

¶ 5 Joshua M. Assad's Taylorville home and contents were totally destroyed by fire on August 12, 2007.

¶ 6 On the date of the fire, the structure and contents of the home were insured with a policy sold to Assad by Gerald Cocagne of Cocagne Insurance Agency. The Cocagne Insurance Agency is owned by Gerald Cocagne. The insurance policy issued to Assad covering his home and its contents was written by Mosquito Mutual Insurance Company. In addition to owning and operating Cocagne Insurance Agency, Gerald Cocagne served as the manager of Mosquito Mutual Insurance Company. The office for both businesses is the same. Cocagne Insurance Agency, by its owner Gerald Cocagne, also served as the insurance adjuster for Mosquito Mutual Insurance Company. Cocagne Insurance Agency billed Mosquito Mutual for the time spent by Cocagne adjusting claims on behalf of Mosquito Mutual. Mosquito Mutual insured the property, while Grinnell Mutual Reinsurance Company¹ provided liability coverage. Grinnell Mutual also reimbursed Mosquito Mutual for payments Mosquito Mutual made to Assad for the property and contents reimbursements.

¶ 7 Upon processing Assad's claims for property and contents damages resulting from the fire loss, Gerald Cocagne changed professional roles. He switched from functioning as Assad's insurance sales agent and began functioning as the Mosquito Mutual insurance adjuster on Assad's claims. He did not advise Assad that his roles had changed and that he

¹Plaintiff originally filed suit against Grinnell Mutual Reinsurance Company, as well as Cocagne Insurance Agency and Mosquito Mutual Insurance Company. Grinnell was served with process. No appearance on behalf of Grinnell was filed with the trial court. Shortly after the initial complaint was filed, and in response to a motion to dismiss filed by the other defendants, plaintiff amended his complaint. His amended complaint omitted Grinnell as a defendant in this case.

was no longer operating as Assad's agent.

¶ 8 After some negotiation, Assad was paid \$350,000 for the building. Reimbursement for the lost contents was an ongoing process. Before Mosquito Mutual took the position that they would no longer reimburse Assad for his fire claims, Assad had received checks totaling \$22,325.80. With each reimbursement, Assad turned in receipts or a list of bills to Gerald Cocagne, and a check was then drafted to Assad from Mosquito Mutual.

¶ 9 The policy provision for personal property loss provided that Mosquito Mutual would pay no more than the actual cash value of the damage until actual repair or replacement was complete. The policy gave its insured the option to disregard the replacement cost provision and to make claim on an actual cash value basis, and thereafter if the replacement cost was more, the insured would have 180 days from the date of loss in order to file for the additional liability.

¶ 10 Assad decided to make a replacement cost claim for his damaged bedroom furniture. Assad submitted documentation to Mosquito Mutual including sales documents, copies of checks, and information regarding delivery of this furniture. The furniture was all from a furniture store in Springfield—Ashley Furniture. Assad claimed that he made a down payment on the furniture. At the time that he made the purchase, he did not have a residence to which the furniture could be delivered, and so he asked Ashley Furniture to hold the order.

¶ 11 Sometime in late fall, Assad provided these documents to Gerald Cocagne for reimbursement. Upon receipt of the documentation, Gerald Cocagne contacted Ashley Furniture by telephone. He was told by Ashley Furniture that they had not received any payment from Assad and that no order had been placed. On January 3, 2008, Gerald Cocagne called Assad to advise him that there was a problem in light of his failure to make payment to Ashley Furniture. On the same day, Assad took a cashier's check to Ashley Furniture in the amount of \$10,518—the full amount owed.

¶ 12 On January 7, 2008, Assad was notified by Mosquito Mutual that he needed to appear and provide a statement under oath about the Ashley Furniture transactions. The next day, Assad appeared at the office of Cocagne Insurance Agency and Mosquito Mutual Insurance Company to give the statement. The examination was conducted by an attorney representing Mosquito Mutual. During the questioning, Assad stated that he thought he should have his attorney present. In response to this request, Mosquito Mutual's attorney stated that Assad was not being accused of anything, and questioned why he had not brought an attorney if he wanted representation. Assad allowed the questioning to continue.

¶ 13 On February 19, 2008, Mosquito Mutual's adjuster Gerald Cocagne sent a letter to Assad with the company's decision. Based upon its investigation, Mosquito Mutual concluded that Assad made false statements related to the Ashley Furniture transaction. Because of these false statements, Mosquito Mutual denied coverage, stating: "We do not intend to make further payment of this claim, and furthermore, we demand that you refund to us all payments previously made on this claim."

