FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PAUL KENNETH WALKER, JR., and TEXIE MARIE WIGINGTON,

Appellees,

v.

THE MINNESOTA MUTUAL LIFE INSURANCE COMPANY,

Appellant.

Filed April 14, 1977

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2-58355

Appeal from Pottawattamie District Court - E. F. Hanson, Judge.

Appellant-insurer appeals jury verdict awarding appellees' recovery of benefits under their decedent's life insurance policy. Affirmed.

Jack W. Peters, Johnson, Stuart, Tinley, Peters & Thorn, of Council Bluffs, for appellant.

James A. Pratt, Porter, Heithoff, Pratt & Reilly, of Council Bluffs, for appellees.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

ALLBEE, C.J.

Defendant-insurer appeals a jury verdict awarding plaintiffs' recovery of benefits under their decedent's life insurance policy. Insurer asserts trial court committed reversible error in instructing the jury on its affirmative defense of decedent's misrepresentation of a heart condition. Specifically, insurer asserts that the submission of the issue of its right to rely upon decedent's written representations of good health was not at issue and, consequently, trial court erred in submitting the issue to the jury.

At the outset, we note that the allegation of misrepresentation to avoid this insurance contract is an affirmative defense casting upon insurer the burden of proof to establish each of its elements. Atlantic Veneer Corporation v. Sears, 232 N.W.2d 499, 503 (Iowa 1975). Reliance is an element of misrepresentation. First National Bank in Lenox v. Brown, 181 N.W.2d 178, 181 (Iowa 1970); Phoenix v. Stevens, 256 Iowa 432, 436, 127 N.W.2d 640 (1964). Moreover, insurer alleged that the "issuance of the policy was based upon the truthfulness of the [decedent's] answers to questions. . . ." Not only was evidence introduced concerning reliance, but also, that insurer had actual knowledge of decedent's misrepresentation concerning his arthritis through an independent investigation and decedent's contemporaneous application for health and accident coverage. Reliance was an issue given the state of pleadings and evidence.

Having resolved reliance was an issue, we find insurer's contention that it was not at issue because there was no factual dispute of its right to rely to be without merit. Insurer's objection to trial court's instructions in effect asserted that it had met its burden of proof on the issue of reliance as a matter of law. We believe trial court correctly submitted the issue to the jury.

Defendant has cited cases from other jurisdictions which hold that an insurer has no duty to investigate the truthfulness of an insured's responses concerning his health absent its knowledge of any material misrepresentation. Insurer further insists that since decedent's misrepresentation concerning his arthritis of which they had actual knowledge was not material, it had the right to rely on decedent's response as matter of law. Even ignoring defendant's own requested instruction given by trial court which told the jury decedent's misrepresentation concerning his arthritis was material, we believe insurer overstates the law under the peculiar facts of this case. *See* Major Oil Corp. v. Equitable Life Assur. Soc., 457 F.2d 596 (10th Cir. 1972). Insurer's own independent investigation which disclosed discrepancies combined with its actual knowledge of the misrepresentation concerning arthritis raised a question of fact concerning insurer's right to rely. Major Oil Corp. v. Equitable Life Assur. Soc., supra. Significantly, on the same day which insurer's underwriter accepted decedent's life insurance policy, he rejected decedent's application for health and accident coverage because of arthritis. Trial court correctly instructed the jury on the law as to the circumstances when an insurer may rely on the insured's responses.

Only rarely does a party having the burden of proof carry it as matter of law. McCaull v. Universal Manufacturing Co., 218 N.W.2d 592, 593 (Iowa 1974). This is especially true in this case since insurer failed to challenge the sufficiency of the evidence by a motion for directed verdict. Trial court properly submitted the case to the jury and its judgment hereby is affirmed.

All judges concur except CARTER, J., who concurs specially.

CARTER, J. (specially concurring)

I concur in the opinion of Allbee, C.J., and in the result but wish to discuss another objection made by the insurer to instruction six. It is claimed that this instruction told the jury that if the insurer knows applicant's statements are false in some respect it may not rely upon them in any respect, even if the portion of the statement known to be false is, on its face, minor or immaterial. Without determining whether the instruction is subject to this criticism I believe such imperfection, if any, is not reversible error in view of the fact that the insurer requested and received an instruction that all of the claimed misrepresentations were material as a matter of law.