2013 IL App (2d) 121369-U
No. 2-12-1369
Order filed October 21, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

AMERICAN FAMILY MUTUAL INSURANCE COMPANY, Plaintiff-Appellee, v. ANDRZEJ LOBROW and BOGUMILA LOBROW, Defendants-Appellants.	))))))))))	Appeal from the Circuit Court of Lake County. No. 09-CH-5870 Honorable Jorge L. Ortiz, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Jorgensen and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in allowing plaintiff's expert witness to testify instead of barring his testimony; the trial court properly considered cause-and-origin testimony about the explosion and fire as it related only to plaintiff's affirmative defense to defendants' counterclaim even though it allowed evidence to be presented out of order and during its case-in-chief; the trial court did not err in refusing to apply the innocent insured doctrine, and it properly considered statements made by one of the defendants in her deposition and in her inventory of personal property losses to be equivalent to the required sworn statement and sworn proof of loss, as defendants advocated in the trial court below.

¶ 2 Defendants, Andrzej and Bogumila Lobrow, appeal the judgment of the circuit court of Lake County awarding judgment in favor of plaintiff, American Family Mutual Insurance Company, on count III of its declaratory judgment action seeking to avoid coverage under the insurance contract between the parties due to material misrepresentations made by defendants in the adjustment of their claim. On appeal, defendants argue that the trial court erred in allowing plaintiff's expert witnesses to testify about the cause and origin of the fire which destroyed the house that was the subject matter of the insurance policy because the expert witness's answers to defendants' interrogatories and discovery disclosures never referenced the cause and origin of the fire during the pendency of the case, thereby surprising and prejudicing defendants at trial. In addition, defendants contend that plaintiff did not adequately plead cause and origin in its complaint, and instead, raised the issue only in an affirmative defense to defendants' counterclaim even though plaintiff presented some of the evidence in its case-in-chief. Defendants further argue that the trial court erred in declining to apply the innocent insured doctrine to Bogumila and erred in determining the effect of Bogumila's purported misrepresentations in compiling her inventory list of possessions destroyed in the fire. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In 2007, plaintiff issued an insurance policy to Bogumila, insuring the home located on Noble Drive in Port Barrington. Later, the policy was amended, and Andrzej was added as a named insured. The policy was in the amount of a little over $1 million, with the house being insured for about $562,000, and the personal property in the house being insured for about $450,000. Clauses in the policy provided coverage to defendants for living expenses, including rent for a new domicile, if the house became uninhabitable.

¶ 5 The insurance policy also had exclusion provisions. The policy excluded "fraud," which it defined as "any concealment, misrepresentation or attempt to defraud by any insured either in causing any loss or in presenting any claim under the policy." Additionally, the policy provided that it would be void as to "all insureds" if "any insured" "intentionally concealed or misrepresented any material fact or circumstance," "engaged in fraudulent conduct," or "made false statements."

¶ 6 The relevance of the insurance policy came to the fore when, early in the morning of November 16, 2009, an explosion and fire destroyed the Noble Drive residence. Defendant's residence, according to a neighbor, "blew up." Apparently, fire blossomed from all of the windows in the residence when the fire initiated. When the fire department arrived, they quickly concluded that they could not save anything of the house, and concentrated on making sure the fire did not spread to any adjacent buildings. One of defendant's neighbor's homes was damaged by the fire in defendant's home.

¶ 7 At the time of the explosion and fire, none of the Lobrows were home. Andrzej testified that, on the morning of November 15, 2009, he traveled to Nashville, Tennessee, and was still there when the explosion and fire occurred. Bogumila testified that she and her son were staying with her daughter in Schiller Park, Illinois. During the evening of November 15, they went to movies, returning to the daughter's home by around 1 a.m. on November 16, notwithstanding the fact that the son had school in Wauconda that morning, about an hour's travel away from the daughter's home. Both defendants testified that their residence had been secured, all the windows and doors had been locked, and access through the garage was by code entered on a keypad and then through a locked door. Defendants testified that the code was known only to the family members and no one else, and a key for the locked door was hidden in the garage.

¶ 8 On the date of the explosion and fire, defendants had a first and second mortgage on the Noble Drive residence, and both mortgages had been foreclosed in 2008, after defendants stopped making payments. In addition, the homeowner's association of defendant's subdivision had sued defendants for failing to pay their monthly assessments.

¶ 9 On November 19, 2009, Phillip Brown, a fire investigator hired by plaintiff, conducted an initial inspection of the fire scene. He noted that window-glass and other debris was located up to 100 feet from the house, which indicated an explosion, because in a fire without an explosion, such debris will be found within about 20 feet from the house. Brown was only able to examine the perimeter of the house and yard, and was prevented from examining the remnants of the residence because he did not have a consent from both defendants to enter the premises, and he did not have the permission to do so from the Wauconda Fire Department because the fire department did not want the scene disturbed.

¶ 10 Plaintiff, claiming that the fire and explosion was unusual, asked defendants to provide written consent to inspect the premises. Bogumila signed the consent; Andrzej requested time to review the consent and, ultimately, never signed a consent. Testimony showed that Andrzej pointed out that the consent contained a number of errors, including in the spelling of his name, the address of the residence, and he asserted that he wanted to provide his own investigation using a private detective. Andrzej also told plaintiff to stop talking to Bogumila and requested that plaintiff only deal with him.

¶ 11 On November 18, 2009, Michael Zwemke, at the time an adjuster for plaintiff, met with defendants and presented an authorization for access to the premises, an authorization for information, a request for financial records, and a nonwaiver agreement for defendants to sign.

Andrzej refused to sign the various authorizations and requests, and plaintiff issued two reservation of rights letters explaining that there were questions over whether coverage under the policy would apply to the loss.

¶ 12 From November 18 through December 11, 2009, Andrzej continued to refuse to sign any document provided by Zwemke, even though any errors he pointed out were corrected and a new document was presented for signature. For example, Andrzej objected to giving a personal recorded statement because he would not immediately be given a copy or a transcript of the recording. When plaintiff suggested that Andrzej bring his own recorder, Andrzej still declined to give a recorded statement. Likewise, Andrzej insisted that a Polish interpreter be available for his wife when she would give a recorded statement; when plaintiff agreed to provide an interpreter, Andrzej still refused to present Bogumila for a recorded statement. Nevertheless, during the pendency of this case, both defendants were eventually deposed and explained their understandings of the events surrounding the explosion and fire.

¶ 13 The Wauconda fire department's fire investigator, Lieutenant Patrick Kane, gave a consent form to inspect the premises to Bogumila to sign; she did not sign the form. Eventually, Kane signed a complaint for an administrative search warrant to enable him to inspect the premises.

¶ 14 On December 11, 2009, less than a month after the explosion and fire, plaintiff filed suit against defendants. The complaint alleged that defendants breached the cooperation provision of the insurance policy, and it also sought a court order allowing plaintiff to conduct an investigation of the site. On December 15, 2009, the court ordered that plaintiff be allowed to inspect the site. Plaintiff conducted its investigation over the three-day period between December 28 and December 30, 2009. In addition to investigators employed by plaintiff, investigators from the Illinois State Fire

Marshall and the Wauconda fire department were also present and conducting their own investigations.

