Estate argues that American Family is bound by its document examiner's statement that there was no evidence of forgery in the signature. We simply note that this statement falls far short of admitting that the signature is genuine and is *not* a forgery. Nor is the fact that American Family settled the underlying lawsuit after receiving its expert's opinion an admission that the signature is a forgery; it was simply an acknowledgement that proof was lacking. Finally, American Family's statements in its response to the Estate's posttrial motion reflected the evidence at that time, prior to the testimony of Threlkeld in which he denied having prepared or signed the receipt. They did not constitute binding admissions. The circuit court's finding that Patrick Threlkeld did not sign the receipt was not contrary to the manifest weight of the evidence.

The Estate next argues, "The Appellate Court's decisions *** that the letter written by tort plaintiff Stone's attorney to American Family on January 10, 2001, should be considered as evidence that American Family possessed 'actual knowledge, at least by January 2001, that a lawsuit had been filed against its insured ***' were binding upon the trial court, and the trial court's disregard thereof violated the doctrine of the law of the case." American Family responds that the law-of-the-case doctrine does not apply to questions of fact, such as whether and when the insurance company had notice of the underlying lawsuit.

The law-of-the-case doctrine generally provides that a rule established as controlling in a particular case will continue to be the law of the case in the absence of error or a change

in the facts. *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 368 Ill. App. 3d 734, 742 (2006). The doctrine, however, merely expresses the practice of courts generally to refuse to reopen what has been decided; it is not a limit on their power. *Commonwealth Edison Co.*, 368 Ill. App. 3d at 742. A reviewing court may depart from the law-of-the-case doctrine if the court finds that its prior decision was palpably erroneous. *Commonwealth Edison Co.*, 368 Ill. App. 3d at 743. We do so here. See also *People v. Williams*, 138 Ill. 2d 377, 392 (1990) ("invoking the law of the case might still not preclude reconsideration of an earlier judge's order if the facts before the court changed or error or injustice were [*sic*] manifest").

As we have already pointed out, no evidence of the letter from Nester to American Family dated January 2001 was ever presented to the circuit court in the Estate's case in chief. The circuit court entered a judgment for American Family at the close of the Estate's case without any knowledge of any letter sent in January 2001. As far as the circuit court believed from the evidence presented, American Family first learned of the underlying lawsuit in October 2003.

Nevertheless, in rendering our decision on appeal from the circuit court's judgment at the close of the Estate's case, we erroneously relied on the fact, never presented to the circuit court, that a letter had been sent from Nester to American Family in January 2001. Evidence that was not before the trier of fact should not be used by a reviewing court to determine the sufficiency of the evidence on appeal. *People v. Kluppelberg*, 257 Ill. App. 3d 516, 536 (1993). The existence of the letter of January 2001 was a fact not in evidence and clearly should not have been relied on by us in rendering our decision. It remains a fact not in evidence; there has been no evidence presented to the circuit court regarding that letter.

" 'Absent *** exceptional circumstances, the appellate court should decide all legal

questions correctly without regard to earlier decisions by the court.' [Citation.] '[I]t would seem that if on second appeal we thought our earlier opinion was erroneous, we ought sensibly to set ourselves right, rather than to invite reversal above.' " *People v. Huff*, 308 Ill. App. 3d 1046, 1049 (1999) (quoting *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1940)), *vacated on other grounds*, 195 Ill. 2d 87 (2001). Accordingly, to the extent this court made a finding of fact that a letter was sent to and received by American Family in January 2001 and to the extent that finding of fact might otherwise be the law of the case, we choose to depart from the doctrine and hold that this finding is not the law of the case. Accordingly, the circuit court's disregard of this finding in rendering its final judgment herein did not violate the law-of-the-case doctrine. To hold otherwise would not only constitute palpable error but create a manifest injustice.

We acknowledge and have considered the Estate's argument that American Family should have filed a petition for a rehearing or a petition for leave to appeal to the supreme court to correct the error in the appellate court and that in the absence of that petition it has forfeited the error. See *Sanders v. Shephard*, 258 Ill. App. 3d 626, 633 (1994), *aff'd*, 163 Ill. 2d 534 (1994). As we have stated, to so hold would perpetuate a palpable error and create a manifest injustice. The law-of-the-case doctrine is not a limit on our power, and we will not rely on it where to do so would perpetuate a palpable mistake and create an injustice.