¶ 14 The cost of the Ashley Furniture bedroom set was \$10,518. Mosquito Mutual paid \$1,650. Possession of the damaged furniture had been taken by Mosquito Mutual. After denying Assad's claim, Mosquito Mutual refused to return the damaged bedroom set—or any of Assad's other damaged personal belongings. Mosquito Mutual determined that because of his misrepresentations, Assad forfeited his right to his items.

¶ 15 THE COMPLAINT

¶ 16 Assad filed suit against Cocagne Insurance Agency and Mosquito Mutual Insurance Company on August 11, 2008. The lawsuit alleged that defendants breached their contract of insurance with Assad, for failing to pay the fair market value of the property damaged by the fire in violation of the terms of the insurance policy.

¶ 17 He filed his second amended complaint on August 3, 2009 in four counts. Three of

the four counts were directed to Cocagne Insurance Agency.

¶ 18 The first count against Cocagne Insurance Agency alleged breach of duty owed to Assad. Assad alleged that in switching roles from sales agent to insurance adjustor, Cocagne became his adversary without notification. Assad alleged that Cocagne misrepresented the process by which he was to obtain reimbursement for his lost property from the fire—that Cocagne told him that he only needed to obtain price quotes for the personal property. Assad believed that he did not have to go out and buy everything with his own money before receiving a full or partial payment from Mosquito Mutual. He also alleged that Cocagne Insurance Agency breached its duty by giving away, disposing of, or selling many of his possessions damaged in the fire without first obtaining his approval to do so. In his second count against Cocagne Insurance Agency, Assad claimed false misrepresentation. Assad alleged that these false misrepresentations by Gerald Cocagne were made intentionally with the purpose of misleading him into acting as advised with the intent that Mosquito Mutual could deny his claim. Assad's third claim against Cocagne Insurance Agency was for theft. He alleged that Cocagne Insurance Agency stole his fire-damaged personal property by giving away and/or selling this property.

¶ 19 Assad's second amended complaint contained one count against Mosquito Mutual Insurance Company for breach of the insurance contract. Assad alleged that Mosquito Mutual failed to pay his claim pursuant to the terms of the insurance contract.

¶ 20 MOSQUITO MUTUAL'S MOTION FOR SUMMARY JUDGMENT

¶ 21 On December 17, 2009, Mosquito Mutual Insurance Company filed its motion for summary judgment. In this motion, Mosquito Mutual claimed that the evidence supported its contention that Assad lied about having made any payment to Ashley Furniture for the bedroom furniture. Assad chose to utilize the replacement cost provision of the property damage provisions of his policy as opposed to the actual cash value, and therefore Assad was

aware that he had to pay for the furniture before he could be reimbursed. Mosquito Mutual claims that Assad made his monetary claim for the cost of the furniture before he had actually made payment, that this representation amounted to fraud, and that this fraud voided the policy.

¶ 22 In support of its motion, Mosquito Mutual cited to deposition testimony of the Ashley Furniture office manager, Nancy Sage, who testified that she was unable to locate the copies of the same sales documents Assad gave to Cocagne when he was seeking reimbursement. Ashley Furniture does not consider a sale as final until they are paid in full. Ashley Furniture records do not reflect a sale until Assad made payment in full on January 3, 2008. The salesperson at Ashley Furniture, Diane Tarro, acknowledged writing up the total sales price for Assad, who stated that he needed the information for his insurance company. Notations about payments, delivery dates, and check numbers on the Ashley Furniture order form were written by Sasha Gutierrez, the secretary at Assad's business. Sasha testified that she made the notations as directed by Assad as she believed he was submitting the paperwork to the insurance company for the purchase of replacement items. Sasha did not send any checks to Ashley Furniture for payment.

¶ 23 COCAGNE INSURANCE AGENCY'S MOTION FOR SUMMARY JUDGMENT

¶ 24 Gerald Cocagne, doing business as Cocagne Insurance Agency, filed his motion for summary judgment on January 27, 2010. In this motion, Cocagne argues that there was no dispute that Assad knew that Gerald Cocagne was acting as Mosquito Mutual's claims adjuster; that there was no dispute that Assad had been told that he had to pay cash out of pocket before he could be reimbursed; and that there was no dispute that Assad opted to replace rather than to repair certain items of personal property, and that therefore ownership of the damaged property transferred to Mosquito Mutual.