¶ 15 The case languished in discovery and motion practice until early in 2011, when plaintiff filed a motion for summary judgment. In April 2011, the motion was denied. Also, on April 21, 2011, plaintiff issued a formal denial letter to defendants, denying their claim for loss on the basis that the explosion and fire was caused by an intentional act, and the commission of fraud in procuring the policy and specifying the losses from the fire.

¶ 16 On June 1, 2011, plaintiff sought leave to file an amended complaint, seeking to add claims based on material misrepresentation in the procurement of the insurance policy (count I) and misrepresentation in processing the claim (count III) to the already-existing claim of non-cooperation (count II). The trial court granted leave over defendants' strenuous objections. Defendants contended that plaintiff had known of and hidden the new claims until the literal eve of trial, at which point plaintiff sought leave to amend. The trial court held that it could not discern that allowing plaintiff to amend its complaint would cause prejudice (like being unable to defend the new allegations) to defendants. The trial court granted leave to amend, granted leave to defendants to file a counterclaim, continued the trial date, and reopened discovery related to the new allegations. The parties filed motions to dismiss the amended complaint and the counterclaim, both of which were denied by the trial court. Plaintiff subsequently filed affirmative defenses, including that defendants had intentionally caused the explosion and fire and had made material misrepresentations about the amount of money they were due under the insurance policy.

¶ 17 As the matter progressed, on April 27, 2011, plaintiff filed its disclosures pursuant to Illinois Supreme Court Rule 213(f) (eff. Sept. 1, 2008). Kane, the Wauconda fire investigator, was disclosed

as having formed the opinion that the explosion and fire resulted from arson triggered by a deliberate accumulation and ignition of a large amount of natural gas in defendant's residence. Brown, plaintiff's fire investigator, opined that, the fire was intentionally caused based on his observations of irregular burn patterns in the residence, which were indicative of the presence of accelerants.

¶ 18 On August 1, 2011, plaintiff updated its Rule 213(f) disclosures. Brown maintained his opinion that the fire was intentionally caused. New experts supporting facets of Brown's overall opinion were also disclosed: Dennis McGarry, a metallurgist, provided an opinion based on his study of the drip leg pipe of the water heater, that the cap had been removed before the fire occurred, allowing natural gas to leak into the house and accumulate; Stephen Erlenbach, a mechanical engineer, studied the natural gas piping in the premises and opined that the natural gas service to defendants' home was properly functioning at the time of the explosion and fire, and he found no evidence of leaks in the gas delivery system. Defendants requested and received time to depose the new experts on their newly disclosed opinions, and the discovery cutoff was extended to November 1, 2011, with trial set for November 14, 2011.

¶ 19 Early in October 2011, defendants completed their depositions of Brown, McGarry, and Erlenbach. On October 14, 2011, plaintiff again updated its Rule 213(f) disclosures, this time to include any opinions divulged during the witnesses' depositions. On November 4, 2011, defendants filed a motion to exclude the testimony of plaintiff's cause and origin expert witnesses. On November 10, 2011, the trial court denied the motion because the Rule 213(f) disclosures and depositions of the witnesses disclosed all of their opinions. The trial court also reopened discovery for all parties to allow defendants to retain cause and origin expert witnesses if they wanted.

Defendants did not disclose any expert witnesses during this discovery extension; likewise, defendants did not seek to further extend discovery to obtain any expert witnesses.

¶ 20 Regarding the cause and origin of the fire, the trial court allowed plaintiff's witnesses to testify regarding their investigation, conclusions, and opinions. At trial, the following testimony about the cause and origin of the explosion and fire was elicited.

¶ 21 Brown testified that, on November 19, 2009, he performed a preliminary investigation of the scene of the explosion and fire. He walked around the outside of the remnants of the house, noted the position of debris from the house, took photos, and interviewed the neighbors. From this preliminary investigation, he concluded that there had been an explosion. He was unable to examine the premises himself at that time, due to the fact that he had not received a signed permission from both defendants and he was precluded by the orders of the Wauconda fire department. Regarding the homeowners' permission, Brown testified that he had obtained Bogumila's signed consent, but plaintiff subsequently determined that it needed both Bogumila's and Andrzej's signatures on a consent form before Brown would be allowed into the premises. Brown remarked that, in light of the fact that he was comfortable investigating the fire before he had any signed permission to do so, he was satisfied with Bogumila's signed permission form and would have been comfortable investigating the interior of the premises with only that single permission. Later, plaintiff obtained a court order to allow Brown to enter the premises, and, on December 28, 29, and 30, 2009, the investigation of the interior of the premises occurred.

¶ 22 Brown testified that, during the interior investigation, none of the gas appliances (like the stove or the dryer) were involved in causing the fire; likewise, a majority of the gas pipes were also determined not to have been involved in the fire. During the investigation, it was discovered that

the drip leg pipe to the water heater was missing its cap. Closer inspection revealed that the threads on the drip leg pipe appeared to be completely intact. Brown surmised that the cap had likely been removed before the fire occurred. In addition, there was some wood in the drip leg pipe that had apparently been jammed into the pipe to restrict the flow of gas escaping from the drip leg pipe, but he required additional testing and examination to make that a firm conclusion. Brown testified that he also observed irregular burn patterns in three different areas on the basement floor. Brown took samples of the areas and reported that chemical testing performed was negative for the presence of accelerants or ignitable substances. Brown explained that the weeks between the fire and the examination of the premises may have allowed any trace evidence to degrade or otherwise be destroyed, and the irregular burn patterns themselves suggested the presence of an accelerant.

¶ 23 Brown testified that, on March 1, 2010, he submitted a report to plaintiff. In that report, Brown informed plaintiff that, to make a positive determination about the origin and cause of the explosion and fire, he needed additional testing performed. Specifically, he needed a materials engineer to examine the drip leg pipe in order to determine how and when the cap came off of the drip leg pipe, and he needed the gas meter and gas piping to be examined to determine whether there was a leak in the meter or piping that could have caused or helped cause the explosion and fire.

¶ 24 McGarry testified that he was a metallurgist, and, in August 2011, he examined the piping to the water heater and furnace. He had been asked to determine if the cap on the drip leg pipe had been missing at the time of the fire, or if it had been blown off or removed in some other manner. Using microscopic examination, McGarry determined that, at the time of the fire, the drip leg cap had not been threaded onto the drip leg pipe. He based this conclusion on the fact that the threads were intact, and they had a high level of oxidation that would have been caused by the heat of the

fire, demonstrating that the threads had been exposed at the time of the fire. McGarry further testified that there was no evidence that the cap to the drip leg pipe had been blown off, and he conducted testing to determine at what pressure the cap would have been blown off, finding it to be a much greater pressure than was normal (or even likely). McGarry also found low-density wooden debris (consistent with pine) within the drip leg pipe suggesting that wood had been jammed into the pipe before the explosion and fire.

