2017 IL App (1st) 162310-U

No. 1-16-2310

Order filed September 14, 2017

Fourth Division

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

AMERICAN HEARTLAND INSURANCE COMPANY,	)	
Plaintiff-Appellant	)	Appeal from the Circuit Court of
v.	)	Cook County
WINFORD COWART and JORDAN ZAWIDEH,	)	No. 14 CH 19989
Defendants,	)	Honorable Rodolfo Garcia, Judge Presiding.
(Jordan Zawideh Appellee).	)	

PRESIDING JUSTICE BURKE delivered the judgment of the court.
Justices McBride and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the judgment of the circuit court where AHIC rescinded the automobile insurance policy within the time limitation outlined in the statute and there was insufficient evidence in the record to support the circuit court's finding that AHIC engaged in conduct that was sufficient to waive its right to rescind. We remand the cause for further proceedings not inconsistent with this order.

¶ 2 Defendant Winford Cowart was driving a vehicle when it struck defendant Jordan Zawideh who was on his bike. Cowart made a claim with his insurance company, plaintiff American Heartland Insurance Company (AHIC). AHIC denied the claim and notified Cowart that it was rescinding his policy based on material misrepresentations he made about his driving record on his automobile insurance application. AHIC then filed this declaratory action against Cowart and Zawideh seeking a declaration that it was not obligated to pay out on the claim, that the claim was void, and that Cowart's policy was void *ab initio*. AHIC filed a motion for summary judgment contending that the statutory scheme permitted it to rescind the policy, and Zawideh filed a cross-motion for summary judgment contending, *inter alia*, that AHIC had waived its right to rescind the policy by engaging in conduct inconsistent with rescission. The court found that AHIC had waived its right to rescind and granted Zawideh's motion for summary judgment. On appeal, AHIC contends that the court erred in finding that it waived its right to rescind the policy where it issued the rescission less than one year after learning about the misrepresentation and where Zawideh improperly raised the affirmative defense of waiver for the first time in his motion for summary judgment. For the reasons that follow, we reverse the judgment of the circuit court of Cook County.

¶ 3 I. BACKGROUND

¶ 4 On April 24, 2014, Cowart went to Crown Insurance Services (Crown Insurance) in Chicago, Illinois after his prior insurer had stopped conducting business. With the assistance of an insurance producer at Crown Insurance, Cowart filled out and signed an application for automobile insurance.[1] The application lists a number of questions underneath a heading that

[1]Three different copies of the insurance application are included in the record filed on appeal, but each contains substantially the same information and each is signed by both Cowart and the producer at Crown Insurance.

reads: "All questions must be accurately answered, incorrect or fraudulent answers may result in denial of coverage." The questions listed include whether the applicant had been involved in a motor vehicle accident in the last five years and whether the applicant had been charged with a moving violation in the last five years. The response field for each of these questions listed on the application is filled in with an "X" in the "No" column. In his deposition, Cowart testified that he never read the application or filled out any of the information, but merely signed the application when the producer handed it to him. He further testified that the producer did not ask him about any accidents or moving violations. Although not disclosed on his application, Cowart acknowledged during his deposition that he received a speeding ticket on September 7, 2012, and was involved in an automobile collision on October 11, 2013.

¶ 5 On June 29, 2014, Cowart's vehicle was parked on the street when it was struck by another vehicle. Cowart reported the collision to AHIC pursuant to the uninsured motorist provision of his policy (Uninsured Motorist Claim). In response to Zawideh's requests for admissions, AHIC acknowledged that it paid this claim, but Cowart stated in his deposition that AHIC did not. On July 11, 2014, AHIC received a fax from Interstate Bankers Casualty Company (IBCC) showing that Cowart had an automobile insurance policy with IBCC from October 9, 2012, through April 26, 2014, and had made a claim with IBCC for a motor vehicle accident that occurred on October 11, 2013. On July 15, 2014, a representative of AHIC sent Cowart an accident report to fill out for his Uninsured Motorist Claim. On August 5, 2014, AHIC obtained an Illinois driving record report for Cowart from QuotePro, Inc. showing that Cowart had been issued a speeding ticket on September 7, 2012. On August 27, 2014, a representative of AHIC contacted Cowart in connection with his Uninsured Motorist Claim to

inform him that he needed to obtain a denial letter showing that the at-fault driver was uninsured at the time of the accident.

