2018 IL App (1st) 180240-U

FOURTH DIVISION
September 28, 2018

No. 1-18-0240

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DIRECT AUTO INSURANCE COMPANY, Plaintiff-Appellant, v. SHWE THANG and BU KEE, Defendants-Appellees, and ELISSA KOZAK KROWN, SANDRA LIEURANCE, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, and ALLSTATE INSURANCE COMPANY Defendants.	)	Appeal from the Circuit Court of Cook County 2015-CH-13809 Honorable Franklin U. Valderrama, Judge Presiding

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

O R D E R

Held: In a bench trial, where insurer failed to show that unsigned paper application for insurance coverage was a printout of the electronic application submitted on behalf of its insured, insurer did not demonstrate its insured made a material misrepresentation justifying rescission of his policy, and insured was entitled to coverage for vehicle collision damages.

¶ 1 The issue on appeal is whether plaintiff/counter-defendant Direct Automobile Insurance

Company has produced a copy of defendant/counter-plaintiff Shwe Thang's application for automobile liability insurance coverage in which he purportedly failed to disclose all the drivers in his household. This omission could be a material misrepresentation of the insurer's assumption of risk and entitle Direct Auto to rescind Thang's coverage pursuant to section 154 of the Insurance Code. 215 ILCS 5/154 (West 2014). Direct Auto seeks to avoid liability for a multi-car collision in which a member of Thang's household, his cousin and defendant/counter-plaintiff, Bu Kee, was driving Thang's vehicle. Thang denied that the application attached as Exhibit 3 to Direct Auto's complaint was genuinely his and Thang and Kee objected to its admission into evidence for that purpose. To demonstrate that Exhibit 3 was not reliable and trustworthy, Thang and Kee tendered their Exhibit 8, which was an application for insurance coverage that included illegible applicant and agent signatures and had been produced by Direct Auto during discovery without any explanation for the new marks. After a bench trial, the judge sustained Thang and Kee's hearsay objection to Exhibit 3 and found that Exhibit 8 was no better. The judge further found that by not tendering the insured's application, Direct Auto had failed to prove its claim and that Thang and Kee were entitled to judgment on their counterclaim for a declaration of insurance coverage. On appeal, Direct Auto does not dispute that Exhibit 3 is hearsay but contends Thang and Kee waived their objection to the authenticity of Exhibit 8 as Thang's application by including it in their own trial materials. Direct Auto also contends the judge added a requirement to the statute by requiring the insurer to overcome the hearsay objection and prove that Exhibit 3 was a printout made from Thang's electronic application. Direct Auto also asks us to find the judge erroneously determined that a printout of an electronic application for insurance coverage is not a written application for purposes of the statute.

¶ 2 We preface the appellate arguments with a recap of the factual and procedural history.

The record shows that the authenticity of the document proffered as Thang's application, not its format as an electronic or printed document, was in dispute early on, well before the bench trial.

¶ 3 Thang's agent, Thee Insurance Shoppe Agency, of Wheaton, Illinois, procured the personal automobile policy at issue on July 30, 2014 by using QuotePro to transmit information to and from Direct Auto. QuotePro is a computer program and website that incorporates various insurers' underwriting standards and enabled the agent to request and then issue the Direct Auto policy instantaneously. There was no paper application. At the time, Thang, was an assembly worker residing at 999 South Lorraine Road, #2C, Wheaton, Illinois, 60189 with three other adults, one of whom was his cousin Kee, who was also a factory worker. (The family has since relocated to Ohio.) Thang owned a 2012 Chevrolet Sonic LT beige subcompact. Direct Auto collected a premium of $448 to provide liability and underinsured motorist coverage for six months.

¶ 4 Less than two months later, on September 17, 2014, Kee caused a three-car collision while driving Thang's Chevrolet just a short distance from the family's apartment. Kee testified in this insurance coverage suit that this was the only occasion he drove the Chevrolet and that Thang had given him permission to take the car because Kee was ill but needed to go to the bank. Kee was driving the Chevrolet westbound on Taft Avenue and failed to yield the right-of-way to Elissa M. Krown as she proceeded south on Lambert Road in Glen Ellyn, Illinois. The collision of the two cars caused the Chevrolet to spin, cross the intersection, and strike Sandra J. Lieurance's vehicle as she waited at the stop sign to proceed east on Taft Avenue. The Chevrolet and Krown's vehicle had to be towed from the scene.