¶ 25 Erlenbach testified that he was a mechanical engineer and had been retained by plaintiff to examine the gas appliances and gas supply system of the Noble Drive residence. Erlenbach testified that, in normal operation of the gas system, the cap on the water heater's drip leg pipe would normally be screwed into place to prevent natural gas from flowing into the house. His examination of the other gas appliances revealed that there were no defects or leaks that would have allowed gas to escape into the home. Similarly, the gas meter and the gas piping proved to be leak free. Erlenbach testified that, during the investigation of the premises, the cap for the drip leg pipe had not been discovered. Relying on McGarry's examination showing that the threads of the drip leg pipe were intact, he concluded that the cap was removed before the fire occurred.

¶ 26 Brown testified that, while he had a suspicion regarding the cause and origin of the explosion and fire, he could only confirm his opinions using the findings of McGarry and Erlenbach, along with those of Robert Juergens (an electrical engineer). Brown explained that, based on the findings of McGarry, Erlenbach, and Juergens, he was able to exclude any accidental cause for the explosion and fire. Brown concluded that the explosion resulted from the removal of the cap from the water heater's drip leg pipe at some time before the explosion occurred. Brown further determined that a solid piece of wood had been jammed into the open drip leg pipe in order to slow down the escape

of natural gas into the house, and to allow time for whomever removed the cap to leave the house. Later, after sufficient gas had built up, it was ignited by one of the many ignition sources present in the basement, thereby causing the explosion.

¶ 27 Defendants claimed $848,168 under the insurance policy for the loss of personal property destroyed in the explosion and fire. Brown testified that, during his examination of the premises, he noted the absence of a number of household items compared to pre-fire photos of defendants' home. The pre-fire photos showed the presence of three beds located in different bedrooms in the house. Brown's investigation located evidence of only one mattress and box-spring in the debris. Brown also testified that he did not find in the debris the remains of pots and pans that had been shown in the pre-fire photos, and he did not find evidence of a metal pan rack, stone counter tops, and the silverware shown in the pre-fire photos. Brown testified that, even in an extremely hot fire, as this appeared to be, he should have been able to find remnants of hangers holding clothing, along with the other items identified as missing or providing a much smaller amount of remains than would be expected.

¶ 28 Brown testified that clothing remains were missing from the fire scene, even though the pre-fire photos shoed that two closets had been stuffed with clothing. Brown testified that the pre-fire photos showed a grandfather clock near the front door, but none of the metal components that would be expected to survive the fire, such as the weights, chains, and gears, were located in the debris. Brown testified that, similarly, metal components of furniture that would be expected to remain after the fire were not located, such as the metal bases of rolling office chairs and metal table legs.

¶ 29 Testimony suggested that Bogumila took a long time compiling and verifying a list of the personal property lost in the explosion and fire, combing through the pre-fire photos and trying to

obtain information as to the current value of the various items. As noted, defendants claimed over $848,000 in personal property losses. Bogumila testified that the personal property had been acquired over time, between the years 2000 and 2009, amounting to an accumulation of $87,000 of personal property, on average, for each of those years. Bogumila also testified that her flower shop closed in 2006, when her insurance was canceled due to the frequency of claims against it, and replacement insurance was unavailable. After the closure of her flower shop, Bogumila became depressed, and suffered poor health and illnesses. She testified that she was no longer able to pay the family bills, her credit rating dropped, she was unable to obtain a loan, and, eventually, in 2008, she stopped making payments on the two mortgages on the Noble Drive residence. Additionally, there was testimony that her income during the years she owned and operated her flower shop was between $10,000 and $40,000 per year, dropping to nothing when she was no longer able to work.

¶ 30 Andrzej testified that he owned none of the personal property claimed to have been lost; it was all owned by Bogumila. Andrzej assisted Bogumila in compiling the personal property loss list. Andrzej testified that, in the past 10 years, he had no taxable income, and he was unemployed at the time of the explosion and fire. Andrzej's testimony was vague about what he did even when he claimed to be employed or self-employed. In 2007, Andrzej testified that he filed for bankruptcy, and, in that proceeding, he declared, under oath, that he had income of $1,000 per month and owned personal property in the amount of $2,600. Plaintiff impeached Andrzej's testimony with his answers to plaintiff's interrogatories, in which Andrzej averred that he had not filed a bankruptcy claim before the explosion and fire.

¶ 31 Plaintiff also provided testimony based on the items displayed in the pre-fire photos. Plaintiff calculated that, based on the items photographed, defendants had documented personal property in the amount of $77,723.

¶ 32 Andrzej testified that, at the time of the explosion and fire, he was out of town. He testified that, on the morning of November 15, 2009, he flew to Nashville, Tennessee, to meet a person, but he could not recall the person's last name. Andrzej testified that, in Nashville, he was met by three persons who drove him around and to his meetings. Andrzej testified that two of the persons perished in the 2010 plane crash that claimed the life of the then Polish prime minister. He had lost touch with the third person following his Nashville trip. He was also unable to recall their names at trial.

¶ 33 Andrzej testified that he had forgotten his cell phone when he flew to Nashville. Plaintiff provided phone records showing that, between 1:30 and 3:30 a.m. on November 15, 2009, Andrzej's cell phone was making and receiving calls.

¶ 34 Defendant's insurance policy from plaintiff contained a provision obligating plaintiff to assist defendants in relocating and providing living expenses. Plaintiff provided testimony that defendants were shown several two- and three-bedroom homes and apartments. Defendants provided various reasons as to why these accommodations were unacceptable and rejected them. Instead, defendants rented a one-bedroom apartment from Radoslaw Grzelak. The apartment was located in Schaumburg, but was in the Fremd high school district. Andrzej testified that, on November 20, 2009, he first met Grzelak. Defendants submitted to plaintiff a signed lease for the apartment showing that defendants made a $5,000 deposit and were paying rent of $2,800 per month.

¶ 35 In spite of defendants' testimony, the evidence showed that Grzelak had a first lease dated before the fire, with a monthly rent of $914. Grzelak produced a second lease that matched the terms testified to by defendants. The record also suggests that the first lease was backdated to allow defendants to establish their son's residence in the Fremd high school district, but this information does not seem to have been elicited at the trial or placed before the trial court at any relevant time.

¶ 36 Following the trial, the trial court held in favor of defendants on counts I and II of plaintiff's complaint, but held in favor of plaintiff on count III. The trial court held, pertinently:

> "In Count 3 of its amended complaint, [plaintiff] seeks a declaration of noncoverage for material misrepresentations made by [defendants] in their claim, those being the value of the personal property they claim was destroyed in the fire and the monthly rent for the apartment they rented.
>
> The Court has carefully considered the parties' testimony and had the opportunity to observe their demeanor and credibility. With respect to [Andrzej], the Court finds his testimony was mostly evasive, contradictory, and not credible. *** With respect to the issue of the rental charges for the apartment, the Court finds that [Andrzej] materially and fraudulently misrepresented the amount of rent he and [Bogumila] were to pay for the apartment in an attempt to defraud [plaintiff]. The represented monthly rent was $2800 according to the lease dated December 1st, 2009, which was admitted into evidence as Plaintiff's Exhibit No. 207. The lessor was [Grzelak], and [defendants] were the lessors [*sic*]. The Plaintiff's Exhibit No. 208 is a lease dated 10/26/09 showing Mr. [Grzelak] as the resident. *** [T]he [defendants'] son[] is also listed as an occupant on this lease. The rent on this lease was shown as $1140. I think actually it was $945 due to some rent concessions.