¶ 6 On September 10, 2014, Cowart was driving his vehicle when he collided with a bike being ridden by Zawideh. Cowart reported the incident to AHIC and was assigned a claim number. On September 11, 2014, AHIC sent a notice to Cowart informing him that his insurance policy was set to expire at the end of October and suggested that he contact his agent for assistance in renewing his policy. On September 17, 2014, a representative of AHIC contacted IBCC and learned that Cowart was the at fault party in the motor vehicle accident that occurred on October 11, 2013. Five days later, on September 22, 2014, AHIC sent Cowart a notice that his automobile insurance policy was null and void from its inception due to his failure to disclose on his application the automobile accident that occurred on October 11, 2013, and the speeding ticket he received on September 7, 2012. AHIC informed Cowart that it was rescinding his policy pursuant to section 154 of the Illinois Insurance Code (Insurance Code) (215 ILCS 5/154 (West 2012)) and refunding his premium payments.

¶ 7 AHIC subsequently filed a declaratory action in the circuit court contending that Cowart's policy was issued in reliance on his application which failed to disclose the prior accident and speeding ticket. AHIC asserted that Zawideh had made a claim on Cowart's now-rescinded policy and the claim was denied. AHIC sought a declaration that, *inter alia*, it was not obligated to pay out any sums under the rescinded policy to Zawideh or Cowart and that the policy was void *ab initio*. Zawideh filed an answer in which he responded to the contentions raised in AHIC's complaint, requested that the court determine the rights of the parties with respect to the policy, and asked that the court declare that AHIC had a duty to indemnify Cowart

under the policy, but Zawideh did not raise any affirmative defenses. Following discovery, including a deposition of Cowart, both AHIC and Zawideh filed motions for summary judgment.

¶ 8 In its motion for summary judgment, AHIC contended that under section 154 of the Insurance Code, it had the right to rescind the policy within one year of its effective date based on Cowart's material misrepresentations on his application. AHIC also attached an affidavit to its motion in which an employee of AHIC averred that if Cowart had disclosed the accident and speeding ticket on his application, his premium payments would have been 54% higher. In Zawideh's motion for summary judgment, he contended, *inter alia*, that, contrary to AHIC's contentions, the misrepresentations rendered the policy voidable, rather than void *ab initio*. As such, Zawideh contended that, under certain circumstances, AHIC could waive its right to rescind the policy. Zawideh asserted that such circumstances were present here where AHIC acted inconsistently with the intent to rescind. Zawideh pointed out that AHIC was aware of the Cowart's misrepresentation regarding his accident record on July 11, 2014, and was aware of the misrepresentation regarding the speeding ticket on August 5, 2014, but did not effectuate the rescission until September 22, 2014, after Cowart made a claim on the policy for the accident with Zawideh September 10, 2014. Zawideh also contended that AHIC's conduct was inconsistent with its intention to rescind the policy where it sent a renewal notice to Cowart and continued to request documentation related to his Uninsured Motorist Claim even after learning about the misrepresentations.

¶ 9 Zawideh further contended that the insurance producer at Crown Insurance who filled out the insurance application for Cowart was an agent of AHIC, not of Cowart. Zawideh asserted that Cowart testified in his deposition that the producer, rather than Cowart, filled out the application, and Cowart merely signed it. Zawideh contended that as an agent of AHIC, the

actions of the insurance producer should be imputed to AHIC, thus restricting its ability to rescind the policy. Zawideh pointed out that the agreement between Crown Insurance and AHIC provided Crown Insurance with the authority to review risk and solicit applications for insurance on behalf of AHIC, which permitted Crown Insurance to act as an agent of AHIC.