¶ 25 ASSAD'S RESPONSE TO THE SUMMARY JUDGMENT MOTIONS

¶26 On the date that the motions for summary judgment were scheduled for hearing, Assad filed his response, along with his affidavit. In his response, Assad asserts that his actions in providing Ashley Furniture price quotes to Cocagne constituted a misunderstanding of the Mosquito Mutual reimbursement requirements. He argued that this misunderstanding has been wrongly characterized by the defendants as being an intentional misrepresentation. In his affidavit, Assad explained that after filing his fire loss claim, Gerald Cocagne became the Mosquito Mutual and Grinnell Mutual insurance adjustor, but did not advise Assad that his obligations to these two insurance companies were in conflict with his role in assisting Assad in preparation of his claim as the Cocagne insurance agent. Assad stated that Gerald Cocagne instructed him to "secure estimates or proof of replacement of items of personal property [Assad] was planning on replacing." Regarding the bedroom furniture, Cocagne advised him that "an estimate or a price quote would be satisfactory for the bedroom outfit." Following Cocagne's express instructions, he obtained a price quote from Ashley Furniture and sent a down payment in by mail on the bedroom set. Upon learning from Cocagne that Ashley Furniture had not been paid for the furniture, he made immediate payment to resolve the misunderstanding. Assad also stated that he never gave Cocagne ownership rights in any of his damaged items. In closing, Assad stated that he "did not, at any time, intend to misrepresent anything to Gerald Cocagne or the insurance companies he represents."

¶27 EVIDENCE FOR CONSIDERATION ON THE SUMMARY JUDGMENT MOTIONS

¶28 Assad's January 8, 2008, Examination Under Oath. The following set of questions by the attorney for Mosquito Mutual and answers by Assad are cited by the defendants as evidence supporting their summary judgment motions. We reproduce these relevant questions and answers here.

"Q. Did Mr. Cocagne also assist you in understanding how you could make a claim for your personal property loss?

A. Yes.

Q. So up until this point, do you feel that the insurance company has been fair and helpful to you?

A. Yes.

* * *

Q. After the fire, did Mr. Cocagne talk to you about the fact that the company could pay you a depreciated value on your personal property right now but it wouldn't be as much as the stuff would be worth new, or you could just go right out and replace the personal property with like kind and quality items and they would pay you the full replacement costs?

A. Yes.

Q. And you opted or elected to do replacement of as many items as you could, and then after you were through replacing, you intended to sit down with Mr. Cocagne and reach an agreement on the depreciated value of anything else, am I right?

A. Yes."

¶ 29 The attorney for Mosquito Mutual also asked Assad to explain the various Ashley Furniture documents, notations thereon, and checks in payment of the furniture. Assad stated that he found the bedroom furniture that he wanted at Ashley Furniture. The sales representative, Diane, wrote up an order sheet on October 17, 2007. He did not pay for the furniture that day, but he testified that he thought he had ordered the furniture and that he was not responsible to pay for the furniture until he received the delivery. He testified that he and Diane had an understanding that the furniture was to be "held." Notations at the bottom of the order sheet were made by Sasha, an employee of Assad's business. She made notations indicating that the furniture was a special order and that a deposit of 25% of the total due

(\$2,500) was made by check number 2366. The date of this payment was not included in Sasha's notation. There was also a notation by Sasha to request February 2008 delivery. Assad stated that Sasha sent this payment to Ashley Furniture. On what he believed was the same date, Assad called Diane to tell her that the order should be placed and that the down payment check was in the mail.

¶ 30 Mosquito Mutual's attorney showed Assad a separate order sheet, dated October 21, 2007, prepared by Diane which only included the mattress set. The total amount owed for the mattress was \$2,154.89. Sasha's notations were also on the bottom of the form, indicating the special order date of October 21, with a projected two- to four-week delivery and a 25% deposit in the amount of \$550 paid by check number 2366. Assad stated that he believed that the deposit on both the mattress and the furniture was, in fact, made by one check—check number 2366 on or about October 21, 2007,—the date on which the order was written up. In the middle of the form, there was another notation that said that \$1,650 was paid in cash, and the item was to be or was delivered on November 2. The mattress set was not delivered on that date, however. Assad testified that the "paid in cash" was a notation made by his office staff to reflect that he brought cash into his own office, and the staff cut a corporate check to pay this bill.