[Andrzej] testified that he first met Mr. [Grzelak] at an event at the Polish National Alliance on November 20th, 2009, after the fire and explosion. If this were true, how could it be that [defendants' son] came to be listed as an occupant on the lease dated 10/26/2009?

Plaintiff's Exhibit No. 234 is a rental application for the apartment in question in Schaumburg showing a move-in date of November 1st, 2009, and listing Mr. [Grzelak] as the applicant and [defendants' son] as an occupant. This application also lists a 2000 Chevrolet Astro Van under vehicle information. This is the van or same type of van that [Andrzej] claims he lost in another fire.

[Andrzej] testified he had never seen Exhibit 234 previously, which may be true; however, the Court draws the inference and concludes that [Andrzej] and Mr. [Grzelak] rent the apartment for him before the fire and then attempted to defraud [plaintiff] by having a second lease prepared claiming the rent for the apartment was $2800 per month. [Andrzej's] testimony regarding the lease and rents was false and fraudulent.

The court also finds that the parties made material and false, fraudulent–and fraudulent misrepresentations with respect to the value of the personal property. The parties' incomes, bank accounts, [and] credit accounts simply do not support the acquisition of $878,168 worth of personal property over a [10]-year period as they testified. This is an average of slightly more than $87,000 worth of personal property per year, and [Andrzej] has had no taxable income for the years 2000 to 2010[,] and [Bogumila's] income in 2009 was $23,000 and was generally between 30- to $40,000 when she ran Beauty of Flowers [her flower shop].

***

Plaintiff alleged that [defendants] committed an intentional act that precludes coverage for both under the policy, here the allegations that [defendants] are responsible for the explosion and resulting fire.

No evidence was adduced which establishes that [Bogumila] was[] [c]omplicit or a participant causing or procuring the cause of the explosions. Her actions during the hours following the explosion are not indicative of a person who was involved in something of this nature. She spoke with Lieutenant Kane and signed a authorization for Mr. Brown to enter and inspect the property. On the other hand, there is substantial circumstantial evidence pointing towards [Andrzej] as causing or having someone cause this loss. The evidence overwhelmingly and conclusively established that the gas cap on the drip leg leading–on the drip leg from the gas pipe leading to the water heater was intentionally and manually removed and that pieces of wood consistent with pine were inserted into the open end of the pipe so as to slow the escape of gas. This would have allowed for sufficient time for the parties to leave the home prior to the explosion and ensuing fire.

First is the issue of the lease as referred to earlier. The Court infers and concludes that [Andrzej] and Mr. [Grzelak] leased the apartment in anticipation of the destruction of the Noble Drive home. [Andrzej] testified, not credibly, that he was going to Nashville on business and going to meet with two persons, one who he conveniently has no contact information for and the other [*sic*] who died allegedly in a plane crash along with the president [*sic*] of Poland.

While [Andrzej] may have indeed flown to and from Nashville and he produced boarding passes–copies of boarding passes and hotel receipts, this is a false alibi in the Court's view. And so what would be the motive for all of this?

Well, the Court finds and it was established at trial that the parties had lost their home or were in the process of losing their home in foreclosure–due to a foreclosure. They had a primary mortgage and a secondary mortgage, both of which were foreclosed upon. And so the Court finds that the parties–that was the motive–the motivation here was that if they could not have the house–if [Andrzej] could not have the house, no one would have this house. And indeed, it's not hyperbole to say that this house was blown to smithereens. Fortunately, no persons were injured, although there was some damage caused to a neighboring home.

Getting back momentarily to the issue of this–the nature of the explosion and fire, the evidence established conclusively that there was an explosion, and that's due to the debris field, glass being strewn as much as 100 feet away from the home, which is consistent with an explosion. In a typical fire, the testimony established that glass or debris would typically not be strewn further than 10 to 20 feet from the home.

Also, it is noteworthy that there was evidence of only one mattress on the property or–and little or no silverware, very few metal clothes hangers, all items which, according to the investigators, and–one would–and expert witnesses, one would expect to find even after an explosion and fire such as the ones which occurred at the Noble Drive residence. This leads the Court to conclude that many items of personal property had been removed from the home prior to the explosion.

[Defendants] have argued that evidence of [defendants'] intentional act should not have been allowed to have been introduced during [plaintiff's] case in chief. Frankly, the evidence of cause and origin came in by manner of the affirmative defense filed by [plaintiff] in response to the counterclaim filed by [defendants].

In any event, also–if indeed–also indeed the [*Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 144 Ill. 2d 178 (1991)] case, *** a 1991 Illinois Supreme Court case, establishes that an insured should be allowed to plead and introduce this type of evidence unless, and unlike in the case at bar, it fails to issue a reservation of rights letter and fails to seek a declaration of no coverage. Again, they did that here. So to the extent that some of this evidence may have been presented during the case in chief, according to this authority, it is permissible.

In addition, [*Continental Insurance Co. v. Skidmore, Owing & Merrill*, 271 Ill. App. 3d 692 (1995)]–this is a First District 1995 case–it stands for the proposition that pleading of all policy defenses in one action is permissible even if an amended complaint is required as long as the proposed amendment does not interject a policy defense which was known at the time the original pleading was filed. Such was not the case here.

[Plaintiff] has raised the issue of judicial estoppel in reference to [Andrzej's] bankruptcy and his personal property claim. [Andrzej] was successfully discharged in a Chapter 7 liquidation. In his petition, he claimed he owned only $2600 worth of personal property. This is in stark contrast to the personal property he and [Bogumila] have alleged to have lost herein. The claim was for $878,168.

It is well-established that [Andrzej] may not take position in the bankruptcy case, again asserting ownership of $2600 worth of personal property, and succeed in receiving the benefits and protections of the bankruptcy laws and the liquidation and then assert in this case inconsistently he possesses more than $800,000 worth of personal property. And the Court considered the case law cited by Counsel for [plaintiff] in its trial brief in addressing this issue. Such a position is not supported by any credible evidence nor is it supported by the law of judicial estoppel, and [Andrzej] was judicially estopped from asserting any claims for personal property exceeding $2600.

[Defendants] assert that [Bogumila] is entitled to the protection of the Innocent Insured Doctrine in the event this Court finds that *** [plaintiff] proves it must not provide coverage because [Andrzej] failed to cooperate, lied throughout the process, or intentionally caused the fire. [Defendants] also claim that, as a result, [Bogumila] is entitled to a one-half share of the insurance proceeds.

The Court has reviewed the relevant provisions of the insurance policy at issue: 'General Conditions' on paragraph 3 on page 13 of 16 of the policy as well as the exclusions section, Section 1, Part A; and 2, Part A-2, and the Court finds that the general conditions of Section Paragraph 3 [*sic*] referred to momentarily–or just a short moment ago, the Court finds that this provision clearly, unequivocally, and unambiguously provides that the policy is void as to all insureds if any insured has intentionally concealed or misrepresented any material fact or circumstance before or after a loss, engaged in fraudulent conduct, or made false statements relating to the insurance. The Court has found and finds [Andrzej] misrepresented material facts and engaged in fraudulent conduct with respect to the ALE

coverage, that being the rent for the apartment, and by causing the explosion or having someone cause this explosion and ensuing fire to occur.