¶ 10 In response to Zawideh's motion, AHIC contended that the insurance producer at Crown Insurance was an agent for Cowart, the insured, where both the application and the agreement between AHIC and Crown Insurance provided that Crown Insurance was an agent for the insured. AHIC further contended that it did not waive its right to rescind the policy where it waited only 45 days between learning of both misrepresentations and rescinding the policy. AHIC asserted that where section 154 of the Insurance Code provided that policies could be rescinded within one year, there was no authority to indicate that 45 days was an unreasonable amount of time for AHIC to wait before rescinding the policy.

¶ 11 Following argument, the court found that AHIC had waived its right to rescind the policy. The court recognized that there was not an issue with rescinding the policy post-accident, but observed that AHIC should have rescinded the policy in July 2014 when it first learned about the misrepresentation regarding the prior accident. The court also noted that Zawideh's claim of waiver was an affirmative defense that is normally a question of fact based on trial evidence, but elected to decide the issue on the summary judgment motion. The court concluded that AHIC acted inconsistently with the intent to rescind the policy where it knew about the misrepresentations well before effectuating the rescission and waited until Cowart made a claim on the policy before rescinding. The court also found AHIC's conduct inconsistent with the intent to rescind where it sent a renewal notice to Cowart despite knowing about the

misrepresentations. The court therefore granted Zawideh's motion for summary judgment. This appeal follows.

¶ 12 II. ANALYSIS

¶ 13 On appeal, AHIC contends that the circuit court erred in finding that it waived the right to rescind the policy. AHIC asserts that waiver is an affirmative defense that the circuit court should not have considered at the summary judgment stage because it was not pled in Zawideh's answer. In the alternative, AHIC contends that it rescinded Cowart's policy within the timeframe permitted by statute and did not engage in any conduct that would have waived its right to rescind. AHIC also asserts that the insurance producer at Crown Insurance was an agent of Cowart, not AHIC.

¶ 14 A. Standard of Review

¶ 15 Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file, when viewed in a light most favorable to the nonmoving party, reveal that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *General Casualty Insurance Co. v. Lacey*, 199 Ill. 2d 281, 284 (2002). "A genuine issue of material fact precluding summary judgment exists where the material facts are disputed, or, if the material facts are undisputed, reasonable persons might draw different inferences from the undisputed facts." *Adames v. Sheahan*, 233 Ill. 2d 276, 296 (2009) (citing *Adams v. Northern Illinois Gas Co.*, 211 Ill. 2d 32, 43 (2004)). We review *de novo* the circuit court's entry of summary judgment. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 349 (1998).

¶ 16 B. Waiver as Affirmative Defense

¶ 17 We first address AHIC's contention that it was improper for the court to consider Zawideh's waiver argument where he raised it for the first time in his motion for summary

judgment rather than as an affirmative defense in his answer. AHIC contends that as a general rule, affirmative defenses that are not raised in an answer or amended answer are waived. Zawideh asserts, however, that plaintiff waived this argument for review by failing to raise it in the trial court. As Zawideh points out, an argument not raised in the trial court is generally considered waived for purposes of appeal. *Nasrallah v. Davilla*, 326 Ill. App. 3d 1036, 1046 (2001).

¶ 18 Forgoing considerations of waiver, we find AHIC's argument unpersuasive. AHIC is correct that section 2-613 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-613(d) (West 2012)) provides that in order to avoid surprise, the facts constituting any affirmative defense must be set forth in the answer or reply. This court has held, however, that:

> "The purpose of this provision is to prevent unfair surprise at trial, however it does not place a restriction on motions for summary judgment. [Citation]. Under Illinois law, a defendant may file a motion for summary judgment at any time, even prior to filing an answer and numerous cases have held that an affirmative defense raised in such a motion is timely and may be considered even if not raised in defendant's answer." *Salazar v. State Farm Mutual Auto Insurance Co.*, 191 Ill. App. 3d 871, 876 (1989) (citing *Strzelczyk v. State Farm Mutual Automobile Insurance Co.*, 138 Ill. App. 3d 346, 349 (1985); *Chaplin v. Geiser*, 79 Ill. App. 3d 435, 438 (1979)).