¶ 5 Thang made a claim with Direct Auto for the collision damage to his vehicle, the cost of which is not disclosed by the record. Krown's vehicle was declared a total loss and when her

insurer, Allstate Insurance Company, filed a subrogation action against Kee in early 2015 for property damage totaling $11,997, Kee tendered his defense to Direct Auto. Direct Auto's response to the claims was to notify Thang and Kee that it was exercising its statutory rescission rights.

¶ 6 In 2015, Direct Auto sought a declaratory judgment that Thang's policy had been effectively rescinded. Direct Auto alleged "[t]hat the policy was issued in [r]eliance upon the Application appended as Exhibit 3." Thang was only driver listed in the application, despite the statement on the first page of Exhibit 3, "Applicant warrants that other than those drivers listed below there are no other drivers whether or not they are in the household, at school, in the military, or their license is suspended or revoked at the time of the application." The second page of Exhibit 3 was distorted to the extent that most of it was unreadable, however, the third page of Exhibit 3 appeared to be a legible copy of the second page. On the third page were 14 "Underwriting Questions" which "must be answered truthfully and honestly (failure to do so may result in denial of coverage)." A tick mark for "Yes" had been made in response to "9. Have all residents of household 15 years and older and all permit or other operators been listed on the application?" Toward the bottom of the third page was the following:

> "Applicant's Statement: The Applicant states that the application was read and attests that all answers are truthful and that said answers were made as an inducement to the insurance company to issue a policy, and it is a special condition of this policy that the policy shall be NULL and VOID and of no benefit or effect whatsoever as to any claim arising thereunder in the event that the attestations or statements in this application shall prove to be false or fraudulent in nature. It is understood that this application shall be part of the policy of insurance when issued and that it is intended that the company shall rely

on the contents of this application in issuing any policy of insurance or renewal thereof.

Agent of Applicant Statement: The agent of the applicant states that the information in this application was given to him by the applicant.

The insurance policy issued pursuant to this application is valid only if signed by the applicant or the agent of the applicant acting on behalf of this applicant."

¶ 7 Despite the clear condition that the application had to be signed by the applicant or applicant's agent, both signature fields and date lines were blank. There was a fourth page to Exhibit 3, but it had no bearing on the dispute.

¶ 8 In their answer and counterclaim for a declaration of coverage, Thang and Kee denied that the policy was issued in reliance upon Exhibit 3. Their attorney also emailed Direct Auto's attorney to request "a fully-executed copy of the application attached as Exhibit 3 to your complaint." In a subsequent affidavit, the attorney swore "I never received a response to this email."

¶ 9 During discovery, Thang and Kee's attorney sent a Rule 214 request for Direct Auto to produce "[a] certified copy of the fully-executed Application identified as Exhibit 3" and any documents stored electronically relating in any way to the policy. Ill. S. Ct. R. 214 (eff. July 1, 2014). Direct Auto, however, again tendered the same Exhibit 3 and produced what it said was its "entire file" with the exception of property damage and medical care bills that were irrelevant to the proceedings and attorney-client communications that were privileged. In the cover letter, Direct Auto's attorney said, "We cannot produce a certified copy of the application, as no such thing exists."

¶ 10 Thang and Kee's attorney followed up with a Rule 216 request to admit, in which counsel asked the insurer to admit that "Direct Auto does not have a signed copy of the Application

identified as Exhibit 3." Ill. S. Ct. R. 216 (eff. July 1, 2014). Direct Auto responded: "Objection. Illinois has no requirement of a 'signed' Application, and Applications may be processed and relied upon by phone, fax, internet and the like and may be submitted 'on behalf' of the insured under the Insurance code. Thereby, the Notice concerning a 'signed' Application, whether by the agent of the insured or the insured, is irrelevant and immaterial."