¶ 31 Assad stated that he had received a call from Gerald Cocagne indicating that there was a problem at Ashley Furniture—that they had not received payment for the furniture. Alerted to the problem, Assad stated that he then contacted the store manager at Ashley Furniture, as he was concerned about whether or not they had received his check for the 25% deposit on the order. He learned that they did not have the check and that this was an explanation for why Ashley Furniture's records did not reflect that there had been a sale. Assad also stated that the bank did not show that the check had been cashed. When speaking with the store manager, Assad acknowledged his part in the communication and records problem and

learned that placing an order on hold as Diane did was not proper Ashley Furniture protocol.

¶ 32 Assad also identified a check written out of his personal account dated December 19, 2007, which was attached to a copy of the Ashley Furniture order sheet and purported to pay the balance of the bill. Check number 1083 was written to Ashley Furniture in the amount of \$5,971.14. Assad acknowledges that he had not mailed the check because there would not have been sufficient funds in his bank account to cover the amount of the check on the date that the check was written. Once adequate funds were in his account, he intended to mail the check to Ashley Furniture. The notation of "pd" next to the total amount of the bill, representing the paid status of the bill, was a notation made by Assad when he wrote out the check.

¶ 33 Mosquito Mutual Insurance Policy Provisions. The insurance policy contained a section on concealment or fraud which stated:

"We may deny coverage if you or any 'insured' has:

1. Intentionally concealed or misrepresented any material fact or circumstance;
2. Made false statements; or
3. Committed fraud relating to this insurance.

Whether before or after any loss, accident, application for coverage, or claim for which coverage is sought under this policy."

Regarding personal property losses, the policy stated that the insurer would "pay no more than the actual cash value of the damage until actual repair or replacement is complete." This provision was modified by endorsement, which provided:

"Personal Property

- a. personal property other than that described in paragraph b will be settled at replacement cost without deduction for depreciation.

Payment will not exceed the smallest of the following amounts:

- (1) replacement cost at the time of the loss;
- (2) the full cost of repair or restoration;
- (3) 400% of the actual cash value of the property at the time of loss;
- (4) the limit of liability applying to personal property; or
- (5) any special limits of liability stated in this policy or by endorsement.

When the cost to repair or replace covered property for which a claim has been submitted is more than \$1,000, we will pay no more than the actual cash value of the covered property until the actual repair or replacement is completed.

You may disregard the replacement cost provision and make claim under this policy for loss or damage to Household Personal Property on an actual cash value basis and then make claim within 180 days after loss for any additional liability brought about by the replacement cost provision."

¶ 34 Additionally, the policy provides that the entire policy will be treated as void if the insured has:

- "1. Intentionally concealed or misrepresented any material fact or circumstance;
2. Made false statements; or
3. Committed fraud relating to this insurance, whether before or after the loss."

¶ 35 Deposition Testimony of Nancy Sage of Ashley Furniture. Nancy Sage has worked at the Springfield, Illinois, Ashley Furniture store since August 2006 as its comptroller,

officer manager, and bookkeeper. She is responsible for record-keeping at that store, and she audits all financial aspects of sales. Her records reflect Assad's payment date of January 3, 2008. Her records did not contain a sale to Assad on October 21, 2007. She acknowledged that the October 21, 2007, filled-in form could have been created by an Ashley Furniture salesperson. She indicated that the form with that date is not an official form, but is used as a tool by a salesperson in assisting a customer and amounts to a rough draft in the event that the customer places an order for that furniture. A sale of furniture is not completed with the draft copy. Nancy testified that customers who do not live locally may call up the store to finalize a sale. However, merely stating that the customer wanted to finalize a sale does not, in fact, complete the sale. She confirmed that as comptroller, until she received money, there could be no sale. The money that is required to complete the sale is 100% of the sales price, unless there is financing involved. Nancy acknowledged that there was a time in the history of the store where they would accept a down payment, with the balance due in full prior to delivery. Whether that policy was in effect at the time that Assad made his purchase was not known. Regardless, the transaction was not considered a sale until payment in full was received. None of the checks or other payments handwritten on the draft order forms in question were received and noted in Ashley Furniture's records.