Accordingly, "this court has rejected arguments that affirmative defenses asserted in motions for summary judgment were waived when the defendants failed to include them in their answers." *Horwitz ex rel. Gilbert v. Bankers Life and Casualty Co.*, 319 Ill. App. 3d 390, 399 (2001). We therefore find that the court did not err in considering Zawideh's defense of waiver raised for the first time in his motion for summary judgment. This, however, does not end our inquiry, and we

must determine whether the circuit court properly granted summary judgment in favor of Zawideh finding that AHIC waived its right to rescind the policy.

¶ 19 C. Waiver of Rescission

¶ 20 We next address whether the circuit court properly found that AHIC waived its right to rescind Cowart's policy. The court noted that there was no issue with rescinding the policy post-accident, but found that AHIC waived its right to rescind the policy through its conduct. AHIC asserts that this finding was in error in light of section 154 of the Insurance Code, which provides that an insurance company may rescind an automobile insurance policy within one year if the issuance of the policy was based on a misrepresentation or false warranty. 215 ILCS 5/154 (West 2012). AHIC contends that its rescission of the policy was sufficiently prompt under the statute where it rescinded the policy 73 days after learning about the prior undisclosed automobile accident and 48 days after learning about the prior undisclosed speeding ticket. AHIC further contends that it did not engage in any conduct which would suggest that it waived its right to rescind.

¶ 21 1. *Rescission*

¶ 22 " '[R]escission' is the cancelling of a contract so as to restore the parties to their initial status." *Horan v. Blowitz*, 13 Ill. 2d 126, 132 (1958). Section 154 establishes a two-prong test to determine whether an insurance policy may be rescinded based on a material misrepresentation made on the written application for the policy: 1) the statement must be false and 2) "the false statement must have been made with an intent to deceive or must materially affect the acceptance of the risk or hazard assumed by the insurer." *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 464 (2003). Thus, a misrepresentation, even if innocently made, can serve as a basis to void the policy. *Id.* (citing *Campbell v. Prudential Insurance Co. of America*,

15 Ill. 2d 308, 312 (1958)). Section 154 further provides that an insurance company cannot rescind a policy once the policy has been in effect for one year—or one policy term, whichever is less—regardless of any misrepresentation made on the application for the policy. 215 ILCS 5/154 (West 2012); see also *Standard Mutual Insurance Co. v. Jones*, 2012 IL App (4th) 110526, ¶ 16.

¶ 23 2. *Waiver of Right to Rescind*

¶ 24 "[A] material misrepresentation in an insurance policy merely renders that policy voidable, granting an insurer the option to ratify the policy despite the misrepresentation if it so chooses, but also imposing a duty upon an insurer that chooses instead to void the policy to do so promptly, or risk waiving that right." *Illinois State Bar Ass'n Mutual Insurance Co. v. Coregis Insurance Co.*, 355 Ill. App. 3d 156, 169 (2004). The language of section 154 creates an "outer limit of what constitutes promptness by imposing a one-year time limit within which an insurer must act to void a policy." *Id.* at n. 4.

¶ 25 Here, AHIC rescinded Cowart's insurance policy within the statutorily prescribed time period. The policy was issued on April 24, 2014, and it was rescinded on September 22, 2014, less than one year or one policy term after the policy went into effect. Zawideh contends, and the trial court agreed, however, that AHIC waived its right to rescind the policy by acting in a manner that was inconsistent with its intent to rescind. Zawideh points to AHIC's conduct after learning about the misrepresentations including AHIC sending Cowart a notice to renew his policy, requesting information related to his Uninsured Motorist Claim, and neglecting to rescind the policy until months after learning about the undisclosed automobile accident and speeding ticket. Although acknowledging that AHIC rescinded the policy within the time limit prescribed by section 154, Zawideh relies on the language from *Coregis* that "[i]n the context of policy

defenses, an insurer waives its right to enforce a provision of the contract when its words or conduct are inconsistent with its intention to rely on the requirements of the policy." *Coregis*, 355 Ill. App. 3d at 170[2] (citing *Twin City Fire Insurance Co. v. Old World Trading Co.*, 266 Ill. App. 3d 1, 11 (1993)). "Although strong proof is not required to establish a waiver of a policy defense, such facts must be shown as would make it unjust, inequitable or unconscionable to allow the defense to be interposed." *Mollihan v. Stephany*, 52 Ill. App. 3d 1034, 1041 (1977). We find that no such facts are present in this case.