It is a well-established principle of law that in the trial of a case, the trial judge may consider only that knowledge she has acquired by the introduction of evidence or of which she may take judicial notice. *Drovers National Bank of Chicago v. Great Southwest Fire Insurance Co.*, 55 Ill. App. 3d 953, 957 (1977). The trial judge in the case at bar abided by this principle of law, refusing to consider the letter of January 2001, which had not been introduced into evidence and of which she had not been asked to take judicial notice. We now hold that she did not thereby violate the law-of-the-case doctrine.

The Estate next argues that the circuit court's finding that American Family did not have notice of the underlying tort action violated the law-of-the-case doctrine and was contrary to the manifest weight of the evidence. We have already held that the circuit court did not violate the law-of-the-case doctrine by finding that the January 2001 letter from Nester to American Family was never received in evidence and therefore did not establish that American Family had notice of the underlying lawsuit in January 2001. Given this and our holding that the circuit court's finding that Threlkeld did not receive the summons and complaint from LeGrand and forward it on to American Family in 1998 is not contrary to the manifest weight of the evidence, the circuit court's finding that American Family did not have actual notice of the underlying lawsuit is not contrary to the manifest weight of the evidence.

The Estate next argues that the circuit court's findings that American Family successfully resolved the situation, that the Estate did not suffer any loss as a result of American Family's actions, that the Estate was not forced to file suit to recover any loss that it suffered, and that the Estate was not deprived of any right or the use of any property as a result of American Family's actions were contrary to the manifest weight of the evidence and violated the law of the case. We need not repeat, again, the facts in evidence. Suffice it to say that upon first learning of the default judgment against its insured in 2003, American Family immediately took action to have the default judgment vacated and, upon learning that it could not conclusively prove that Threlkeld had not signed the receipt for the summons and complaint, immediately settled the underlying lawsuit. American Family offered to pay the Estate's expenses, costs, and attorney fees incurred in defending the declaratory judgment action. The manifest weight of the evidence demonstrates that American Family did successfully resolve the situation and that the Estate did not suffer any actual loss, did not have to file suit, and was not deprived of any property or right as a result of American Family's actions. Further, these findings did not violate the law of the case where, as we

have found, the pertinent part of our previous order was palpably erroneous.

Finally, the Estate argues that the circuit court's finding that American Family's conduct was not vexatious and unreasonable and the court's refusal to award the Estate a statutory penalty, reasonable attorney fees, and costs under section 155 of the Illinois Insurance Code constituted an abuse of discretion. The Estate predicates its argument on its preceding arguments, all of which we have rejected. Nevertheless, we examine the circuit court's decision for error.

The question whether an insurer's action and delay is vexatious and unreasonable is a factual one committed to the discretion of the circuit court. *West American Insurance Co. v. Yorkville National Bank*, 388 Ill. App. 3d 769, 780 (2009), *rev'd on other grounds*, 238 Ill. 2d 177 (2010). Thus, the circuit court's determination will not be disturbed on review unless an abuse of discretion is demonstrated on the record. *West American Insurance Co.*, 388 Ill. App. 3d at 780. The court must consider the insurer's conduct in the totality of the circumstances. *West American Insurance Co.*, 388 Ill. App. 3d at 780. Specifically, a court should look to the insurer's attitude, whether the insured was forced to file suit to recover, and whether the insured was deprived of the use of its property. *West American Insurance Co.*, 388 Ill. App. 3d at 780.

The circuit court did not abuse its discretion in finding that American Family's conduct was neither vexatious nor unreasonable. American Family acted promptly and appropriately as soon as it learned of the underlying lawsuit. It immediately tried to have the default judgment set aside. Until the Estate produced the purported receipt, American Family believed in good faith that its insured had not notified it of the underlying lawsuit. Accordingly, it filed a declaratory judgment action to determine the issue. Upon the production of the purported receipt, American Family immediately settled the underlying lawsuit while protecting its insured. The circuit court did not abuse its discretion in finding

that American Family did not act vexatiously or unreasonably. Accordingly, we affirm the judgment of the circuit court of Madison County.

For the foregoing reasons, the judgment of the circuit court of Madison County is hereby affirmed.

Affirmed.