¶ 36 Deposition Testimony of Ashley Furniture Sales Associate Diane Tarro. Diane testified that she recalled meeting with Assad prior to the January 3, 2008, date on which the full furniture payment was made. She remembered that he was looking for furniture to replace furniture that he lost in a fire. She wrote up a list of the pieces Assad selected with their prices, and she gave him a copy. The date of that price quote was October 17, 2007. She testified that Assad needed the paperwork to give to his insurance company. Diane testified that he came back another time in order to get a price quote on a mattress set. The date of this quote was October 21, 2007. She did not receive any payment from Assad for

this mattress set. Prior to January 3, 2008, Assad did not pay her for the furniture listed on the first price quote. She recalled receiving a telephone call from Assad sometime close to the January 3, 2008, date. Diane could not recall being told by Assad that he needed this furniture to be "held." Ashley Furniture's change in policy to require payment in full occurred in the spring or summer of 2007, to the best of her knowledge. Diane was asked about Assad's reaction when she told him that she needed payment in full before the furniture could be ordered. Diane recalled that Assad had no problem with that policy and indicated that he needed to take the price quote back to the insurance company, which would cut him a check, and then he would make the payment for the furniture.

¶ 37 Deposition Testimony of Sasha Gutierrez. Sasha was a secretary employed by Assad and his father at one of their businesses—Taylorville RV and Marine. However, at the time of her deposition, she was no longer their employee. She recalls the night of the fire and the documentation issues that followed when Assad began the process of making his insurance claim. She assisted Assad in the preparation of his claim by gathering documents. Regarding the October 17, 2007, and October 21, 2007, Ashley Furniture price sheets, she acknowledges making various notations on the paperwork. Assad told her what to write on these Ashley Furniture sheets. She never actually saw the checks involved. She no longer recalls whether or not Assad came in and gave her cash and then had a check drafted to Ashley Furniture in that amount. However, in light of another business owned by Assad and his father that involved real estate development and leasing, she testified that cash was frequently being brought into the office by Assad.

¶ 38 Sasha testified that her understanding was that the price quotes were required in order to get insurance reimbursement.

¶ 39 At some point after the Ashley Furniture price quotes were submitted to Cocagne Insurance Agency, she received a call directly from Gerald Cocagne. Sasha described the

conversation as being somewhat uncomfortable. According to Sasha's recollection, Gerald told her that her answers to his questions about the Ashley Furniture transactions would dictate how the process went forward. She could not recall the specifics of his questions, but overall she had the sense that he was questioning the validity of the documents he was given. Gerald Cocagne asked her questions about which accounts were used to write the checks. She told him that she did not know because of the number of bank accounts used in the Assad businesses. She also recalls being approached by Gerald Cocagne in public to tell her that she was going to be called upon to provide a deposition about what she knew of these transactions.

¶ 40 When asked, Sasha testified that she was unaware of any dishonesty by Assad and the furniture transaction. She stated that she had no reason to disbelieve what he had told her.

¶ 41 She testified that she had no knowledge of Assad's claims that Cocagne Insurance Agency was in possession of his damaged personal property, or whether or not there was any misrepresentation made to Assad. When asked, Sasha denied that Assad told her that Gerald Cocagne had misrepresented anything to him.

¶ 42 Deposition Testimony of Gerald Cocagne. Gerald is the sole owner of Cocagne Insurance Agency. As an agent of the agency, he solicits, markets, and sells insurance products. He estimated that 90% of his annual income is derived from the insurance agency, with the balance coming from adjustor income for Mosquito Mutual. In a technical sense, Gerald explained that all of his income came from the agency, as the agency would bill Mosquito Mutual for the hours he spent adjusting claims. He is not an owner of Mosquito Mutual any more than any other insured of the mutual insurance company, and he testified that he believed that there were approximately 600 to 700 members. In this case, Grinnell provided reinsurance when the amount Mosquito Mutual paid out on any one claim reached a set annual limit.

¶ 43 Gerald testified that he became aware of the fire at Assad's home the day after it happened. He admits that he did not ever provide Assad with written explanation or guidelines on submission of claims for personal property loss—not when he sold Assad the policy and not when Assad had to make his personal property claim. He also admits that he never told Assad that after Assad submitted his personal property claim, he was now acting in the role of a Mosquito Mutual insurance adjustor rather than Assad's insurance sales agent. He claimed that he did not need to tell Assad because Assad already knew about his role change given his past claims history with other properties insured by Mosquito Mutual on policies sold by Cocagne Insurance Agency.

¶ 44 Gerald Cocagne claims that he told Assad that in order to obtain reimbursement for the personal property items lost in the fire, if Assad decided that he did not want to accept a salvaged version of his property or actual cash value, Assad needed to first replace the items. Only after replacement would Mosquito Mutual reimburse him. Gerald explained that all an insured had to do was to pay for an item and present his agency with the receipt and he would cut them a check on behalf of Mosquito Mutual.