¶ 26 Here, we cannot say that AHIC's "words or conduct" were sufficient to support the circuit court's finding that AHIC waived its right to rescind the policy. Although AHIC first learned about the prior undisclosed automobile accident on July 11, 2014, it is clear from the record that AHIC continued to investigate the claim Cowart made with IBCC and learned on September 17, 2014, that Cowart was the at-fault party. AHIC sent a notice to Cowart rescinding the policy five days later. Although nearly six weeks elapsed between when AHIC first discovered the undisclosed automobile accident, it is evident that AHIC continued to investigate Cowart's driving record, and based on the timeline of events and the one-year time limitation provided in the statute, we find that AHIC acted promptly in rescinding Cowart's policy. See, *American Service Insurance Co. v. United Automobile Insurance Co.*, 409 Ill. App. 3d 27, 35-36 (2011) (finding rescission was not waived where rescission took place nine months after the policy went into effect).

¶ 27 Nor do we find AHIC's conduct in resolving Cowart's Uninsured Motorist Claim indicative of an intent to waive the right to rescind. Although AHIC became aware of the prior

[2] We observe that *Coregis* was decided without consideration of the amendment to section 154 which added the one-year "outer limit." The court noted that "[n]either party has argued that this amendment is applicable here." *Coregis*, 355 Ill. App. 3d at n.4.

undisclosed automobile accident while resolving his Uninsured Motorist Claim, it continued to research Cowart's driving record and eventually became aware of Cowart's undisclosed speeding ticket and the fact that he was at fault in the undisclosed automobile accident. While conducting this research, AHIC asked Cowart to fill out an accident report and obtain a denial letter showing the at-fault motorist had no insurance coverage. Before the circuit court, AHIC acknowledged that it paid Cowart for this claim, but Cowart stated in his deposition that AHIC did not. Irrespective of whether AHIC paid this claim, we find that AHIC's conduct was not sufficient to constitute waiver of the right to rescind based on the material misrepresentations Cowart made on his application. Our research has revealed no authority which indicates that an insurer must move to rescind the policy and cease all contact with the insured as soon as any potentially material misrepresentation comes to light. AHIC merely continued business as usual while it continued to research Cowart's driving record to determine the extent of his misrepresentations. We cannot say that such conduct was indicative of an intent to waive its right to rescind the policy.[3]

¶ 28 We further find unpersuasive Zawideh's contention that AHIC waived its right to rescind the policy where it sent Cowart a notice to renew the policy after learning about both misrepresentations. We find *Mollihan* instructive with regard to AHIC's conduct after discovering Cowart's misrepresentations. In *Mollihan*, as here, the insurer rescinded the insured's policy based on material misrepresentations the insured made on the insurance application. *Mollihan*, 52 Ill. App. 3d at 1036-37.

[3]We observe that the omissions in this case were undoubtedly material where an employee of AHIC averred that had Cowart disclosed the prior accident and speeding ticket, his premium payment would have been 54% higher. Zawideh does not contest the materiality of the omissions.

> "Shortly after the policy had been rescinded, agents of the insurer paid the insured for damage to his vehicle and accepted from the insured a summons and complaint which had been served on him by another party involved in the accident. The court found that these actions by the agents of the insurer resulted from a delay in communication of information between different departments within the insurer's organization. The court held that these actions were insufficient to establish a waiver of the insurer's right to deny coverage under the policy." *State Farm Mutual Auto Insurance Co. v. Gray*, 211 Ill. App. 3d 617, 622-23 (1991) (citing *Mollihan*, 52 Ill. App. 3d at 1041).