¶ 11 At the next status hearing, Thang and Kee's attorney orally moved for a resolution of the objection and to have the request deemed admitted. Direct Auto asked for time to respond and the issue was deferred for about a month. Direct Auto never responded, however, with support for its contention that "Illinois has no requirement of a 'signed' Application." Instead, Direct Auto produced a 4-page application whose second page contained illegible but identical signatures for the applicant and the applicant's broker. The signatures appear to this court to be dissimilar to Thang's signature on his sworn interrogatory answers. The date fields adjacent to the signatures were blank. The first two pages of this application had fax transmittal lines indicating Direct Auto sent the pages on "5/16/16" at "13:16" and "Thee Ins Shoppe" returned the two pages that same day at "3:00." Thus, the only dates on this version of the application were the fax transmission marks indicating the application completed in 2014 had been faxed from and then back to Direct Auto in 2016.

¶ 12 Direct Auto attached the recently-produced version of the application to its first motion for summary judgment. In an attached affidavit, Mike Torello indicated he was a Direct Auto claims manager and "1 is the policy," "2 is the Declaration page," and "3 is the application." Torello swore that had all four adults in the Thang household been included on his policy, the premium would have been $908, or roughly double the premium collected. Direct Auto made no attempt to explain the recent appearance of the signatures.

¶ 13 Thang and Kee countered that Direct Auto had failed to meet its burden under section 154 of proving that a material misrepresentation was made in a written application for insurance coverage. 215 ILCS 5/214 (West 2014). Section 154 states in part:

> "Misrepresentations and false warranties. 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 5/214 (West 2014).

¶ 14 Thus, section 154 establishes a two-part test for determining whether an insurance policy may be rescinded by the insurer: the statement made in the policy, endorsement, rider, or written application must be false, and the false statement must either have been made with intent to deceive or must materially affect the acceptance of the risk or the hazard assumed by the insurer. *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 464, 786 N.E.2d 1010 (2003). Under the statute, therefore, a misrepresentation, even if innocently made, can serve as a basis for the insurer to void a policy. *Schwartz*, 203 Ill. 2d at 464. The insurer bears the burden of proving it is entitled to statutory rescission. See *e.g.*, *Direct Auto Insurance Co. v. Beltran*, 2013 IL App (lst) 121128, 998 N.E.2d 892. A misrepresentation in an application for insurance is a statement of something of fact which is untrue and affects the risk taken by the insurer. *Beltran*, 2013 IL App (lst) 121128, ¶ 47, 998 N.E.2d 892. Not all misrepresentations, however, materially affect the risk assumed by the insurer. See *Beltran*, 2013 IL App (lst) 121128, ¶ 47 (female vehicle

owner's false statements that owner was male and the only driver of the vehicle were not material where woman did not drive her own vehicle but her brother did; meaning policy covered his accident); *Ratliff v. Safeway Insurance Co.*, 257 Ill. App. 3d 281, 628 N.E.2d 937 (1993) (nondisclosure of 20-year-old son residing in same household and driving insured's car with her permission twice a week was misrepresentation that materially affected insurer's risk, such that policy did not cover son's accident). Whether an insured's statement is material is determined by whether reasonably careful and intelligent persons would have regarded the facts stated as substantially increasing the chances of the events insured against, so as to cause a rejection of the application. *Beltran*, 2013 IL App (lst) 121128, ¶ 47. In establishing the materiality of a misrepresentation, an insurer may rely on the testimony of its underwriter or other employees. *Beltran*, 2013 IL App (lst) 121128, ¶ 47. (However, in this appeal, the only issue is whether there was a written application for insurance coverage that included a material misrepresentation.)

¶ 15 In response to the first motion for summary judgment, Thang and Kee disputed the authenticity of both versions of the application. Their attorney pointed out that in their answer, his clients denied that the policy was issued in reliance on Exhibit 3. Thang also provided an affidavit in which he denied that it was his signature on the new, signed version of the application, denied that he knew who had signed the new exhibit, denied that he had been asked in 2014 about the other drivers in his household, and denied that he had been asked in 2014 to verify the accuracy of the answers on the exhibit. Counsel also disputed the sufficiency of Torello's affidavit that "3 is the application" in that the statement was conclusory and did not factually show that the attached version of the application was genuinely what Thang or his insurance agent transmitted to Direct Auto in 2014. Counsel also argued it was questionable

whether the new exhibit was in Direct Auto's possession in 2014, given that the insurer had relied on an unsigned version when it filed suit in 2015, stated during discovery that no physical signature was required, and then produced a signed and undated version that bore 2016 fax transmission marks. Counsel concluded that Direct Auto had yet to "submit[] to this court competent, undisputed evidence" of Thang's application and that this open question precluded summary judgment.

