FOURTH DIVISION
June 23, 2016

1-15-2932

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

LARRY PRESCOTT, YOLANDA PRESCOTT, and DERRICK GATES,	)	Appeal from the Circuit Court of Cook County.
Plaintiffs-Appellees,	)	
v.	)	No. 14 CH 9979
AMERICAN HEARTLAND INSURANCE COMPANY,	)	
Defendant-Appellant.	)	Honorable Rodolfo Garcia, Judge Presiding.

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

ORDER

¶ 1 *Held*: The circuit court of Cook County's judgment granting plaintiffs' motion for summary judgment on petition to certify arbitrator's award is affirmed; defendant insurer failed to produce evidence that plaintiff-insureds' omission from application for insurance was material, therefore the trial court properly granted summary judgment for plaintiffs.

¶ 2 Plaintiffs, Larry Prescott, Yolanda Prescott (Larry Prescott's mother), and Derrick Gates, filed a petition in the circuit court of Cook County to confirm an arbitrator's award against

defendant, American Heartland Insurance Company (AHI) finding that defendant owed coverage to plaintiffs for damages resulting from an automobile accident. Larry Prescott was the named insured in an automobile liability policy issued by AHI. Plaintiffs, with Yolanda Prescott and Gates as passengers, were injured in an automobile accident with an uninsured driver and sought coverage from defendant under the uninsured motorist provision in the policy.

¶ 3 Defendant rescinded the policy post-accident on the grounds Larry Prescott made a material misrepresentation in his application for insurance when he failed to identify Gates as a member of his household. The matter proceeded to arbitration and plaintiffs received an award in their favor. Thereafter, they filed a petition to confirm the arbitrator's award, and defendant filed a counter-complaint for declaratory judgment that the policy was void. The parties filed cross-motions for summary judgment. The trial court entered summary judgment in favor of plaintiffs and against defendant.

¶ 4 For the following reasons, we affirm.

¶ 5 BACKGROUND

¶ 6 Plaintiffs' petition to confirm arbitration award alleged defendant was the insurer of Larry Prescott under a policy effective from May 18, 2012 until May 18, 2013. The policy provided uninsured motorist coverage of vehicles owned and operated by Larry Prescott. On June 19, 2012, while Larry Prescott was driving one of his insured vehicles and Yolanda Prescott and Derrick Gates were passengers, the vehicle was hit by a hit-and-run motorist. Plaintiffs were unable to resolve their claim with defendant and plaintiffs' attorney demanded arbitration and named an arbitrator pursuant to the policy. Defendant failed to name an arbitrator as required by the policy and plaintiffs' demanded arbitration by the American Arbitration Association (AAA). In March 2013 defendant was notified plaintiffs had filed their claim with AAA.

¶ 7 In August 2013 the AAA notified plaintiffs of an email to AAA from a vice-president of claims for defendant. In the email defendant stated the policy was rescinded. The email further stated: "We will not be responsible for your irresponsible actions in proceeding when NO [*sic*] policy exists." Plaintiffs wrote to the AAA, stating that after plaintiffs presented claims to defendant, defendant rescinded the policy based upon an alleged material misrepresentation by Larry Prescott. Plaintiffs' letter stated defendant failed to provide plaintiffs with a basis for that decision or obtain a judicial determination the policy was rescinded, and therefore plaintiffs requested the AAA to continue with its administration of plaintiffs' claim. The AAA notified plaintiffs and defendant that the AAA's filing requirements had been met and absent agreement or court order the arbitration would continue.

¶ 8 In October 2013 the AAA notified defendant of the selection of an arbitrator and the opportunity to object. Defendant did not object and the AAA notified defendant of the opportunity to select an arbitration date. The AAA set the arbitration hearing date and, after one postponement, the matter proceeded to arbitration in March 2014. The AAA sent defendant a reminder of the hearing date. Plaintiffs alleged that on the hearing date, the arbitrator attempted to contact defendant because no representative appeared on defendant's behalf.

¶ 9 In April 2014 the arbitrator awarded $15,000 each to Larry Prescott and Derrick Gates and $10,000 to Yolanda Prescott. The petition to confirm the arbitrator's award alleged that during the pendency of the arbitration defendant failed to apply for a stay of the arbitration.