We find that the actions of AHIC in this case were similarly insufficient to establish a waiver of its right to rescind. Here, there was no post-rescission payment or contact from AHIC as there was in *Mollihan*. All of the conduct cited by Zawideh took place before AHIC rescinded the policy. We further find Zawideh's attempt to distinguish *Mollihan* on its facts unpersuasive. Zawideh contends that in *Mollihan*, "an insurer paid a claim on an auto insurance policy that it later rescinded, but did so before learning about the misrepresentation *** that served as the basis for the rescission." Contrary to Zawideh's assertion, the insurer in *Mollihan* learned about the misrepresentation on December 16, 1970, and payment at issue was made on December 23, 1970, the same day the insurer "started the process of rescission." *Mollihan*, 52 Ill. App. 3d at 1036, 1041.

¶ 29 We also find Zawideh's reliance on *Gray*, 211 Ill. App. 3d 617 misplaced. In *Gray*, the plaintiff insurance company, State Farm Mutual Automobile Insurance Company (State Farm), brought a declaratory action seeking a judgment of its rights and obligations under an automobile insurance policy for uninsured motorist coverage issued to defendant, Gray. *Id.* at 617-18. Gray was involved in an automobile accident while driving an automobile she did not own. *Id.* at 618.

Under her policy, she was required to report the accident to police within 24 hours and to State Farm within 30 days if she was claiming uninsured motorist coverage. *Id.* Gray reported the incident to State Farm nearly 23 months after the accident occurred. *Id.* State Farm initially sent Gray a notice indicating that there was a question as to her coverage based on the late notice, but later sent her a letter informing her that she would be afforded coverage for the incident. *Id.* at 621. Nine months later, State Farm sent a letter to Gray indicating that it was continuing the investigation of her claim and seven months after that sent her notice that it was denying her claim because of the late notice. *Id.* at 622. The court found that State Farm had waived the policy defense of late notice where it previously sent her a letter specifically informing Gray that she would be afforded coverage. *Id.* at 621.

¶ 30 We find *Gray* distinguishable from the case at bar where in that case State Farm knew about its policy defense at the time Gray filled her claim and later indicated that it would provide coverage. Here, by contrast, AHIC did not know about Cowart's misrepresentations at the time he filed his Uninsured Motorist Claim and began resolving the claim before learning about the misrepresentations. After discovering the undisclosed automobile accident, AHIC continued to resolve Cowart's claim and also continued to research Cowart's driving record, eventually discovering the undisclosed speeding ticket. There is conflicting information in the record whether AHIC paid Cowart for this claim, and there is no indication in the record when any payment was made, *i.e.*, we cannot determine whether AHIC knew the full extent of Cowart's misrepresentations at the time any payment would have been made. Moreover, after Cowart filed his second claim following the collision with Zawideh, AHIC made no representations that Cowart would be afforded coverage for that claim and rescinded his policy 12 days after the collision occurred. As such, we find that the actions of AHIC are distinguishable from the

plaintiff in *Gray*. Accordingly, we find that the circuit court erred in finding that AHIC waived its right to rescind the policy and that the court erred in granting Zawideh's motion for summary judgment on that basis. We further hold that based on the circumstances apparent from the record, that AHIC did not waive its right to rescind the policy as a matter of law.

¶ 31 D. Insurance Producer's Agency

¶ 32 Finally, we address Zawideh's contention that the producer at Crown Insurance acted as an agent for AHIC in filling out Cowart's insurance application. We note that the circuit court did not address this issue in its ruling, but Zawideh contends that in the event this court rejects his contentions regarding waiver, this argument provides another basis on which to affirm the trial court's ruling.[4] Zawideh points out that Cowart stated in his deposition that he did not read or fill out the insurance application, but merely signed it when the insurance producer at Crown Insurance presented it to him. Zawideh asserts that the insurance producer at Crown Insurance was acting as AHIC's agent and, thus, the material misrepresentations should be imputed to AHIC and cannot be the basis for rescission.

