FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

286

STATE OF IOWA, )
Plaintiff-Appellee, )
vs. )
JOE ANDREW JACKSON, ) 8-476
87-1453
Defendant-Appellant. )

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Appeal from the Iowa District Court for Ringgold County (No. 1959), Thomas S. Bown, Judge.

Defendant appeals his conviction of fraudulent practices in the third degree in violation of Iowa Code sections 511.18 and 714.11 (1987). **REVERSED.**

John R. Sandre, of Scalise, Scism, Sandre & Uhl, Des Moines, for the defendant-appellant.

Thomas J. Miller, Attorney General, and Ann E. Brenden, Assistant Attorney General, for plaintiff-appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ., but decided en banc.

**SACKETT, J.** 287

In this case we address the issue of whether the trial court was correct in determining as a matter of law it was not possible to determine an amount of money or value of property and service procured as a result of an alleged concealment or false statements made by defendant to procure a life insurance contract. We must determine whether the trial court properly ruled as a matter of law the value of the property involved could not be determined.

Defendant, an insurance agent, while acting as an agent for Provident Life of Bismarck, North Dakota, made application in April 1984 for a term life insurance policy on his wife of some thirty-two years, Carmetta Jackson. Defendant filled out the application for insurance, answered the questions on the application and signed Carmetta's name to the application. Carmetta allegedly was unaware of the application. The policy issued. In April 1986 Carmetta claimed she first heard of the policy. In June of that year she wrote to the company telling them she had been unaware the policy issued and she had a serious health condition.

In early 1960, Carmetta had been diagnosed as having lupus. Since that time she had consulted on a regular basis with Dr. Fisher. In 1984 she was treated for a broken leg at the Mt. Ayr Hospital by a doctor in practice with Duane Mitchell. The medical part of the application was as shown:

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PART II
NON-MEDICAL

## ..ements in Continuation of Application ..
## PROVIDENT LIFE INSURANCE COMPANY, Bismarck, North Dakota

1 Name of proposed insured (or payor if payor benefits applied for) — BUILD — WEIGHT GAINED OR LOST IN PAST YEAR

CARMETTA M JACKSON — 5 Ft. 7 In. 125 lbs. Gain 0 Loss 10 Cause

If answer is "yes" to any of the following questions, give details.

| | YES | NO |
|---|---|---|
| 2. (a) Any bodily impairment or paralysis? | | ✓ |
| (b) Impairment of sight or hearing? | | ✓ |
| (c) Ever been treated for alcohol or drug habit? | | ✓ |
| 3. Have you had any sickness, disorders, infections, ailments, operations or injuries in the past five years? | | ✓ |
| 4. Other than above, have you in the past five years (a) consulted or been examined by any doctor? | ✓ | |
| (b) received any disability, compensation or pension payment? | | ✓ |
| (c) been under treatment or observation at any hospital, clinic or institution? | | ✓ |
| 5. Except as indicated above, have you ever had or been advised to have an operation? | | ✓ |
| 6. Except as indicated above, have you ever had or been told you had a. heart trouble or chest pain | | ✓ |
| b. abnormal blood pressure | | ✓ |
| c. arthritis | | ✓ |
| d. tumor or cancer | | ✓ |
| e. tuberculosis | | ✓ |
| f. asthma, pleurisy | | ✓ |
| g. ulcer, any part of body | | ✓ |
| h. sugar or albumin | | ✓ |
| i. nervous or mental disease | | ✓ |
| j. nephritis or kidney stone | | ✓ |
| 7. In the past five years have you used: a. alcoholic beverages to excess or intoxication? | | ✓ |
| b. barbiturates, sedatives or tranquilizers habitually? | | ✓ |
| c. L.S.D., marijuana or any amphetamine habitually? | | ✓ |
| d. heroin, morphine, or other narcotic drugs habitually? | | ✓ |
| 8. Have any of your family ever had a mental disease? | | ✓ |
| Diabetes? | | ✓ |
| Tuberculosis? | | ✓ |
| 9 Are you receiving treatment or taking any medication? | | ✓ |

10 FEMALE ONLY

| | YES | NO |
|---|---|---|
| (a) Ever had a menstrual disorder or any disorder of the breast or female organs? | | ✓ |
| (b) Ever had a miscarriage, difficult labor, stillbirth, or Caesarian operation? | | ✓ |
| (c) Are you pregnant? (If "yes", give date when child is expected) | | ✓ |

| Quest No | Condition | Year | Duration | Name and Address of Doctor |
|---|---|---|---|---|
| 2 | Broken Leg | 84 | 5½ Weeks | Dr Duane Mitch MT, Ryan FA |
| 4 | Flue & Pneumonia | 83 | | " " |
| 1 | HER Family Dr in Grant City Died in 83, HER Dr now is Donna Mitchell MD MT Ryan, FA | | | |
| 7 | Send Rec & Discharge from MT Hyp FA, Office | | | |

11. **FAMILY PLAN AND JUVENILE SECTION ONLY** (Complete A, B and C for Family Rider A and C for Juvenile Applicat on

A. (Full names of ALL to be covered)

| | Birthdate Month | Day | Year | Age | Sex | Build Ft | In | Lbs | Amount of Present Life Insurance | Year Taken |
|---|---|---|---|---|---|---|---|---|---|---|
| Second Insured — NONE | | | | | | | | | | |
| [redacted] | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |

(Children in Family Plan / Child Juvenile Age)

...nswer is "yes" to any of the questions in Section B or C, give details under question 12 below.