¶ 45 There were three different Ashley Furniture documents that Assad provided to Gerald Cocagne. Gerald did not know the dates on which these three documents were provided to him. On the first of the three documents, there was a written notation that a deposit in the amount of \$2,500 had been sent or given to Ashley Furniture. Gerald Cocagne did not issue a check for the \$2,500 to Assad. Another document only for the mattress set also contained a notation about a deposit—that \$550 had been paid toward the total owed. A second notation on this mattress price quote indicated that \$1,650 had been paid in cash. From his records, Gerald determined that he did cut a check to Assad for \$1,650 of the total amount of the mattress set (\$2,154.89), on November 29, 2007.

¶ 46 Gerald Cocagne testified that when Assad decided to reject the salvaged personal

property, ownership of the property shifted to Mosquito Mutual. Even after Mosquito Mutual rejected any future reimbursement for personal property loss as a result of this fire, Gerald was of the opinion that the salvaged property was no longer owned by Assad. On the date of his deposition, October 28, 2009, the remainder of Assad's property was being stored at Gerald Cocagne's home. He testified that he would ultimately decide what price to set for the sale of Assad's old bedroom set and that he may well purchase it for himself.

¶ 47 Summary Judgment Order. The trial court's entry of summary judgment was made by docket entry.

¶ 48 Regarding Mosquito Mutual's motion for summary judgment, the court found that the insurer could deny coverage if the insured intentionally misrepresented any material fact or circumstance of the claim. The court noted that whether the insured actually replaced the bedroom set in order to claim the replacement cost benefit was "material to the investigation of [the] claim." Finally the court held that Assad intentionally presented false or misleading documentation to Mosquito Mutual purporting to establish that he had replaced the bedroom set, and that he intended for Mosquito Mutual to rely on this misleading/false information to induce the insurer to pay him the replacement cost.

¶ 49 Regarding Cocagne Insurance Agency's motion for summary judgment, the court found that on all counts of Assad's complaint there was no dispute that he knew that Gerald Cocagne was acting as adjustor for Mosquito Mutual with respect to the adjustment of the claim—and not acting on behalf of Cocagne Insurance Agency. The court also concluded that there was no issue of material fact that documents presented by Assad were false and/or misleading. With respect to the theft claim, the court concluded that Assad could be entitled to return of his personal property in light of the denial of his replacement cost benefits.

¶ 50

LAW AND ANALYSIS

¶ 51 On appeal, courts review summary judgment orders *de novo*. *Myers v. Health*

Specialists, S.C., 225 Ill. App. 3d 68, 72, 587 N.E.2d 494, 497 (1992). In determining the appropriateness of a summary judgment, the trial court strictly construes all evidence in the record against the movant and liberally in favor of the opponent. *Purtill v. Hess*, 111 Ill. 2d 229, 240, 489 N.E.2d 867, 871 (1986). The court must consider all pleadings, depositions, admissions, and affidavits on file to decide if there is any issue of material fact. *Myers*, 225 Ill. App. 3d at 72, 587 N.E.2d at 497. The use of summary judgment is considered to be a drastic method of concluding litigation and should only be granted if the facts and issues raised by the party seeking judgment are free from doubt. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 272, 586 N.E.2d 1211, 1215 (1992); *Colvin v. Hobart Brothers*, 156 Ill. 2d 166, 169-70, 620 N.E.2d 375, 377 (1993).

¶ 52 After careful review of the transcripts of all depositions and statements that were considered by the court in deciding to grant summary judgment, we are not able to reach the same conclusion.

¶ 53 COCAGNE INSURANCE AGENCY

¶ 54 On the issue of Cocagne Insurance Agency's breach of duty owed to its client, Gerald Cocagne admits that he did not provide written claims information to Assad and that all of his instructions were verbal regarding paperwork and the process necessary to handle his personal property loss claims. Cocagne Insurance Agency seizes upon Assad's affirmative answers in his statement under oath. Mosquito Mutual's attorney asked questions utilizing language directly from the insurance policy. Assad answered, yes, that he had been advised that he "could just go right out and replace the personal property with like kind and quality items and they would pay you the full replacement costs." The attorney did not ask Assad to provide a narrative answer about the process he believed he was supposed to follow. That narrative answer came in his response to the defendants' summary judgment motions in his sworn affidavit. In the affidavit, Assad states under oath that Cocagne told him that he could

secure price quotes or proof of replacement of items of personal property. Most specifically regarding the bedroom furniture, Assad stated that Cocagne told him that a price quote would be satisfactory. Clearly, Assad's sworn statement is in conflict with the sworn testimony of Cocagne.