¶ 33 Zawideh acknowledges that both the agreement between AHIC and Crown Insurance and the insurance application Cowart signed provide that the Crown Insurance is an agent of the insured. Zawideh contends, however, that the producer's conduct, rather than his position, during the transaction is determinative of whether he is an agent of the insurance company or the insured.

¶ 34 In order to determine whether an agency relationship exists, we must first determine whether the producer at Crown Insurance who filled out the application was an insurance broker

[4]We observe that we may affirm the grant of summary judgment on any basis in the record, regardless of whether the trial court relied on that basis. *Harlin v. Sears Roebuck and Co.*, 369 Ill. App. 3d 27, 31-32 (2006).

or an insurance agent. *Pekin Life Insurance Co. v. Schmid Family Irrevocable Trust*, 359 Ill. App. 3d 674, 680 (2005). "Whether a person is an agent or broker usually is a question of fact, but the issue may be decided as a matter of law if the facts clearly show the person acting as a broker is an agent of the insured." *Id.* (citing *Brandt v. Time Insurance Co.*, 302 Ill. App. 3d 159, 166 (1998)). Our supreme court has stated that:

> " 'A broker is an individual who procures insurance and acts as a middleman between the insured and the insurer, who solicits insurance business from the public under no employment from any special company and who, having secured an order, places the insurance with the company selected by the insured, or in the absence of any selection by the insured, with a company he selects himself. [Citation.] An agent is an individual who has a fixed and permanent relation to the companies he represents and who has certain duties and allegiances to such companies.' " *Zannini v. Reliance Insurance Co. of Illinois*, 147 Ill. 2d 437, 451 (1992) (quoting *Krause v. Pekin Life Insurance Co.*, 194 Ill. App. 3d 798, 804-05 (1990).

Generally, a broker is an agent of the insured, not the insurer. *State Security Insurance Co. v. Burgos*, 145 Ill. 2d 423, 431 (1991). The determination of whether a party acted as an agent of the insured or insurer is a question of fact based on the party's conduct rather than his or her title. *Krause*, 194 Ill. App. 3d at 805.

¶ 35 Here, the agreement between AHIC and Crown Insurance delineated the relationship between the entities. Under the agreement, Crown Insurance was a broker or "producer" for AHIC and that Crown Insurance was an agent for the insured. By the terms of the agreement, Crown Insurance was not AHIC's general agent, but was AHIC's agent for specific purposes outlined in the agreement, such as soliciting applications for insurance, reviewing the prospect of

risks, and remitting premiums. *State Security Insurance Co. v. Frank B. Hall & Co.*, 258 Ill. App. 3d 588, 597 (1994). There is no evidence in the record to suggest that AHIC and Crown Insurance deviated from the terms of this agreement.

¶ 36 In his deposition, Cowart testified that he did not fill out the insurance policy application, but merely signed it when the insurance producer handed it to him. AHIC presented no evidence to contradict this testimony. The agency agreement, however, did not provide the producer the authority to fill out the application for the insured. As such, the producer was not acting in the limited agency capacity granted to him under the agreement (*Zannini*, 147 Ill. 2d at 451-52 (discussing *Wille v. Farmers Equitable Insurance Co.*, 89 Ill. App. 2d 377 (1967)), but was acting as an agent of Cowart when he filled out the policy application. This is particularly the case where the agency agreement provides that Crown Insurance was authorized merely to submit completed risk applications to AHIC, and AHIC would assess, evaluate, and determine final acceptance.

¶ 37 This finding is not disturbed by the decisions in *Allied American Insurance Co. v. Ayala*, 247 Ill. App. 3d 538 (1993) and *Brandt*, 302 Ill. App. 3d 159, relied on by Zawideh. In *Ayala*, the court found that "*when an insurance applicant gives correct answers to the insurer's agent and the agent fills in the application with incorrect answers*, the insurer is estopped from denying liability even if the application is signed by the applicant." (Emphasis added.) *Ayala*, 247 Ill. App. 3d at 553-554. Zawideh omits the emphasized portion of the quotation from his brief in contending that the producer in this case was acting as an agent of AHIC. The context provided by the full quotation is crucial, however, where, here, there is no contention or evidence in the record to suggest that Cowart gave correct answers and the insurance producer filled in incorrect answers.

