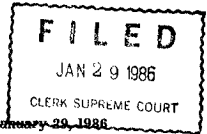


IN THE COURT OF APPEALS OF IOWA



DAVID C. ANDERSON, )  
Plaintiff-Appellant, )  
vs )  
STATE FARM MUTUAL AUTOMOBILE )  
INSURANCE CO., )  
Defendant/Cross-Appellant. )

Filed January 29, 1986

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5-465  
84-1810

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Appeal from the Iowa District Court for Scott County, Max R. Werling,  
Judge

Plaintiff appeals and defendant cross-appeals from the order sustaining  
defendant's motion for new trial in an action for breach of an insurance contract.  
**AFFIRMED IN PART; REVERSED IN PART; VERDICT REINSTATED.**

Michael J. McCarthy of McCarthy & McCarthy, Davenport, for  
plaintiff-appellant.

George A. Goebel of Goebel & Koury, and Robert H. Fedden, Davenport,  
for defendant/cross-appellant.

Heard by by Oxberger, C.J., Donielson, and Sackett, JJ.

OXBERGER, C.J.

Appeal is made by the parties following a grant of a new trial by the court after a verdict in favor of appellant. We reverse the grant of a new trial and affirm the other rulings of the trial court.

Plaintiff David Anderson commenced an action for breach of an insurance contract when defendant insurer, State Farm, refused to pay a claim arising out of plaintiff's hospitalization and treatment for a heart condition. Defendant counterclaimed for rescission of the contract. The jury returned a verdict for plaintiff but the trial court sustained defendant's motion for new trial on the ground that the jury verdict was not sustained by sufficient evidence and was contrary to law.

The insurer's rejection of the claim was based solely on failure to disclose a 1979 treatment for alcoholism. Plaintiff's 1983 application for insurance contained a negative response to a question asking about any hospitalization for alcoholism within the preceding five years. Plaintiff testified at trial that he orally disclosed the alcoholism treatment to the insurance agent, who told him that he wouldn't worry about it. A friend of plaintiff who was present remembered plaintiff telling the agent about hospitalization in Iowa City but did not recall specific reference to alcoholism.

Although rejection of the claim was based solely on failure to disclose treatment for alcoholism, plaintiff incorrectly answered in the negative several other questions on the application concerning specific types of health problems. The jury was ultimately instructed that in order to sustain its affirmative defense the insurer must prove that the false information was supplied knowingly or without regard to its truth or falsity. The insurer had sought an instruction stating that it need only prove that there was a false answer on the application.

On appeal, plaintiff asserts that the jury verdict in his favor was neither unsupported by the evidence nor contrary to law. Defendant asserts: (1) that the evidence was sufficient as a matter of law to establish the existence of material misrepresentations by plaintiff; (2) that the issue of rescission of the contract is equitable in nature and therefore should have been withdrawn from the jury's consideration; and (3) that rescission should be permitted upon the ground of innocent misrepresentation and that the trial court should have so instructed the jury.

This court is less inclined to interfere with the trial court's grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4). We view the evidence presented in the light most favorable to the plaintiff. Kuehn v. Jenkins, 251 Iowa 557, 562, 100 N.W.2d 604, 607 (1960). The grant of a new trial will be upheld unless abuse of discretion is shown; however, the trial court abuses its discretion by granting a new trial simply because it would have reached a different result. Lappe v. Blocker, 220 N.W.2d 570, 572 (Iowa 1974).

The insured here was hospitalized for acute alcoholism in September 1979. On January 17, 1983, he met with Phil Kinsley, the agent for the insurer. When Kinsley asked Anderson if he had been treated or confined in a hospital for alcoholism, Anderson said he told Kinsley that he had been in a hospital for the "D.T.s" and Kinsley told him not to worry about it. The woman living with Anderson, Bennie Miller, was also a friend of the insurance agent. She says Anderson told Kinsley about the hospitalization, but she couldn't remember if there was any conversation about alcoholism. She recalled Kinsley said the hospitalization didn't matter. Kinsley's version of the story is that Anderson told him he had gotten drunk and was hospitalized in Iowa City, but the incident had occurred fifteen years before the conversation.

In its conclusion that the verdict should be overturned and a new trial granted, the court decided that the evidence was undisputed that Anderson had been asked about his alcoholism, had admitted he understood the question asked, and made a false statement. The court added it was also undisputed the policy would not have been issued if not for the misstatement about Anderson's treatment for alcoholism and continued drinking. Therefore, the court decided, the verdict was contrary to law.