¶ 55 We also take issue with the trial court's conclusion that there is absolutely no doubt that Cocagne did not breach his duty as Assad's agent. Assad alleged in his complaint and then swore under oath that he was unaware that Cocagne changed roles in the course of the adjustment of his claim. He claimed that he thought that Cocagne was working for him and did not know that Cocagne shifted to an insurance adjustor for Mosquito Mutual taking a position contrary to his own. Cocagne does not claim that he told Assad that his relationship to Assad changed. He testified that he felt that Assad already had this knowledge because of past interactions between the two men.

¶ 56 The court focused on what it characterized as the misleading notations made on the documents Assad provided Cocagne related to the furniture. We agree that the notations are certainly confusing without additional explanation. But given the deposition testimony and statements of witnesses and the parties presented to the court, we find that a genuine issue of material fact still remains as to whether those notations amount to an intentional misrepresentation of a material fact. The notations and the reason for the notations cannot be considered in a vacuum, but must be construed with the balance of the evidence. That evidence includes Assad's statement that he was specifically instructed by Cocagne that a price quote or a proof of loss for the furniture was sufficient. If Cocagne told Assad that he only needed to get a price quote in order to be reimbursed for his personal property damage, then the notations about payment and delivery have no relevance. Furthermore, the fact that Ashley Furniture did not note a down payment for the furniture does not automatically mean that the payment was not actually mailed.

¶ 57 With respect to the theft claim against Cocagne Insurance Agency, the trial court's order seems to be contradictory. On the one hand, it granted summary judgment for Cocagne on this issue, while on the other hand the court indicated that Assad may be entitled to the return of his property. In summary, we find that genuine issues of material fact remain as to counts I, III, and IV.

¶ 58 MOSQUITO MUTUAL INSURANCE COMPANY

¶ 59 The trial court's order of summary judgment for Mosquito Mutual was based on the conclusions reached in deciding Cocagne Insurance Agency's motion for summary judgment—that Assad intentionally misrepresented to Gerald Cocagne that he paid for the bedroom furniture and that, therefore, Mosquito Mutual validly denied coverage. We are aware of the policy language contained within Mosquito Mutual's insurance policy. However, Gerald Cocagne is Mosquito Mutual's agent. Although not directly employed by Mosquito Mutual, there is no disagreement that it pays Cocagne Insurance Agency for the insurance adjustor services of its employee, Gerald Cocagne.

¶ 60 An agency relationship is an agreed-to fiduciary relationship between two individuals or entities—the principal and the agent. *Gunther v. Commonwealth Edison Co.*, 126 Ill. App. 3d 595, 598, 467 N.E.2d 1104, 1106 (1984). An agency relationship cannot be presumed, but must be proven by the person who is claiming the existence of the agency relationship. *Mitchell Buick & Oldsmobile Sales, Inc. v. National Dealer Services, Inc.*, 138 Ill. App. 3d 574, 582, 485 N.E.2d 1281, 1287 (1985).

¶ 61 Generally speaking, the acts of an agent, which are within the scope of his agency authority, bind the principal. *John Deere Co. v. Metzler*, 51 Ill. App. 2d 340, 355, 201 N.E.2d 478, 483 (1964). The agent can bind his principal if the agent has actual authority or apparent authority from the principal. *Advance Mortgage Corp. v. Concordia Mutual Life Ass'n*, 135 Ill. App. 3d 477, 481, 481 N.E.2d 1025, 1029 (1985). Representations made by

an agent to a third party can bind the principal by way of estoppel. See Restatement (Third) of Agency § 2.05 (2006).

¶ 62 In this case, the existence of an agency relationship is not in dispute, as Gerald Cocagne and Mosquito Mutual both acknowledge the relationship. We find that the issue is whether or not Assad was made aware that Cocagne was no longer functioning as his sales agent, but rather was functioning as Mosquito Mutual's agent in the adjustment of Assad's claims.

¶ 63 On appeal, Mosquito Mutual does not address the agency arguments in any respect, instead focusing on Assad's alleged misrepresentations. Mosquito Mutual cites two cases in support of its contention that intentional misrepresentation by an insured in the claims process can void the entire policy. We have reviewed these cases and find them to be inapposite.