¶ 10 Defendant filed an answer and counter-claim to plaintiffs' petition to confirm arbitrator's award. Defendant's answer denied it was the insurer for Larry Prescott. Defendant's counter-complaint alleged Larry Prescott failed to list Derrick Gates as a member of Prescott's household in his application for insurance. Gates admitted he was a resident of Larry Prescott's household. In a letter attached to the counter-complaint to Larry Prescott dated January 2, 2013, defendant

notified Prescott the policy is null and void from inception because of undisclosed residents above the age of 15 in the household and unlicensed residents in the household. The counter-complaint alleged that because the policy was void *ab initio* the arbitration was void and should be vacated. The counter-complaint sought a declaration that the policy is void *ab initio* and the claim is null and void, and an order quashing the arbitration award as having no jurisdictional basis.

¶ 11 The parties agreed the trial court was first to determine whether the policy is rescinded before deciding the petition to confirm award. The parties filed cross-motions for summary judgment. Plaintiffs' motion argued Larry Prescott did not make a misrepresentation to defendant. The motion alleged Prescott had a telephone conversation with an insurance agent during which Prescott answered the agent's questions for purposes of applying for automobile insurance. The agent asked Prescott the number of drivers residing in his household and Prescott answered himself and Yolanda Prescott. The motion further alleged that while Derrick Gates did reside with the Prescotts at the time of that conversation, Gates was not and has never been a licensed driver. The agent never asked Larry Prescott to provide the names of all residents of his household over the age of 15. Prescott never reviewed or signed the insurance application. Plaintiffs asked the court to find defendant improperly rescinded the policy, the policy was in effect at the time of the accident, and for judgment on the arbitrator's award. Plaintiffs supported their motion with affidavits by Larry Prescott and Derrick Gates.

¶ 12 Defendant filed a response to plaintiffs' motion for summary judgment that argued that the omission of Gates as a resident was material because the fact of his residence increases the likelihood he will be a passenger in Prescott's vehicles and thus increases the risk he will have a claim against defendant. The motion argued defendant could "rely upon our employees [*sic*] affidavit on materiality and do so" and that "by our client's affidavit [defendant] made clear this

is a question of fact." (Emphasis omitted.) Defendant further argued it is not bound by the arbitration award if it properly rescinded the policy. Defendant's response is supported by an affidavit motion by a vice-president of AHI. The affiant averred, in pertinent part:

1. AHI's application for insurance asks for the names of all residents of the applicant's household age 15 or older whether licensed or not.
2. "The information we seek in this Warrant is relevant to us."
3. "We believe it is more likely true than not that residents of the household are *more likely* to make a UM claim as a passenger, pedestrian, or potentially a driver/owner than someone who is not a resident of the household." (Emphasis in original.)
4. "Based on many years of practical experience, a household of many members is much more likely to have a larger number of UM claims, particularly as passengers and pedestrians, than a household with a fewer number of household members; further, the most expensive risk is often times in UM claims before AAA, particularly of passengers who are not guilty of contributory negligence."
5. "The risk insured against include [*sic*] UM claims as passengers, pedestrians, drivers, owners."
6. "The warrant was material to the risk insured against."

¶ 13 Following a hearing, the trial court granted plaintiffs' motion for summary judgment and denied defendant's motion for summary judgment.

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 "Summary judgment is only appropriate when the pleadings, depositions, admissions, or affidavits on file show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. [Citations.]" *Pepper Construction Co. v. Transcontinental*

Insurance Co., 285 Ill. App. 3d 573, 576 (1996). "In reviewing a motion for summary judgment, a court must construe the pleadings, depositions, admissions, and affidavits strictly against the moving party to determine whether a genuine issue of material fact exists. [Citation.]" *Lamb-Rosenfeldt v. Burke Medical Group, Ltd.*, 2012 IL App (1st) 101558, ¶ 23. We review the grant of summary judgment *de novo* and may affirm the decision on any ground in the record. *Pepper Construction Co.*, 285 Ill. App. 3d at 577. "When parties file cross-motions for summary judgment, they agree that only a question of law is involved and invite the court to decide the issues based on the record. [Citation.] However, the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact, nor does it obligate a court to render summary judgment." *Pielet v. Pielet*, 2012 IL 112064, ¶ 28. "The defendant may meet his burden of proof either by affirmatively showing that some element of the case must be resolved in his favor or by establishing that there is an absence of evidence to support the nonmoving party's case. [Citations.]" (Internal quotation marks omitted.) *Direct Auto Insurance Co. v. Beltran*, 2013 IL App (1st) 121128, ¶ 43.

¶ 17 The dispositive issue on appeal is whether the failure to disclose Gates as a resident of Larry Prescott's household was a material misrepresentation in the application for insurance.