In addition, the Court finds that [Bogumila] also misrepresented material facts and engaged in fraudulent conduct as she signed the lease in question wherein the rent was purported to be $2800 per month.

In addition, the Court finds that both [defendants] made false statements and misrepresented material facts with respect to the value of the personal property for which they seek reimbursement. [Bogumila] testified that she compiled the inventory list, and [Andrzej] helped her enter the information into a computer for the purpose of generating the spreadsheets of personal property inventory admitted into evidence as Defendants/Counter-plaintiffs' Exhibit 1.

Accordingly, [Bogumila] is not entitled to innocent [insured] protection here because her actions as just stated–because of her actions as just stated in addition to those of [Andrzej].

The Court finds the Exclusion Section 1, paragraph 2, Intentional Loss, is applicable here also because the Court finds the loss was caused by or at the direction of [Andrzej] who was an insured with the intent to cause a loss.

Getting back to, momentarily, the language of the General Conditions, paragraph 3 on page 13 of 16, as the Court stated earlier, this language is clear, it is unambiguous, and it applies here. In fact, the language in this policy, this particular provision is very similar to the language which was discussed in [*Aurelius v. State Farm Fire & Casualty Co.*, 384 Ill. App. 3d 969 (2008)]. This is a 2008 Second District Appellate case. The language again

is strikingly similar. This language is found to be unambiguous, and the Court finds that this case is analogous to the incident–to the case at bar.

In the cases cited by [defendants] for the proposition that the language in question was ambiguous and that the Innocent Insured Doctrine should apply, the Court finds that those cases are distinguishable in that the policy language in those cases, [*Wasik v. Allstate Insurance Co.*, 351 Ill. App. 3d 260 (2004)]–particularly *Wasik* as a 2004 Second District case, and [*State Farm Fire & Casualty Insurance Co. v. Miceli*, 164 Ill. App. 3d 874 (1987)] was [*sic*] clearly a much different case. The language was different in those cases. It was not as clear as the language found in–construed in *Aurelius*, which is again very similar to the language in the case at bar. The [case of *West Bend Mutual Insurance Co. v. Salemi*, 158 Ill. App. 3d 241 (1987)], that's also distinguishable here. You know, the innocent insured was the contract seller in a real estate transaction and clearly had no participation in any of the alleged inappropriate activity. And so those other cases cited are distinguishable from the case at bar.

It is therefore ordered, declared, and adjudged as follows: Count[] 1 of the Plaintiff's First-Amended Complaint is denied. Count 2 of the Plaintiff's First-Amended Complaint is denied. Count 3 of the Plaintiff's First-Amended Complaint is granted. The Court declares [plaintiff] has no obligation to provide coverage for the claim loss because [defendants] materially breached the policy by virtue of their false, fraudulent, and material misrepresentations and because of [Andrzej's] conduct in bringing about or causing the loss to occur. It is further ordered that [plaintiff] [be] awarded its costs of suit.

*** Oh, and [defendants] counterclaim is denied for the reasons stated previously."

¶ 37 Defendants timely filed a motion for reconsideration. On November 15, 2012, the trial court denied the motion. The trial court held that defendants' depositions were equivalent to the sworn statements required by the insurance policy, and the lease and list of property defendants compiled were submitted as proofs of loss, also required by the insurance policy. The trial court noted that, because it was conducting a bench trial, it allowed, with the parties' agreement and participation, witnesses to be taken out of order, and even allowed a single witness's testimony to be taken out of order for the sake of efficiency. The trial court then noted that it only considered the cause and origin evidence in relation to plaintiff's affirmative defenses, and did not consider in relation to plaintiff's amended complaint. Last, the trial court reiterated its holding that allowing plaintiff to file an amended complaint resulted in no error or prejudice because the trial court negated any error or prejudice by allowing defendants to take additional discovery and sufficient time to formulate a defense, noting that all of the significant deadlines were extended as well as the date of the trial. Defendants timely appeal.

¶ 38 II. ANALYSIS

¶ 39 On appeal, defendants raise four issues. First, defendants argue that the trial court should have precluded plaintiff's expert witness testimony concerning the cause and origin of the explosion and fire because plaintiff's discovery disclosures concealed this opinion until the eve of trial. Second, defendants contend that the trial court erroneously allowed plaintiff to promulgate evidence of the cause and origin of the explosion and fire in its case-in-chief when plaintiff had not made any allegations of cause and origin in its amended complaint. Third, defendants contend that the trial court erred in finding that Bogumila was not protected by the innocent insured doctrine. Fourth and last, defendants argue that the trial court's determination that Bogumila made material misstatements

of fact in the inventory of personal property losses she compiled even though the list was created for and in contemplation of the instant lawsuit. We consider each of defendants' issues in turn.

¶ 40 A. Statement of Facts

¶ 41 As an initial matter, we note that defendants' statement of facts is fraught with argumentative statements and asides. Illinois Supreme Court Rule 341(h)(6) (eff. Feb. 6, 2013) provides that an appellant's statement of facts "shall contain the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." Defendants' effort in this regard is replete with argument and bias and is plainly in violation of the rule. In spite of this shortcoming, we do not strike defendants' statement of facts or their brief on appeal; rather, we ignore the portions of defendants' statement of facts containing improper argument and comment. See *In re Detention of Powell*, 217 Ill. 2d 123,132 (2005) (striking an appellant's brief is a harsh sanction to be imposed only where the violations of the rules interfere with or preclude review). We do, however, admonish counsel that our supreme court's rules are not simply hortatory, but are mandatory and are to be scrupulously followed. See *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 38 (the "supreme court rules governing the content and format of briefs are mandatory"); *McGrath v. Botsford*, 405 Ill. App. 3d 781, 790-91 (2010) (the supreme court rules are not suggestions, but they have the force of law and it is presumed that the rules will be obeyed and followed as they are written).

¶ 42 B. Preclusion of Brown's Testimony

¶ 43 We now turn to defendants' first argument. Defendants contend that the trial court should have barred plaintiff's expert witness testimony about the cause and origin of the explosion and fire as a result of purported violations of Illinois Supreme Court Rule 213(f) (eff. Sept. 1, 2008). According to defendants, in three Rule 213 disclosures, Brown did not mention his belief, that he

learned upon uncovering the fact that the cap to the water heater's drip leg pipe was missing during the December 28-30, 2009, inspection of the remnants of the home, that the explosion and resulting fire were intentionally caused. Defendants accuse Brown and plaintiff of attempting to conceal this information until the last possible second and to unfairly surprise them at trial with this purportedly new theory regarding the cause and origin of the explosion and fire. Defendants contend that this behavior should have been punished by the trial court. Defendants further contend that the appropriate sanction should have been to preclude Brown's testimony altogether.