B. Respecting Second Insured

| | YES | NO |
|---|---|---|
| 1. Has weight varied ten pounds or more in the past year? If so, indicate amount, whether gain or loss, and reason. | | |
| 2. Ever had | | |
| (a) rheumatic fever, rheumatism or any disorder of the bones or joints? | | |
| (b) high blood pressure, pain or tightness in the chest, or any heart disorder? | | |
| (c) tuberculosis, pleurisy, asthma or persistent cough? | | |
| (d) acute or chronic indigestion, ulcers, stomach or bowel disorder? | | |
| (e) kidney disorder or stone, or painful urination? | | |
| (f) sugar, albumin, pus or blood in the urine? | | |
| (g) goitre, cancer, tumor or venereal disease? | | |
| (h) convulsions, fainting spells, nervous breakdown or any disorder of the brain or nervous system? | | |
| (i) any disorder or disease or injury not mentioned above, including, in the case of a female, tumor or disease of breasts, tubes, ovaries, or uterus? | | |
| 3. Has an application for insurance ever been declined, postponed or modified in any way? | | |
| 4 Has there been treatment or examination by a physician or health practitioner for any purpose in the past five years? If "Yes," give complete details under 12 below | | |

C. Regarding child or children, list in section 12 all causes for wh... a physician has been consulted in the last ten years

| | YES | NO |
|---|---|---|
| b. Is child now in good health? | | |
| c. Is child normal in every way? | | |
| Had child any birth injury or do you know of any congenital or hereditary abnormality, disease or trait which may affect his future health? | | |

| 12. MEMBER OF FAMILY | CONDITION | YEAR | DURATION | NAME AND ADDRESS OF DOCTOR |
|---|---|---|---|---|
| | | | | |
| | | | | |
| | | | | |

I have read and agreed that to the best of my knowledge and belief the statements are true and complete and shall constitute a part of this ... ...

Dated this 6 day of APRIL 19 84

Witness _____ AGENT _____

3A—6-74

After learning of Carmetta's medical condition in June 1986, the company determined it should either let her keep the policy or change the beneficiary. The policy had a two-year contestability clause. A company employee testified at trial because it was beyond two years from the date the policy was issued when they learned of the actual medical condition they could not contest the policy.

There was medical evidence Carmetta had systemic lupus erythematosus in 1984. An employee of the company testified had the company known Carmetta had systemic lupus erythematosus it would not have issued the policy because it is beyond the company's rates or limits. Therefore, the alleged fraudulent statements were material to the risk the company assumed.

We look to the applicable statutes. Iowa Code section 511.18 provides:

> **Fraud in procuring insurance.** Any agent, physician, or other person who shall knowingly, by means of concealment of facts or false statements, procure or assist in procuring from any life insurance organization any policy or certificate of insurance, shall be guilty of a fraudulent practice.

Fraudulent practice in the third degree is defined in Iowa Code section 714.11(3):

> Fraudulent practice in the third degree is the following:
> 3. A fraudulent practice where it is not possible to determine an amount of money or value of property and service involved.

Value for purposes of fraudulent practices is defined by Iowa Code section 714.14 as:

> The value of property or service is its highest value by any reasonable standard at the time the fraudulent practice is committed. Reasonable standard includes but is not limited to market value within the community, actual value, or replacement value.
>
> * * *

The policy written was a $50,000 term policy. The State has the burden of proving beyond a reasonable doubt every fact necessary to constitute the crime with which defendant is charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 23 L.Ed.2d 368, 375 (1970). Iowa Code section 511.18 provides those factors necessary to constitute the crime of fraudulent practice in procuring insurance. The elements necessary to prove the facts under section 511.18 were introduced and the issue of the application or construction of section 511.18 is not before us.

The controversy here centers on the issue of the degree of fraudulent practice and the question of the State's burden of proof on the issue of degree. The State argues we are not in our inquiry dealing with an element of the crime. It cites State v. Robertson, 351 N.W.2d 790 (Iowa 1974) to support its position. We do not find Robertson instructive as it focuses on corroborating circumstances. We find proof of the elements specified are necessary to prove the relative degree. There is no evidence of the amount the company was defrauded. Clearly, therefore, there is no proof of amounts so as to trigger those degrees of fraudulent practices requiring a certain amount.