¶ 16 Direct Auto, however, still made no effort to connect Thang to the exhibit, such as by having someone from Thee Insurance Shoppe factually swear that the exhibit contained the answers Thang gave when he visited the agent's office in 2014. Instead of directly responding to Thang and Kee's challenge to the evidentiary foundation of the signed version of the application, Direct Auto argued it was entitled to "rely on the representations made on behalf of the insured, not just by the insured," when rating and issuing Thang's policy.

¶ 17 After oral arguments, the judge denied Direct Auto's first motion for summary judgment.

¶ 18 Direct Auto filed a second motion for summary judgment which was similar to its first motion for summary judgment, was supported by an affidavit from claims manager Torello, and was supplemented by an affidavit from underwriting manager Rosa Miranda. Miranda disclosed for the first time that Direct Auto does not use paper applications and instead receives electronic versions through QuotePro in which an "insured's information is filled in by the producer [such as Thee Insurance Shoppe]," "the risk is evaluated for Direct Auto by the computer," and "the policy and Declarations page [are] issued within seconds as [they are] issued via 'point of sale.' " Miranda did not explain the origin of the signatures. Also, although Direct Auto attached affidavits from Torello and Miranda regarding the insurer's receipt of the application from Thee Insurance Shoppe, Direct Auto did not provide an affidavit from Thee Insurance Shoppe which

connected Thang to the printed application.

¶ 19 In response, Thang and Kee's attorney challenged the evidentiary foundation of the new Exhibit 3, by arguing:

> "Exhibit 3 is a hearsay document because it is an out-of-court statement that Direct Auto is offering in evidence to prove the truth of the matter asserted, that being the fact that a misrepresentation was made either by Shwe Thang or on his behalf in a written application for insurance, such that the statement could actually affect the risk assumed by Direct Auto. Ill. R. Evid. 801(c) (defining hearsay). Direct Auto has not brought this document within any exception to the rule against hearsay. Ill. R. Evid. 802."

¶ 20 After arguments, the judge denied Direct Auto's second motion for summary judgment and scheduled the matter for a bench trial.

¶ 21 Direct Auto filed its "Trial Book" containing only the unsigned version of its application, which it marked as Direct Auto's Exhibit 3. Thang and Kee's "Trial Book" included the signed application, marked as their Exhibit 8, and most of the documents we have summarized above, in order to show that Direct Auto tendered different versions and produced the signed version only after denying it had one.

¶ 22 Following a pre-trial conference, the judge granted Thang and Kee's motion in *limine* to bar any officer or agent of Thee Insurance Shoppe from testifying at trial, because Direct Auto had failed to answer Rule 213(f) interrogatories, the recent disclosure of the proposed trial witness(es) came as a surprise and would prejudice Thang and Kee's defense at trial, and Thang and Kee had been diligent in both issuing their interrogatories and raising the objection.

¶ 23 Direct Auto's chief witness at the one-day trial was its underwriting manager, Miranda, who had previously sworn that Direct Auto relies on electronic applications submitted through

QuotePro. Throughout its direct examination, the only "application" that Direct Auto asked Miranda about or asked the judge to admit into evidence was Direct Auto's Exhibit 3. Thang and Kee objected to the admission of Exhibit 3 into evidence, the judge heard arguments and reserved ruling on the objection. On redirect examination, Direct Auto questioned Miranda about the version included in Thang and Kee's trial book, which was marked as Exhibit 8. At no point, however, did Direct Auto question Miranda about whether Exhibit 8 was the application made by or on behalf of Thang, received by Direct Auto during Thang's application process, or the basis for Direct Auto to issue Thang's policy. On cross-examination, it was established that Miranda lacked any personal knowledge about Thee Insurance Shoppe's procedures and practices for ensuring it was entering, maintaining, and transmitting accurate data. Miranda said she knew Thee Insurance Shoppe "was involved in [Thang's] application process" and used either the QuotePro program or the QuotePro website to "put[] the information into the electronic form." She testified that Direct Auto does not own QuotePro and that it is an independent computer software program and website that insurance producers purchase to use for placing policies with insurers. Miranda was not present during Thang's application process, did not know what type of computer had been used to access QuotePro, did not know which insurance agent assisted Thang, and did not know whether Thang applied in person, online, or over the phone. Miranda never worked for QuotePro, did not know anything about the reliability of the computer system that Thee Insurance Shoppe agency used to access QuotePro, and did not know whether Thee Insurance Shoppe's system "was in working order" either when Thang's information was entered into QuotePro or when the agency sent the information to Direct Auto. Miranda also had no firsthand knowledge about any safeguards Thee Insurance Shoppe used to insure the accuracy of data it entered into the QuotePro system.