¶ 44 The first inkling that defendants have raised an untenable argument is the fact that, as argued, it is unclear precisely what the trial court did that was wrong. Are defendants raising a contention about the discovery process, or are defendants complaining about evidence that should not have been admitted? Or, are defendants conflating two distinct subarguments into a singular and unparsable contention? Regardless of the characterization, our standard of review is the same. Issues of discovery are within the trial court's discretion, and the trial court's discovery rulings will not be disturbed absent an abuse of discretion. *Janda v. U.S. Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 96. Likewise, a trial court's evidentiary determinations are also within its discretion and will not be disturbed absent an abuse of discretion. *Taylor v. County of Cook*, 2011 IL App (1st) 093085, ¶ 23. An abuse of discretion occurs where no reasonable person would take the view adopted by the trial court (*Janda*, 2011 IL App (1st) 103552, ¶ 96), or where the ruling is arbitrary, fanciful, and unreasonable (*Taylor*, 2011 IL App (1st) 093085, ¶ 23). Thus, regardless of whether defendants are presenting an evidentiary issue or a discovery issue, our review proceeds under the deferential abuse-of-discretion standard.

¶ 45 Issues of framing aside, the heart of defendants' first issue on appeal is the unfairness, in defendants' eyes, of Brown's concealment of his opinion on the cause and origin of the explosion and fire. According to defendants, the cause-and-origin opinion was not advanced in over two years of litigation, and was only raised in Brown's October 2011 deposition and the October 2011 updated disclosure pursuant to Rule 213. Defendants contend that they were prejudiced because they were unaware of this impending opinion for two years–two years in which they could have been seeking their own evidence and testing of the evidence to contradict or ameliorate the impact of Brown's impending opinion. Stated in this fashion, defendants' contention has considerable emotional appeal–the unsophisticated defendants were victimized by the discovery games played by canny and unscrupulous insurer. While the emotional appeal of this argument is manifest, it is simply not supported by the actual record.

¶ 46 In the initial disclosure pursuant to Rule 213, plaintiff disclosed to defendants that Lieutenant Kane was of the opinion that the explosion and fire was intentionally caused; it also disclosed Brown's observations of irregular burn patterns and his opinion that irregular burn patterns are indicative of an intentionally set fire. Thus, defendants were placed on notice, at least about a year before the actual start of trial, that there was an issue regarding the cause and origin of the fire, and that plaintiff had evidence and opinion evidence to support a position that the explosion and fire were intentionally caused.

¶ 47 Second, we note that Brown composed a report for plaintiff noting that the cap to the drip leg pipe was missing and observing that he could infer from that fact that there was a good chance that the explosion and fire were intentionally set, but that he needed further testing to be conducted in order to form an opinion with a reasonable degree of scientific certainty. Defendants point to this

report and conclude that Brown knew that his opinion would be that the explosion and fire were intentionally caused, but chose to hide or conceal the full opinion for reasons of trial gamesmanship. We disagree and take Brown at his word: he may have believed he had a valid inference, but he needed further testimony to confirm his suspicion before he would be comfortable in issuing an opinion with a reasonable degree of scientific certainty. It was not until the metallurgical testing had been completed by McGarry and the rest of the gas system had been shown to have been free from leaks by Erlenbach that Brown had the requisite degree of scientific certainty to opine that the cause and origin of the explosion and fire stemmed from the removal of the cap from the water heater's drip leg.

¶ 48 In addition to the foregoing sequence of events, the trial court extended discovery expressly for the purpose of allowing defendants to obtain expert witnesses and to construct any defense possible. Defendants do not complain that this extension was insufficient; they only seek to manufacture a controversy because Brown was unwilling to render an opinion until after additional testing had been performed to his satisfaction. This rather appears to be the ideal of the expert witness, to opine only when he has all of the facts available, and it does not appear to be some underhanded trick by plaintiff to secure an improper advantage. In light of the additional time granted by the trial court, we can see no merit to defendants' argument.

¶ 49 In a nutshell, then, because the trial court reopened discovery and allowed defendants additional time in which to obtain any expert witnesses and to have those witnesses perform any needed examinations of the physical evidence they wanted, we cannot see any merit to defendants' contention that the disclosure of Brown's opinion on the cause and origin of the explosion and the fire left them unable to prepare a defense or was somehow otherwise prejudicial.

¶ 50 Last, we note that Brown's opinion and the results of the additional testing were all disclosed by October 2011. The trial was postponed and did not actually begin until April 2012, giving defendants most of the intervening six months to prepare to answer Brown's opinion. Defendants do not contend that any of the physical evidence taken by plaintiff was unavailable for their inspection and testing, or that they were in some other way prevented from having access to that evidence. Based on all of these considerations, we hold that the trial court did not abuse its discretion, either in not precluding Brown's testimony about the cause and origin of the explosion and fire, or in failing to hold that the October 2011 disclosure of Brown's final opinions represented a discovery violation for which the sanction would be the preclusion of Brown's testimony regarding the cause and origin of the explosion and fire.

¶ 51 Defendants also expressly argue that the disclosure of Brown's cause and origin opinion was a discovery violation and that plaintiff intentionally withheld the information from defendants until the October 7, 2011, Rule 213 disclosure. Defendants also argue that this late disclosure was compounded by the fact that plaintiff had made a disclosure, namely, that Brown would opine that the irregular burn pattern indicated the presence of an accelerant, that would confuse and divert defendant's attention from the actual opinion on which plaintiff would rely at trial. Defendants argue that, taken altogether, plaintiff's conduct amounts to a violation of Rule 213 and should be sanctioned by precluding Brown's opinions on the cause and origin of the explosion and fire.

¶ 52 Before addressing this contention, we note that, at trial, Brown voiced both the opinions noted by defendants: that the irregular burn patterns observed suggested the presence of accelerants, and that the missing cap to the water heater's drip leg pipe (and partial blockage of the open pipe with wood) suggested the intentional removal of the cap to cause the house to fill with natural gas

and subsequently explode when exposed to an ignition source in the basement. At the heart of both opinions is the idea that the explosion and fire were caused intentionally. Thus, the accelerant opinion, rather than misleading defendants about plaintiff's trial strategy, actually telegraphs that strategy, namely, that plaintiff intended to present evidence that the fire was intentionally caused. Defendants may not have had the full scope of plaintiff's strategy until the October 7, 2011, disclosure, but they certainly had the gist of plaintiff's theory of the case when plaintiff disclosed that Lieutenant Kane would opine that the fire was intentionally set, and Brown would opine that irregular burn patterns suggest the presence of accelerants, leading to an opinion that the fire was intentionally caused. (Further, the trial court then reopened discovery and provided defendants more time to build their defense.)

¶ 53 Returning to defendants' argument, and, for the sake of argument, accepting that some sort of discovery violation took place, we evaluate defendants' contention that the proper sanction was to preclude Brown from opining about the implications of the missing cap to the water heater's drip leg pipe. Rule 213 was implemented to help courts manage discovery, especially regarding the disclosure of expert's opinions, because the opposing party is entitled to rely on the disclosure of the expert's opinion when formulating its trial strategy. *Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 109 (2004). Ultimately, one of Rule 213's important purposes is to avoid surprise. *Id.* Where a party does not comply with the provisions of Rule 213, the trial court should not hesitate to impose sanctions. *Id.* at 110. In determining whether the preclusion of a witness's testimony is a proper sanction, the trial court must consider: (1) the surprise to the opposing party; (2) the prejudicial effect of the testimony; (3) the nature of the testimony; (4) the diligence of the opposing party; (5) the timely objection to the testimony; and (6) the good faith of the party calling the witness. *Id.* (We

note that this formulation deals with nondisclosed opinions–Brown's opinion was actually disclosed. Additionally, the trial court never performed this analysis (and we do not believe that defendants specifically requested it to do so), so stepping through the factors actually amounts to a *de novo* review rather than the prescribed abuse-of-discretion review (*id.*)). Defendants argue that they fulfilled all of the factors and that, therefore, Brown's testimony should have been precluded. We disagree.