> "Section 154 of the Insurance Code provides:
>
> > 'No misrepresentation or false warranty made by the insured or in his behalf in the negotiation for a policy of insurance, or breach of a condition of such policy 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.' 215 ILCS 5/154 (West 2008)." *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 15.

¶ 18 " '[E]ither an actual intent to deceive *or* a material misrepresentation which affects either the acceptance of the risk or the hazard to be assumed can defeat or avoid the policy.' (Emphasis in original.) [Citation.]" *Id.* ¶ 17. "Whether statements of an applicant as an inducement to a contract-here a representation-are material is determined by the question whether reasonably careful and intelligent men would have regarded the fact stated as substantially increasing the chances of the event insured against, so as to cause a rejection of the application or different conditions." *Weinstein v. Metropolitan Life Insurance Co.*, 389 Ill. 571, 577 (1945). "Ordinarily, the materiality of a misrepresentation is a question of fact; however, where the misrepresentation is of such a nature that all would agree that it is or is not material, the question is appropriate for summary judgment. [Citation.]" (Internal quotation marks omitted.) *Direct Auto Insurance Co.*, 2013 IL App (1st) 121128, ¶¶ 47-48.

¶ 19 On appeal, defendant relies on guidelines published on the website of the Illinois Department of Insurance to support its argument that having more members of a household indicates a greater degree of risk to the insurer, where the risk insured against includes claims by potential passengers. Defendant cites to a passage on that website under the heading "Factors That May Affect The Premium" which reads as follows: "The ages and driving records of other drivers in your household may affect the premium. Most auto insurance policies cover family members while driving your car. You may jeopardize your coverage if you withhold this information." Defendant argues, without citation to authority or record evidence, that if the

household "contains more members than other potential households, it is more likely to have a higher frequency of more passengers and passenger UM claims."

¶ 20 "When an appellant seeks reversal, theories presented without authority are deemed waived, and the reviewing court should not search the record for reasons to reverse the trial court's judgment." *Lopez v. Northwestern Memorial Hospital*, 375 Ill. App. 3d 637, 648 (2007). In this case, defendant has failed to present a factual basis which arguably entitles it to a judgment that Larry Prescott's misrepresentation was material. There is no evidence that the existence of an additional member of the household substantially increases the chances of a claim by that person as a passenger of another resident so as to cause a rejection of the application or different conditions such as a higher premium.

¶ 21 The website on which defendant relies does not support its claim. Even if we were to consider the Illinois Department of Insurance website as evidence of what reasonably careful and intelligent persons would regard to substantially increase the chances of the events insured against, the factors listed on the website do not include residents of insured's households. Rather, the website refers specifically to "other drivers" in the insured's household and refers to family members "driving your car." Gates was not a driver of Prescott's automobiles. There is nothing in the language relied upon from the website to suggest that reasonably careful and intelligent persons believe that being an adult member of a household substantially increases the chances of being injured as a passenger in the vehicle of another member of the household such that an insurer would reject the other's application to insure the vehicle. See *Direct Auto Insurance Co.*, 2013 IL App (1st) 121128, ¶ 47. Defendant cites to no other evidence to support that claim on appeal. To survive summary judgment, the nonmoving party does not have to prove its case, but the party must present some factual basis which arguably entitles the party to a

judgment. *Hartz Construction Co. v. Village of Western Springs*, 2012 IL App (1st) 103108, ¶ 23. Defendant has not met that burden.

¶ 22 We recognize that "[i]n establishing the materiality of a misrepresentation, an insurer may rely on the underwriter's testimony or the testimony of its employees. [Citation.]" *Direct Auto Insurance Co.*, 2013 IL App (1st) 121128, ¶ 48. Plaintiffs argue that all defendant offered to address the issue of whether the omission of Gates was a material misrepresentation was a self-serving affidavit from an unnamed vice-president of AHI. Defendant's employee averred, in relevant part, that: "We believe it is more likely true than not that residents of the household are more likely to make a UM claim as a passenger, pedestrian, or potentially a driver/owner than someone who is not a resident of the household." (emphasis in original); and "Based on many years of practical experience, a household of many members is much more likely to have a larger number of UM claims, particularly as passengers and pedestrians, than a household with a fewer number of household members; further, the most expensive risk is often times in UM claims before AAA, particularly of passengers who are not guilty of contributory negligence." We find the affidavit is insufficient to raise a genuine issue of material fact as to the materiality of Prescott's misrepresentation.