¶ 24 Direct Auto next called Torello, who testified about his decision to rescind Thang's coverage and that letters to that effect had been sent to Thang and Krown (one of the other drivers involved in the collision). Direct Auto did not question Torello about any version of Thang's application or Torello's familiarity with the application procedures followed by Thee Insurance Shoppe.

¶ 25 Thang and Kee were also witnesses. Kee testified that he went with Thang to Thee Insurance Shoppe location on Roosevelt Road, in Wheaton, Illinois, and that Kee was with Thang the entire time that they dealt with the agent who sold Thang the Direct Auto policy. Thang and Kee sat together, facing the insurance agent who was sitting behind a computer. According to Kee, "we said we want insurance." The agent did not verbally ask Thang questions. They could see that the agent was typing something on the computer, but they could not see what he was typing. As part of the process, the agent had Thang sign a piece of paper. Kee saw the document that Thang signed. Thang and Kee were both shown Direct Auto's Exhibit 3 and both confirmed that the document the agent had Thang sign did not look like Exhibit 3. Thang paid the entire 6-month premium and obtained the Direct Auto coverage that day, for the period July 30, 2014 through January 30, 2015. The only time that Kee drove Thang's Chevrolet was on the day of the accident, when Kee was ill and received Thang's permission to drive the car to the bank. Thang also testified about his receipt of the letter telling him the policy had been rescinded and that his premium would be refunded. Thang's premium, however, was never returned to him.

¶ 26 In its closing argument, Direct Auto returned to the pending ruling of whether its Exhibit 3 was admissible and argued that the judge could instead rely on the faxed application marked as Thang and Kee's Exhibit 8. In their closing argument, Thang and Kee argued that Exhibit 8, with its 2016 fax transmission marks and signatures, was not the same as Exhibit 3, was also hearsay

that was inadmissible without a foundation, and that Direct Auto had put forth no reliable evidence of an application it had actually received and relied upon during the negotiation of the policy issued to Thang in July 2014.

¶ 27 Approximately one month later, the judge issued two written orders, the first of which sustained Thang and Kee's hearsay objection to the admission of Direct Auto's Exhibit 3. The second order indicated Direct Auto had failed to prove its claim and Thang and Kee were entitled to coverage for the loss that occurred in 2014. This appeal followed.

¶ 28 On appeal, Direct Auto contends Thang and Kee waived any objection to the authenticity of their own Exhibit 8 because the judge's standing order made clear that exhibits are admitted into evidence once they are included in a party's trial materials and not objected to by the opponent. As quoted by Direct Auto, Judge Valderrama's standing order stated: "If no written objection is made as provided in this Standing Order, all objections [to the proposed materials] will be considered forfeited absent a showing of good cause, and the exhibit(s) will be received into evidence without further authentication or hearing as to relevance or any other issue." Direct Auto contends, "It was only after [Thang and Kee] realized that the application [marked as Exhibit 8] could be used against them that they tried to reverse course; [but] the trial Court correctly refused to accept this and the application form itself was in evidence." According to Direct Auto, Exhibit 8 contains the data that Thee Insurance Shoppe submitted to Direct Auto.

¶ 29 This argument, however, is overcome by the record. Although this appeal is ultimately about the sufficiency of the plaintiff's trial evidence, we have also summarized the preliminary stages of this suit, because at trial, Thang and Kee's attorney argued this history showed the weakness of Direct Auto's evidence. During closing arguments, Thang and Kee's attorney pointed out that there were significant differences between Direct Auto's Exhibit 3 and Thang