¶ 54 Factors one and two are key for defendants. They would have to show surprise and prejudice. Surprise is lacking here because defendants do not claim that plaintiff never made any disclosure, only that it was outside of one of the trial court's initial scheduling orders. Further, the trial court implicitly rejected a surprise-based objection by allowing plaintiff's Rule 213 disclosures to stand, even if they were outside of the time limits of one of its orders. Last, we note that surprise is not supported by the evidence where Lieutenant Kane was disclosed as a Rule 213 expert witness with the opinion that the fire was intentionally caused, and this was supported by the opinion of Brown, who stated that the irregular burn patterns suggested that accelerants were used to cause and enhance the fire. Both of these disclosures put defendants on notice that plaintiff was pursuing a strategy of proving that the explosion and fire were intentionally caused, thereby falling under the policy's exclusions.

¶ 55 Likewise, defendants cannot demonstrate that they were prejudiced by the disclosure of Brown's cause-and-origin opinion about the cap to the drip leg pipe. When that disclosure was made, the trial court reopened discovery, allowed plaintiffs to take the deposition of Brown, McGarry, and Erlenbach, and extended the time limit for discovery, allowing defendants to seek countervailing expert witnesses if they chose to do so. If defendants needed more time, they could

have asked the trial court for more time; there is nothing in the record to suggest that the trial court would not have reasonably allowed defendants more time to secure expert witnesses. Indeed, given the trial court's apparent sensitivity to the issue of potential prejudice, it seems likely that it would have allowed more time if needed and requested.

¶ 56 Factor three deals with the nature of the testimony. The nature of the testimony was foreshadowed by plaintiff's previous disclosure of the opinions of Lieutenant Kane and Brown. This factor would have weighed in favor of allowing the testimony.

¶ 57 The fourth factor considers diligence. Defendants promulgated their discovery requests in a timely fashion. Likewise, plaintiff made its disclosures and seasonably supplemented them. When they made the disclosure of Brown's cause and origin opinion, a trial date was looming, but the trial court negated any surprise and prejudice by postponing the trial date and reopening discovery to allow defendants to pursue any expert witnesses they deemed necessary. Alternatively, defendants contend that plaintiff withheld the information for about two years before dropping it them on the eve of trial. This view does not diminish the fact that the trial court took successful steps to negate any surprise and prejudice that may have accrued to the disclosure of Brown's cause and origin opinion. At best, then, this factor only very weakly favors precluding Brown's testimony.

¶ 58 The fifth factor is the timeliness of the opposing party's objection. Here, defendants objected shortly after Brown's cause and origin opinion was disclosed. This factor is in defendants' favor. The final factor is the proponent's good faith in calling the witness. Brown had already been disclosed with an opinion at least supporting the general notion that the fire had been deliberately caused. On the other hand, defendants charge that plaintiff withheld the cause and origin opinion for two years. This claim is rebutted by Brown's March 2010 letter, in which he indicated that he

needed more testing to be completed before he would be willing to issue an opinion on the cause and origin of the explosion and fire. This rebuttal is weakened, however, by the lapse of time between the issuance of the March 2010 letter from Brown to the completion of testing. This factor, then is not conclusive in either direction, that plaintiff was fully in good faith or that plaintiff was attempting to game the disclosure of Brown's opinion in hopes of securing an improper advantage at trial. We also note that the trial court's decision to reschedule trial and reopen discovery weakened and negated any surprise and prejudice that would have led to an improper advantage to plaintiff. On balance, then, the factors weigh in favor of allowing the disputed testimony. Accordingly, we hold that there would have been no error if the trial court had refused to preclude Brown's cause and origin testimony pursuant to the six-factor test.

¶ 59 C. Improper Consideration of Cause and Origin Testimony

¶ 60 Defendants next argue that the trial erroneously considered Brown's cause and origin testimony in plaintiff's case-in-chief, when it should only have been admitted as a defense to defendants' counterclaim. The entire premise of defendants' contention is faulty. In order for this argument to succeed, defendants need to show that the trial court considered the cause and origin testimony to be part of the allegations of plaintiff's amended complaint. We note that the trial court expressly addressed this contention in ruling on defendants' motion to reconsider when it stated: "the Court considered the cause-and-origin evidence in relation to the counter- – to the affirmative defense raised by [plaintiff] in response to [defendants'] counterclaim." The court further noted that there was an agreement between the parties to allow witnesses to be taken out of turn. Thus, the trial court's statement, coupled with the fact that the parties were taking witnesses out of order, leads to the conclusion that the trial court may have allowed some of the cause-and-origin testimony to be

elicited during plaintiff's ostensible case-in-chief, yet that evidence was considered only in relation to plaintiff's affirmative defense raised in response to defendants' counterclaim. Accordingly, because the record affirmatively rebuts defendants' contention, we reject it and we do not consider any of defendants' particular arguments, because the entire contention is simply counterfactual.

¶ 61 D. Innocent Insured Doctrine

¶ 62 Defendants next contend that Bogumila should have received the protection of the innocent insured doctrine based on the trial court's express determination that she was not complicit in causing the explosion and fire. Once again, defendants' argument misapprehends the facts as determined by the trial court.

¶ 63 Defendants argue as if the only relevant finding made by the trial court were the singular finding that Bogumila did not know of or participate in the scheme to cause the explosion and fire. If that were the only factual finding of the trial court, then exploration of the innocent insured doctrine might be fruitful. The trial court, however, also held that Bogumila personally engaged in fraudulent conduct in two distinct manners: first, she signed the leases for the apartment rented from Grzelak; second, she prepared the inventory of destroyed personal property. The trial court held that the lease was fraudulently executed to obtain more money from plaintiff than that to which defendants were entitled. The trial court also held that the inventory was an attempt to overstate the value of the personal property lost and destroyed in the explosion and fire in order to defraud plaintiff. The trial court expressly held that Bogumila personally participated in both the lease scheme and the inventory scheme. Because of her personal participation, Bogumila was subject to the exclusions of the policy; further, because of her personal participation in the wrongful conduct, Bogumila could not be deemed an "innocent insured," because the innocent insured doctrine requires

that the innocent party did not engage in the wrongdoing that subjects her to an exclusion under the insurance policy (see *Fittje v. Calhoun County Mutual Fire Insurance Co.*, 195 Ill. App. 3d 340, 346 (1990) ("[w]here the husband was innocent of any wrongdoing in connection with the fire at his home, the arson of his wife could not be imputed to him so as to bar his recovery of half the insurance proceeds under the policy")). Thus, the trial court's determination that Bogumila engaged in fraud, misrepresentation, and making false statements in connection with the lease and the inventory means that, as a result of such wrongful conduct, she cannot be deemed an innocent insured. In other words, because of her personal wrongful conduct, she cannot benefit from the innocent insured doctrine.