¶ 23 The affiant did not aver, or state facts to establish, that had Gates been disclosed as a member of Larry Prescott's household the result would have been that the application for insurance would have been rejected or that the insurance premium defendant charged Prescott would have been higher. In *Styzinski v. United Security Life Insurance Company of Illinois*, 332 Ill. App. 3d 417, 418 (2002), a case involving a dispute over a medical insurance policy, the plaintiff's application for insurance contained a misrepresentation concerning the plaintiff's use or contemplated use of a motorcycle. *Id.* at 420. "In support of its contention that plaintiff's misrepresentation was material, [the] defendant attached to its motion for summary judgment the

deposition of Martin Pinkowski, an underwriting manager for [the] defendant." *Id.* at 420-21. The affiant stated that had the plaintiff answered "yes" in response to the motorcycle-related question on the insurance application, the defendant would have "asked follow-up questions regarding his use of motorcycles and issued an elimination endorsement excluding coverage for motorcycle injuries." *Id.* at 421. On appeal, the plaintiff argued that the defendant "never showed that, as a matter of law, a 'yes' answer to [the motorcycle-related question on the application] would have resulted in the issuance of an *** elimination endorsement by defendant." *Id.* at 424. The court rejected that argument finding that the affiant "repeatedly stated that defendant would not have provided coverage for motorcycle injuries had plaintiff revealed that he had test-driven motorcycles during the two years preceding the submission of his insurance application." *Id.* at 424. Defendant's affiant in this case did not make a similar statement concerning Larry Prescott.

¶ 24 In *Northern Life Insurance Co. v. Ippolito Real Estate Partnership*, 234 Ill. App. 3d 792, 793 (1992), a case involving a material misrepresentation pertaining to a life insurance policy, the defendant-insured argued the misrepresentation concerning his health "did not materially affect" the plaintiff-insurer's risk. *Id.* at 801. The court found that the record did indicate that the plaintiff relied upon the insured's representations. *Id.* at 802. The chief underwriter for the insurer in that case stated that had the insured disclosed his medical condition, the insurer would have declined coverage. *Id.* The insured in that case argued that the testimony did not properly establish the insurer's underwriting policies and standards. *Id.* The court disagreed finding the testimony "proper and sufficient." *Id.* In this case, the affiant does not state that he is an underwriter for defendant. The affiant does state that he or she is "competent to testify *** as above," but that testimony does not include a statement that defendant would not have insured Prescott as did the testimony in *Northern Life Insurance Co.*

¶ 25 In *Ratliff v. Safeway Insurance Co.*, 257 Ill. App. 3d 281, 282 (1993), the insured failed to disclose her 20-year-old son as a driver of the insured automobile. In assessing whether the nondisclosure was material, the court noted that "[f]ailure to disclose a 20-year-old owner on an application for automobile insurance has been held to be a material non-disclosure [citation]" and concluded "the non-disclosure of a 20-year-old driver residing in the same household is a misrepresentation that materially affects the risk assumed by the insurer." *Id.* at 288. The court found that it was "a matter of common knowledge that the rate frequency of accidents for drivers between the ages of sixteen and twenty-four is substantially greater than that for all drivers who are twenty-five years of age or more. [Citation.]" *Id.* But the court also noted that "[t]he materiality of the non-disclosure [was] confirmed by [a] stipulation in the record that *** almost a month after the accident, [the insured] requested that [her son] be added to her policy, and that Safeway charged an additional $320 to add him. This additional premium is clearly a different condition of the contract of insurance, caused by listing Michael as a driver and disclosing his age." *Id.* at 288-89. In this case, defendant cites no precedent holding that the failure to disclose an adult resident of the applicant's household is a material nondisclosure. Nor can we say that it is a matter of common knowledge that adults residing with insured drivers have a greater frequency of accidents as passengers.

¶ 26 The *Direct Auto Insurance Co.* court distinguished both *Styzinski* and *Northern Life Insurance Co.* from the facts of that case because in *Styzinski* and *Northern Life Insurance Co.* "the misrepresentations were material because the insurers would have denied coverage had the insureds not made their misrepresentations." *Direct Auto Insurance Co.*, 2013 IL App (1st) 121128, ¶ 60. There is no evidence defendant would not have issued Prescott insurance had he not made his misrepresentation. We also find instructive that in *Direct Auto Insurance Co.*, in support of a motion to reconsider the trial court's judgment the insured's failure to disclose an

additional driver in her residence was not a material misrepresentation, the insurer attached a printout analyzing the difference in the cost of the premium had the additional driver been disclosed. According to the printout, had the insured listed on the application that other drivers resided with her, the premium would have been four times greater. *Id.*