and Kee's Exhibit 8. Exhibit 3 was the version attached to Direct Auto's complaint regarding the 2014 policy and it was unsigned. Before the trial, Direct Auto was repeatedly asked to produce a signed, written application and had not produced one. During discovery, Direct Auto was asked to admit that it did not have a signed copy of Exhibit 3, but Direct Auto had responded only that it was not required to have a signed application and that applications "may be processed and relied upon by phone, fax, internet, and the like." Direct Auto did not specify whether Thang's application had been sent to the insurer by phone, fax, internet, or "the like." Despite a discovery history suggesting there never was a signed copy, Direct Auto subsequently produced Exhibit 8, which had two signatures. The signature fields for the 2014 insurance applicant and his agent were identical and undated and the pages bore 2016 fax transmission marks. Thang and Kee's attorney argued that the timing and contents of Exhibit 8 cast further doubt on the authenticity of Exhibit 3. The judge then clarified that Exhibit 8 had been admitted into evidence, "[b]ut it seems as though you're arguing or rearguing the admissibility of Exhibit 8," and that it "should not be admitted into evidence *** [as Thang's application because it] was not a business record of Direct Auto." Thang and Kee's attorney agreed, pointed out that the document had not become a business record that existed in July 2014 by virtue of being produced as a Rule 214 discovery response, and that Direct Auto still bore the burden of laying a foundation. Counsel reiterated that Exhibits 3 and 8 were different documents. In rebuttal, Direct Auto's attorney argued the effect of the standing order, noted that Direct Auto had never objected to the admission of Exhibit 8, and said that he had prepared for trial with the expectation that Exhibit 8 was in evidence. Counsel also contended that Thang and Kee bore the burden of putting on evidence that Thee Insurance Shoppe transmitted an incorrect application. Those arguments concluded the trial.

¶ 30 In the subsequent judgment order, the judge detailed that Exhibit 8 had been admitted into evidence without objection but that Direct Auto alleged it issued the policy in reliance on Exhibit 3. Further, "there was no testimony from any witness [or any cross-examination] as to whether the allegedly signed insurance application attached to Defendants' Exhibit #8 was, in fact, the application at issue in this case." The judge found that based on all the evidence adduced, Direct Auto had failed to meet its burden of proving that Exhibit 3 was a true and correct copy of Thang's application. The judge further found that Direct Auto failed to meet its burden of proving that Exhibit 8 was Thang's application. Accordingly, the judge then found that Direct Auto had not met its burden of establishing all the elements for section 154 rescission and was not entitled to the declaratory judgment it sought in this case. Instead, Thang and Kee were entitled to judgment on their counterclaim.

¶ 31 Thus, Direct Auto's contention that Thang and Kee waived any objection that Exhibit 8 was Thang's application and that the judge "correctly refused [to allow them to object during the trial]" is a mischaracterization of the record. The record shows that the judge reconsidered the effect of his standing order, heard the parties' arguments about the significance of Exhibit 8, and then specifically found in the judgment order "that Direct Auto failed to meet its burden of proving that the application attached to Defendants' Exhibit #8 was the application." Direct Auto is not arguing it was prejudiced by the judge's decision to revisit the admission of Exhibit 8 into evidence and Direct Auto is not challenging that ruling. Direct Auto is simply mischaracterizing the record by contending Exhibit 8 was admitted into evidence by virtue of being part of Thang and Kee's trial materials and that the judge subsequently "refused" to allow Thang and Kee to "reverse course." Furthermore, even if Thang and Kee's Exhibit 8 were in evidence, it would not be a substitute for Direct Auto's Exhibit 3 to its complaint, because of the significant differences

between the two documents. And, even if Exhibit 8 were in evidence, it would still be incumbent upon the insurer to provide an evidentiary foundation that connected Exhibit 8 to Thang's visit to Thee Insurance Shoppe.

¶ 32 Direct Auto next argues that the judge added a requirement to Direct Auto's burden under section 154 by expecting the insurer to prove that Thang "signed," "ratified," or "approved" the electronically submitted application as his own application or an application made on his behalf. Direct Auto contends it was error to "require[] Direct Auto to show the electronic transmission printed out or populated on the application form was 'his.' "

¶ 33 Direct Auto's argument demonstrates a misunderstanding of the basis of the judge's ruling. We can find no indication that Direct Auto was expected to prove that Thang had physically signed his Direct Auto application or that Thang had even seen the application data on the computer screen before it was electronically transmitted to Direct Auto. There is no basis in the record for Direct Auto's contention that the judge expanded on section 154's language by imposing a physical signature requirement or other approval requirement on the insurance applicant. What the record discloses is that Direct Auto failed to prove the facts that would entitle it to judgment on its complaint.