A review of the evidence, however, shows it was not undisputed on several important points. Three different versions were presented of what occurred during the conversation between Anderson and Kingsley. Anderson claims to have fully revealed the details, Miller says she isn't sure whether alcoholism was mentioned but knows that Anderson said he had been hospitalized, and the agent says Anderson told him the hospitalization was fifteen years ago. The court in its ruling stated "in fairness to the plaintiff, the record discloses he sometimes said this was 1971 (that the hospitalization occurred), and sometimes said it was later than that and at other times said he did not tell the agent what the date was." This comment by the court reflects the amount of confusion and dispute over exactly what was said. The court then went on to give more credence to the statements of Miller who was a friend of both men. The court here places itself in the position of a juror, who must decide the credibility of the various witnesses. The court states the record shows the agent indicated he was told Anderson was hospitalized in 1971 being drunk. In fact, the agent testified Anderson told him he had gotten drunk and was hospitalized fifteen years before the conversation, which would have been in 1968. This further shows the highly contested nature of the factual situation involved.

The court properly concluded that the insured must show the statements were made by Anderson knowing the statements were false or without regard to the falsity or truth of the statements. Whether the false statement was actually made was a highly disputed matter to be resolved by the jury. It is further a question for the jury whether Anderson understood the questions. Ley v. Metropolitan Life Insurance Co., 120 Iowa 203, 213, 94 N.W. 568, 571 (1903). Accordingly, we disagree that the issues could have been resolved as a matter of law and that the verdict was contrary to law. We reverse the trial court's order granting a new trial. We also affirm its rejection of motions for a directed verdict and for judgment notwithstanding the verdict for the same reasons we have set out above.

In its brief the insurer mentions other questions asked of the insured during the conversation with the agent. The insurer argues the court found that on several of the questions Anderson gave false answers on items which he must have known were false. The insured, who can barely read and write and has an eighth grade education, at times testified he did not understand the questions or could not remember prior illnesses. The insurer makes some reference that these allegedly false answers are further support for the court's decision. However, the court documents, trial testimony, and appellee's own statements in its brief confirm that the sole reason for the denial of insurability was the incorrect answers regarding alcoholism. The trial court mentioned false answers to other questions as an indication of lack of credibility of Anderson and evidence the answer he gave was not an isolated misstatement.

The insurer presented the basis for its denial of coverage as solely relating to the answers regarding alcoholism, the insured presented his case in response to this specific reason for denial, and the court ruled based on the alleged false

answers regarding the hospitalization and continued drinking of Anderson. We do not consider allegedly false answers to other questions on the application form as a separate basis for denial of Anderson's claim.

The insurer contends it was error for the court to hold in its motion to adjudicate law points and in instructions that rescission of an insurance contract will not occur if the misrepresentations of the insured are made innocently. The insurer contends that once it is shown that a material false statement was made, it is not necessary to show the statement was made knowing it was false or with disregard to whether it was true or false.

We find the weight of precedent to the contrary. The supreme court has distinguished between statements made by the insured which are warranties and those which are representations only, and concluded that questions asked of the insured in order to obtain insurance are representations only. Service Life Insurance Co. of Omaha, Nebraska v. McCullough, 234 Iowa 817, 823, 13 N.W. 440 (1944). The holding that it must be shown false statements made to procure a policy are intentionally and knowingly made have been reiterated by the courts on several occasions. McNabb v. State Farm Life Insurance Co., 116 F. Supp. 641, 644 (S.D. Iowa 1954)(statement by insured regarding his health must evidence intentional and willful concealment); Parker v. Union Mutual Life Co. of Iowa, 218 Iowa 145, 150, 254 N.W. 31, 33 (1934)(whether insured "knowingly deceived" insurer is for the jury); Olson v. Southern Surety Co., 201 Iowa 1334, 1338, 208 N.W. 213, 215 (1926)(proof found insufficient to show statement made was knowingly false and made with the intent to deceive insurer); Teepie v. Fraternal Bankers' Reserve Society, 179 Iowa 65, 79 161 N.W. 102, 107 (1917)(court applied principle that false representations if made in good faith by the insured will not avoid policy). We find the court's rulings to be proper.

Finally, the insurer says the issue of rescission should not have been presented to the jury because it is an equitable remedy. The court held that fraud is a defense to an action at law such as the one taken by the insured here to recover upon a policy, citing 43 Am. Jur. 2d, Insurance § 431 (1946). We agree with the trial court's ruling.

We reverse the grant of a new trial and affirm the trial court's rulings in all other respects.

**AFFIRMED IN PART; REVERSED IN PART; VERDICT REINSTATED.**