¶ 64 In *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 165, 886 N.E.2d 976, 977 (2008), Barth filed a fire loss claim with State Farm, which was denied by the insurer because of the exclusion voiding coverage if Barth intentionally concealed or misrepresented a material fact impacting coverage. The fire at issue was deemed suspicious and an investigation was immediately begun. *Id.* at 167, 886 N.E.2d at 978. The misstatements made to State Farm in some way related to his being defrauded by a home health care worker and his friend, and the misstatements were corrected by Barth when he provided his statement to State Farm under oath. *Id.* The case went to trial, and the jury was instructed on the meaning of materiality required for a misrepresentation, but was not instructed as Barth wanted on the common law fraud elements of reasonable reliance and injury. *Id.* at 168, 886 N.E.2d at 979. The jury found in State Farm's favor, and the appellate court affirmed. *Id.* The Illinois Supreme Court affirmed finding that this State Farm exclusion was not couched in terms of fraud despite the fact that the term was used in its heading, and

instead addressed concealment and misrepresentation. *Id.* at 171-75. 886 N.E.2d at 981-83. The court concluded that although State Farm's exclusion did not exclude the common law fraud elements, the exclusion also did not attempt to define common law fraud. *Id.* at 174-75, 886 N.E.2d at 982-83. The court would not read more into the language used by State Farm in order to give the language a more extensive meaning. *Id.*

¶ 65 In *Passero v. Allstate Insurance Co.*, 196 Ill. App. 3d 602, 603, 554 N.E.2d 384, 385 (1990), a case discussed in *Barth*, the Passeros filed a loss claim with Allstate based upon a theft of personal property taken from their home. Allstate concluded the policy void due to an intentional concealment or misrepresentation of a material fact made in the sworn proof of loss. *Id.* at 604, 554 N.E.2d at 385-86. In this proof of loss, the Passeros alleged that the actual cash value of the stolen property was \$9,040. *Id.* Included in their list of stolen items was a \$900 stereo system and \$1,500 worth of video equipment. *Id.* The Passeros attached a J.C. Penney purchase receipt dated prior to the fire for the stereo in the amount of \$962.95. The video equipment was documented with a receipt from J.J.'s Video. *Id.* at 605, 554 N.E.2d at 386. In Allstate's investigation, they found the true receipts which reflected a lower price in fact paid by the Passeros for the stereo and that the J.J.'s Video receipt was actually for a buyer other than the Passeros—that the J.J.'s Video receipt was forged to make it appear that the Passeros were the buyers of the equipment. *Id.* The Passeros acknowledged the misrepresentations but contended that their misrepresentations were immaterial because Allstate took no action based upon their representations. *Id.* at 606, 554 N.E.2d at 386. The appellate court rejected this argument as being based upon common law fraud—and not upon the language of the insurance contract. *Id.* at 606, 554 N.E.2d at 387. The court also found that the misrepresentations were material in light of the replacement cost provision of the Allstate policy, because the Passeros were under an obligation irrespective of this provision to provide true receipts. *Id.* at 606-07, 554 N.E.2d at 387.

¶ 66 We do not find that the cases cited by Mosquito Mutual affect our conclusion that the trial court erred in determining that there was no genuine issue of material fact in this case. To the extent that Mosquito Mutual cites these two cases for the proposition that materiality of a misrepresentation has been broadly defined in insurance cases, we agree. The cases also generally support a holding that material misrepresentations by the insured can void an insurance policy. However, the cases are factually quite distinguishable from what transpired in this case. The fraud in *Barth* apparently related to items allegedly lost in a fire that were somehow connected to an earlier theft by a person employed by Barth. The fraud in *Passero* was admitted by the insureds but was argued to be immaterial. Assad does not admit that he committed fraud, but claims a misunderstanding based upon specific statements made by Gerald Cocagne about how to process his personal property claims.

¶ 67 Because Gerald Cocagne and Cocagne Insurance Agency were acting as agents of Mosquito Mutual, and we have determined that a genuine issue of material fact exists about statements concerning the methods and process for claims reimbursement made by Gerald Cocagne, we conclude that an issue of material fact remains about Mosquito Mutual's liability as to count II in this case.

¶ 68 **CONCLUSION**

¶ 69 In a motion for summary judgment, we must construe all evidence against Cocagne Insurance Agency and Mosquito Mutual and liberally for Joshua M. Assad. In light of the factual issues remaining, and the drastic nature of summary judgment, we conclude that the case was not yet ready for summary judgment and find that the trial court's orders of summary judgment must be reversed.

¶ 70 For the foregoing reasons, the judgment of the circuit court of Christian County is hereby reversed.

¶71 Reversed.