¶ 34 It was established at trial that Thang and his cousin Kee met with an agent of Thee Insurance Shoppe to discuss automobile coverage, that the agent typed information into a computer, that Thang paid the agent a premium for a six-month policy, and that Thang left the office with proof of automobile insurance coverage from Direct Auto. It was disputed, however, by Thang and Kee that Thang gave the answers that appeared on the printed application which Direct Auto attached as Exhibit 3 to its complaint. It was disputed that Exhibit 3 was Thang's application or an application made on his behalf because the contents did not coincide with any

questions and answers verbally exchanged between Thee Insurance Shoppe and Thang. Once Thang and Kee denied this allegation in Direct Auto's complaint, Direct Auto bore the burden of proving this essential fact in order to establish a right to judgment. When Direct Auto moved for summary judgment, twice, Thang and his cousin persisted in their denials and challenged the evidentiary foundation of the documents Direct Auto relied upon. Thus, at trial, Direct Auto needed to connect Thang and Kee's visit to Thee Insurance Shoppe with Direct Auto's printout of an application bearing Thang's name and containing a material misrepresentation about the drivers in Thang's household.

¶ 35 Instead of imposing an unusual burden on Direct Auto, the trial court required Direct Auto to comply with the basic rules of evidence by laying a foundation for the document it alleged was Thang's application. Throughout the trial, Direct Auto treated Exhibit 3 as the "application," but Thang and Kee objected to the admission of this document on multiple grounds and the judge sustained the objection. "In civil cases in Illinois, the basic rules of evidence require a proponent of documentary evidence to lay a foundation for the introduction of that document into evidence." *Anderson v. Human Rights Comm'n*, 314 Ill. App. 3d 35, 42, 731 N.E.2d 371 (2000). "Evidence must be presented to demonstrate that the document is what its proponent claims it to be." *Anderson*, 314 Ill. App. 3d at 42. "Without proper authentication and identification of the document, the proponent of evidence has not provided a proper foundation and the document cannot be admitted into evidence." *Anderson*, 314 Ill. App. 3d at 42.

¶ 36 In reviewing the judgment entered 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 & Scallan, P.C. v. Orlich*, 2012 IL App (1st) 112974, ¶ 35, 981 N.E.2d 38. A factual finding is considered against the manifest weight of the evidence "when the opposite conclusion is clearly evident or the

finding is arbitrary, unreasonable, or not based in evidence." *Staes & Scallan*, 2012 IL App (1st) 112974, ¶ 35. We will not disturb the findings and judgment of the trier of fact "if there is any evidence in the record to support such findings." *Staes & Scallan*, 2012 IL App (1st) 112974, ¶ 35.

¶ 37 In this case, Direct Auto was seeking a declaratory judgment that it effectively rescinded the automobile liability insurance policy it issued to Thang, on the basis that he made a material misrepresentation in his application for insurance by failing to disclose all resident drivers. The trial judge needed to be able to review the questions Direct Auto asked and the answers that Thang gave, in order to find that a material misrepresentation occurred, and grant judgment on Direct Auto's complaint. Thus, Direct Auto needed to prove that Exhibit 3 was a tangible printout of a computer-generated record of Thang's application. Printouts of computer-stored data are considered statements placed into the computer by out-of-court declarants. *In re Marriage of DeLarco*, 313 Ill. App. 3d 107, 114, 728 N.E.2d 1278 (2000). Printouts, therefore, are not admissible unless brought within one of the exceptions to the rule against hearsay. *DeLarco*, 313 Ill. App. 3d at 114. "Tangible printouts of computer-stored data are admissible under the business exception to the hearsay rule if (1) the electronic computing equipment is recognized as standard, (2) the input is entered in the regular course of business reasonably close in time to the happening of the event recorded, and (3) the foundation testimony establishes that the sources of information, method and time of preparation indicate its trustworthiness and justify its admission." *DeLarco,* 313 Ill. App. 3d at 115.