¶ 38 We further find *Brandt* distinguishable from the case at bar. In *Brandt*, plaintiff Brandt filed an action against Time Insurance Company (Time) to recover damages she sustained as a result of Time's refusal to pay her claims under a health insurance policy. *Brandt*, 302 Ill. App. 3d at 161. Brandt was diagnosed as a Type II diabetic in 1988. *Id.* In 1990, Douglas Ruth, an insurance broker, assisted Brandt in obtaining health insurance. *Id.* In 1995, Ruth informed Brandt that her insurance was about to expire and recommended a policy offered by Time. *Id.* Ruth completed the application for Brandt and answered the questions including a question which asked if the applicant had received medical treatment for diabetes in the last five years. *Id.* at 161-62. Ruth answered "No" to this question even though he knew about Brandt's Type II diabetes diagnosis. *Id.* at 162. After her policy went into effect, Brandt was diagnosed with stomach cancer and sought coverage under her policy. *Id.* Time discovered the undisclosed diabetes diagnosis and treatment and refused payment. *Id.*

¶ 39 On appeal, the court found that there was a question of fact as to whether Ruth acted as Time's agent and, thus, whether his knowledge of the misrepresentation could be imputed to Time. *Id.* at 168. The court found that because Ruth had knowledge of Brandt's condition, if Ruth was acting as Time's agent at the time he filled out the application, Time was "estopped from avoiding a policy for untrue representations in the application where the insured discloses facts to the agent and the agent, in filling out the application, does not state the facts as they are disclosed to him but instead inserts conclusions of his own or answers inconsistent with the facts." *Id.* at 167-68.

¶ 40 Here, there is no indication in the record that the insurance producer at Crown Insurance knew about Cowart's prior automobile accident or speeding ticket when filling out the application. Based on the record before us, we cannot say the facts of this case are comparable to

Brandt where there is no evidence that Cowart "disclose[d] facts to the agent and the agent, in filling out the application, [did] not state the facts as they [were] disclosed to him." *Id.* We therefore find that the producer at Crown Insurance was an agent of Cowart, and the material misrepresentations on the application should not be imputed to AHIC.

¶ 41 E. AHIC's Rescission

¶ 42 Having found no waiver and no agency relationship precluding rescission, we must determine whether the rescission was otherwise proper. As discussed, section 154 establishes a two-prong test to determine whether an insurance policy may be rescinded based on a material misrepresentation made on the written application for the policy: 1) the statement must be false and 2) "the false statement must have been made with an intent to deceive or must materially affect the acceptance of the risk or hazard assumed by the insurer." *Golden Rule,* 203 Ill. 2d at 464. Here, the statements were undoubtedly false and an employee of AHIC averred that if Cowart had disclosed the accident and speeding ticket on his application, his premium payments would have been 54% higher, which shows that Cowart's false statements materially affected the acceptance of risk assumed by AHIC. Zawideh does not contest either the falsity of the statements or their materiality to the acceptance of risk. As discussed, *supra*, we also find that AHIC's rescission was sufficiently "prompt" under section 154.

¶ 43 Although we recognize that "the mere filing of cross-motions for summary judgment does not establish that there is no issue of material fact" (*Pielet v. Pielet*, 2012 IL 112064, ¶ 28), our review of the record reveals that there is no genuine issue of material fact that would preclude an entry of summary judgment in favor of AHIC. Accordingly, we find that AHIC properly rescinded Cowart's insurance policy and that AHIC is entitled to judgment as a matter of law.

¶ 44 III. CONCLUSION

¶ 45 For the reasons stated, we reverse the judgment of the circuit court of Cook County granting summary judgment in favor of Zawideh and remand the cause with directions for the circuit court to enter an order of summary judgment in favor of AHIC.

¶ 46 Reversed and remanded with directions.