¶ 64 Defendants do not argue that, even if an insured commits wrongful conduct, she may still qualify for the benefit of the innocent insured doctrine if another insured engages in different wrongful conduct that cannot be imputed to the party seeking to utilize the innocent insured doctrine. Yet that is precisely what defendants need to argue in order to prevail on this contention.

¶ 65 Likewise defendants do not argue that Bogumila should benefit from the innocent insured doctrine for purposes of only the real property loss, even though she may not recover for personal property loss and living expenses owing to her wrongful conduct related to the inventory and the lease. The structure of defendants' argument may, perhaps, imply this argument, but it is not expressly raised or advanced. As it not expressly made, we will not consider it.

¶ 66 Finally, even if we were to accept the premise that Bogumila might be able to receive the benefit of the innocent insured doctrine, the argument fails when considered against the actual policy language of the insurance policy in this case. As noted above, the innocent insured doctrine will allow an insured to recover his or her proportionate share of the insurance proceeds if a coinsured's

wrongful conduct is not imputed to the insured. See *id.* ("[w]here the husband was innocent of any wrongdoing in connection with the fire at his home, the arson of his wife could not be imputed to him so as to bar his recovery of half the insurance proceeds under the policy"). The case of *Aurelius v. State Farm Fire & Casualty Co.*, 384 Ill. App. 3d 969, 975-76 (2008), codified the holdings of several leading innocent-insured cases regarding what verbiage the policy must use to make an insured ineligible to receive the benefit of the innocent insured doctrine: the innocent insured "should not be denied coverage unless the language of the insurance policy clearly states that coverage will be excluded as to all insureds in the event of some improper behavior by any insured." Here, the policy provided that, "[w]ith respect to all insureds, this entire policy is void if, before or after a loss, any insured has [engaged in enumerated misconduct]." For purposes of this argument, defendants appear to concede that Andrzej has engaged in enumerated misconduct under the policy sufficient to preclude him from receiving benefits. The question to be answered, then, is whether the policy language here is equivalent to that of *Aurelius*.

¶ 67 We hold that the policy language here is sufficiently similar to that of *Aurelius* to take Bogumila outside of the protection of the innocent insured doctrine. *Aurelius* requires express language notifying the policyholders that "all insureds" would lose coverage in the event of prohibited conduct performed by "any insured." *Id.* Here, the policy says that "all insureds" will lose coverage if "any insured" engages in the enumerated misconduct. We hold that the language in the instant policy is sufficiently similar, and it clearly and unambiguously excludes Bogumila from coverage based on Andrzej's conduct of setting or causing the fire to be set, along with his misrepresentations and fraudulent conduct associated with inventory and the lease.

¶ 68 Defendants argue that the policy language here is unlike that in *Aurelius*. This may be true, but defendants overlook the fact that *Aurelius* provided a brief statement of what the language in the policy needed to be. The fact that the language of the policy in *Aurelius* boiled down to its statement that the innocent insured "should not be denied coverage unless the language of the insurance policy clearly states that coverage will be excluded as to all insureds in the event of some improper behavior by any insured." *Id.* The language in the policy at issue in this case clearly and unambiguously meets this standard, and defendants do not argue otherwise. Accordingly, we reject their contention.

¶ 69 Similarly, defendants argue that the policy language in this case is more similar to the language used in the cases that *Aurelius* analyzed in coming up with its policy-language requirement. Having determined that the policy language, despite any dissimilarity to that in *Aurelius*, satisfies the requirements set forth in *Aurelius*, little would be gained by expressly comparing it to the policy language in the various underlying cases. Suffice to say that the underlying cases did not have language stating that all insureds would be excluded from coverage based on the prohibited actions of any insured, but instead, the language in those cases did not include the all-versus-any juxtaposition mandated by *Aurelius*. Defendants only point to the language used in the policies, and not to whether the language in the policy satisfies the requirements set forth in *Aurelius*. Accordingly, we reject defendants' contention.

¶ 70 E. Inventory and Misrepresentations

¶ 71 In this final contention on appeal, defendants essentially acknowledge that, if Bogumila made misrepresentations regarding the lost personal property, she is foreclosed from taking advantage of the innocent insured doctrine. Defendants note that the trial court held that Bogumila

made material misrepresentations regarding the inventory listing the personal property lost in the explosion and fire. Defendants argue, however, that the inventory list was created after the commencement of the litigation, and the list was produced in discovery, so it should have not been deemed a statement pursuant to the requirements of the policy, but an evidentiary statement only affecting her credibility. In support, defendants cite to *Tarzian v. West Bend Mutual Fire Insurance Co.*, 74 Ill. App. 2d 314 (1966), for the proposition that the fraudulent act must be committed before the commencement of the litigation in order for that act to fall under a fraud exclusion. Defendants reason, citing to *Tarzian*, *id.* at 322, that the fraud clause protects the insurer during the settlement phase, but when the claim has gone into litigation, the insurer and claimant were no longer in a nonadversarial relation. Defendants contend that they never filed a "proof of loss" document, and that every purported material misrepresentation occurred after the litigation commenced and was made as a part of the litigation process. According to defendants, because the lawsuit was commenced so soon after the fire, any possible misrepresentation was a part of the litigation, not the settlement process, and could not be counted as a material misrepresentation under the policy. Defendants further emphasize that the inventory list was the only misrepresentation made (as found by the trial court) by Bogumila that supported excluding her from coverage under the policy.

¶ 72 We note, however, that the trial court found that, in addition to the misrepresentations made on the inventory of lost personal property, Bogumila also signed the lease showing that the rent was $2,800 per month, and attributed this misconduct to Bogumila. Defendants do not challenge this finding, so their argument regarding the inventory of lost personal property comes to naught, as the lease also supports the trial court's determination that Bogumila made material misrepresentations.

¶ 73 Setting this to the side, however, we also note that, in the trial court defendants argued, and the trial court agreed, that the inventory and the depositions given constituted an equivalent to the sworn statement and sworn proof of loss under the requirements of the policy. Now, on appeal, defendants are claiming that the inventory and depositions were nothing more than litigation documents and should not be deemed as satisfying the policy requirements for cooperation. This is a distinct change in defendants' position from the trial court to the appeal. It is axiomatic that a party cannot assert on appeal an argument contrary to its position at trial. See *In re Marriage of Schneider*, 214 Ill. 2d 152, 172-73 (2005) (a party is not allowed to adopt and benefit from one position in the trial court and then expediently change its position in the appellate court). Accordingly, because defendants argued that their depositions and inventory fulfilled the policy requirements of providing a sworn statement and a sworn proof of loss, they cannot now repudiate that position and argue here that the depositions and inventory were only litigation documents and cannot be used by the trial court as material misrepresentations under the policy. Accordingly, we reject defendants' argument on the merits of this point.

¶ 74 III. CONCLUSION

¶ 75 For the foregoing reasons, the judgment of the circuit court of Lake County is affirmed.

¶ 76 Affirmed.