¶ 38 In *DeLarco,* for instance, which concerned billing records for attorney fees, an evidentiary foundation for the documents was established by an attorney who worked at the firm. The attorney testified that his law firm's billing records were produced by a computer program

known as " 'Time Slips' " and that the program was used by other members of the legal community. *DeLarco*, 313 Ill. App. 3d at 115. The attorney also testified that the law firm's underlying time records were made contemporaneously with the work done and the information was then entered into the computer program on a regular basis. *DeLarco*, 313 Ill. App. 3d at 115. Once a month, the entries were calculated and a billing summary and itemized bill were produced for each client. *DeLarco*, 313 Ill. App. 3d at 115. The court concluded that the testimony about the firm's procedures satisfied the foundational requirement for the admission of the billing records. *DeLarco*, 313 Ill. App. 3d at 115. Although the attorney had admitted on cross-examination that there were some errors in the data entry, the inclusion of errors affected the weight, not the admissibility, of the records. *DeLarco*, 313 Ill. App. 3d at 115.

¶ 39 A comparable witness here would have been a representative of Thee Insurance Shoppe, if that person was capable of testifying, as the *DeLarco* attorney had, about the particular software and procedures that Thee Insurance Shoppe used to collect, input, transmit, and maintain applicant information for Direct Auto to ensure that what Direct Auto contended was a printout of Thang's application was reliable and trustworthy. Direct Auto, however, did not call any witnesses from the Thee Insurance Shoppe. Direct Auto had been barred from calling anyone from Thee Insurance Shoppe to testify at trial, because Direct Auto failed to timely disclose a representative of the agency as a potential trial witness.

¶ 40 Direct Auto's underwriting manager, Miranda, was able to testify about her receipt of information from Thee Insurance Shoppe through the QuotePro system, but cross-examination showed that she knew nothing about the source of that information. Thus, her testimony did not establish that the information that was purportedly Thang's application was, in fact, his application. Miranda was incapable of providing any evidence to refute Thang's denial that

Exhibit 3 was his application or an application made on his behalf.

¶ 41 In the absence of any evidence whatsoever from Thee Insurance Shoppe, Direct Auto failed to overcome Thang's denial and failed to prove that Exhibit 3 was an accurate printout of whatever information was electronically transmitted by Thee Insurance Shop to Direct Auto to obtain Thang's coverage. The manifest weight of evidence supports the judge's conclusion that Direct Auto did not meet its burden as the plaintiff in a statutory rescission case of proving that the application attached to its complaint as Exhibit 3 was a true and correct copy of the insured's written application in July 2014 for automobile liability insurance coverage. Direct Auto failed to bridge the gap between Thang and Kee's visit in 2014 to Thee Insurance Shoppe and Direct Auto's printout in 2015 or 2016 of an application bearing Thang's name. Direct Auto did not prove its entitlement to statutory rescission and it was not entitled to judgment.

¶ 42 Direct Auto also argues, however, that this case presents a question of statutory interpretation. Without specifying whether it is relying Exhibit 3 or 8, Direct Auto contends the judge ruled that the electronic transmission of a document from the insured's agent to the insurer did not qualify as a "written application" within the meaning of section 154. 215 ILCS 5/154 (West 2012). Direct Auto contends this ruling was implied by the judgment order. Direct Auto argues this implied ruling was error because Illinois law treats electronic transmissions as writings. After considering the judgment order and the record that culminated in that decision, we find that Direct Auto is advancing an argument that was never presented or ruled on in the trial court. This new argument has no relevance to the proceedings and is not a basis for reversing the judgment against Direct Auto and in favor of Thang and Kee. After the trial, the judge ruled that Exhibit 3 was inadmissible hearsay, that Direct Auto failed to prove that the other version of the application, Exhibit 8, was Thang's application, and that there was

insufficient evidence supporting Direct Auto's statutory rescission claim. It is apparent that the orders concerned Direct Auto's unwillingness or inability to reliably connect Exhibit 3 to Thang (or even Exhibit 8 to Thang) and overcome his denial that the document attached to the complaint was his application. The determinations concerned the characteristics and weight of the insurer's evidence and did not concern any particular language of the insurance statute. Accordingly, we conclude that Direct Auto misapprehends the record. We decline to address the insurer's analysis of section 154's language as it has no particular significance in these proceedings and any conclusions we would reach would be advisory. 215 ILCS 5/154 (West 2014).

¶ 43 For these reasons, we find that the manifest weight of evidence supports the judgment of the trial court and we affirm that decision.

¶ 44 Affirmed.