¶ 27 On appeal, the court had determined that the alleged misrepresentation was not material because the number of drivers disclosed in the application for insurance was the same as the actual number of drivers. *Id.* ¶ 62. As to the attachment to the insurer's motion to reconsider, the court stated that even if the foregoing were not true, the trial court could not consider the printout because the insurer "gave no explanation as to why it did not previously attach such a document to its motion for summary judgment." *Id.* ¶ 72. The court's holding suggests evidence that the premium would have been higher in the absence of the misrepresentation is relevant. Regardless, defendant presented no such evidence in this case. Absent any evidence that defendant would have refused to insure Prescott or that Prescott's premium would have been higher had Prescott disclosed Gates as an adult member of his household, we cannot determine that defendant relies upon the number of adult residents in the household to determine its risk. "A statement cannot be misleading *** unless an insurer relies upon it in order to determine its risk. [Citation.]" *Northern Life Insurance Co.*, 234 Ill. App. 3d at 801 (citing *Logan v. Allstate Life Insurance Co.*, 19 Ill. App. 3d 656, 659 (1974)).

¶ 28 The statements in defendant's affidavit do not raise a genuine issue of material fact on the question of the materiality of the misrepresentation. "An affidavit submitted in the summary judgment context serves as a substitute for testimony at trial. [Citation.] Therefore, it is necessary that there be strict compliance with Rule 191(a) to insure that trial judges are presented with valid evidentiary facts upon which to base a decision. [Citation.]" (Internal quotation

marks omitted.) *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335-36 (2002) (citing *Solon v. Godbole*, 163 Ill. App. 3d 845, 851 (1987)).

> "Affidavits in support of and in opposition to a motion for summary judgment *** shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto." Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013).

¶ 29 "Unsupported assertions, opinions, and self-serving or conclusory statements do not comply with the rule governing summary judgment affidavits. [Citations.]" (Internal quotation marks omitted.) *National Union Fire Insurance Co. of Pittsburgh v. DiMucci*, 2015 IL App (1st) 122725, ¶ 68. "Affidavits in support must be statements of fact and not mere conclusions, opinions or beliefs ***." *Patterson v. Stern*, 88 Ill. App. 2d 399, 404 (1967). In this case, the affiant stated "[w]e *believe* it is more likely than not that residents of the household are more likely to make a UM claim as a passenger ***." (Emphasis added and emphasis omitted.) The affiant's belief is not sufficient to satisfy Rule 191 or raise a genuine issue of material fact. Further, the affiant stated that households with more residents are likely to have more claims as passengers "[b]ased on many years of practical experience ***." This statement fails to set forth any facts with particularity such that this court has a valid evidentiary basis upon which to base a decision. The affiant's statement that the "warrant was material to the risk insured against" is wholly conclusory and similarly not supported with facts. Finally, the affiant did not state that drivers in households with more adult residents are uninsurable or pay a higher premium than those in households with fewer adult residents. *Northern Life Insurance Co.*, 234 Ill. App. 3d at

801 (“[a] statement cannot be misleading *** unless an insurer relies upon it in order to determine its risk”).

¶ 30 We hold defendant failed to present some factual basis which arguably entitles it to a judgment that the misrepresentation in Larry Prescott’s insurance application was material. See generally *Hartz Construction Co.*, 2012 IL App (1st) 103108, ¶ 23. Absent any evidence an adult resident of a household is more likely to be a passenger in the automobile of another resident of that household and become injured in an automobile accident while a passenger, we find that this misrepresentation is of such a nature that all would agree that it is *not* material. *Direct Auto Insurance Co.*, 2013 IL App (1st) 121128, ¶ 48.

¶ 31 Having found no genuine issue of material fact as to the question of whether Prescott’s misrepresentation was material, we hold that the policy was not void and plaintiffs are entitled to a judgment as a matter of law that defendant improperly rescinded the policy and the policy was in effect at the time of the accident. 215 ILCS 5/154 (West 2012) (“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.”). Defendant does not dispute its failure to participate in arbitration or that if the policy was not rescinded from inception that the arbitration award should be confirmed. Accordingly, we affirm the trial court’s judgment denying defendant’s motion for summary judgment and granting plaintiffs’ motion for summary judgment and confirming the arbitration award.

¶ 32 CONCLUSION

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

¶ 34 Affirmed.