We therefore look to Iowa Code section 714.11(3). The question is did the State prove as a matter of law the property could not be valued? To date the insurance company has received premiums and has not paid out on a death loss.

The fraud on the company was the difference between the risk the company assumed and the risk the company thought it assumed. Because of the fraudulent misrepresentations, the company was put in the position of carrying a greater possibility of loss on the policy written than it thought it was contracting to carry. There is no evidence the differential between these risks cannot be valued.

The time of death is always an uncertainty. This, however, does not mean life insurance risks cannot be valued. Policy risks are valued actuarially using probability of risk. The age of an applicant is generally one basis for assessing premiums. The risk is an older person will die sooner than a younger person. Therefore, the probability of death at a certain age figures into the company's actuarial determination of premium.

The policy entered in evidence illustrates this fact. Premiums are shown per $1,000 based on the applicant's age. At age thirty-four, the premiums per $1,000 are $18.20 per month; at age seventy they are $132.66 per month. If the issue here had been misrepresentation of age rather than health (example, Carmetta had been represented

as being thirty-four but she was seventy) the company would have a $114.46 loss per month. Obviously, these computations are not made without the benefit of experts.

We determine the trial court erred in holding as a matter of law the fraud on the insurance company could not be valued. There is no evidence to support such a holding. The statute provides there must be a showing it is not possible to obtain a value. The State failed to introduce evidence on the degree of fraudulent practice.

Additionally, if we were to accept the State's argument we would limit every fraudulent practice under section 511.18 to fraudulent practices in the third degree. Section 511.18 does not limit itself to fraudulent practices in the third degree and we refuse to do so.

The State claims defendant created or waived the error. We disagree. The State originally charged defendant with a fraudulent practice in the first degree in violation of section 714.9. Defendant moved to dismiss contending the State could not show $5,000 or excess and should determine the value as a matter of law. As a result of defendant's motion, the State amended to charge under section 714.11(3). At the close of the State's evidence, defendant moved to dismiss claiming there was no evidence of value as defined by the Code.

The State contended value was not an essential element of the crime. The court determined there was no evidence

to show the policy had any value at any particular time and there was no way a value could be fixed on the policy. The issue, however, is not the value of the policy but the cost of the risk assumed as opposed to the risk contemplated to be assumed.

We find error was preserved. We therefore need not address defendant's issue on included offenses. We reverse.

**REVERSED.**

All judges concur except Donielson J., and Habhab, J.

**DONIELSON, J.** (dissenting)

I am guided by Iowa Code section 714.14, which reads as follows:

> The value of property or service is its highest value by any reasonable standard at the time the fraudulent practice is committed. Reasonable standard includes but is not limited to market value within the community, actual value, or replacement value.

(emphasis added).

I look at this in strict terms of what it says and determine that the value after this forged application was submitted and approved was $50,000. True, the company has not been required to pay on the policy which was acquired by the husband-forger who was later convicted of solicitation to commit murder. Nevertheless, there was $50,000 worth of insurance protection which could be "triggered" at any time. I would hold that by virtue of the words of this statute, the highest value is $50,000.

I see no reason for actuarial or other strained values. Certainly I fail to see that no evidence of value has been shown when it is clear that the highest value per section 714.14 is $50,000 worth of life insurance protection.

**HABHAB, J.** (dissenting)

I respectfully dissent. I do so for the reasons which follow.

Under an amended trial information, the defendant was charged with the crime of fraudulent practice in the third degree in violation of Chapter 511.18 and Chapter 714.11(3) of the Iowa Criminal Code.

The defendant alleges the trial court erred in determining as a matter of law that fraudulently procured insurance is a fraudulent practice for which the value cannot be determined.

The fraudulent practice with which defendant was charged is defined in an insurance statute:

> Any agent . . . who shall knowingly, by means of concealment of facts or false statement, procure or assist in procuring from any life insurance organization any policy or certificate of insurance shall be guilty of a fraudulent practice.

Iowa Code § 511.18 (1987).

Chapter 714 sets forth varying degrees of fraudulent practice and classifies each for punishment. The section under which the defendant is charged reads as follows:

> . . . [F]raudulent practice in the third degree is the following:
>
> * * *
>
> 3. A fraudulent practice where it is not possible to determine an amount of money or value of property and services involved.

Iowa Code § 714.11(3) (1987).

The trial court determined that the term "life insurance policy," which is the subject of this prosecution, was one "where it is not possible to determine an amount of money or value of property and services involved," classifying it as a fraudulent practice in the third degree. Defendant contends on appeal that the trial court erred in ruling this as a matter of law because it is an element of the crime.

I find that the defendant waived this argument. The defendant was first charged with the crime of fraudulent practice in the first degree in violation of Chapter 511.18 and Chapter 714.9 of the Code. To this charge, the defendant filed a "motion to dismiss or in the alternative, a motion to amend" alleging:

> 4. That the question of the ultimate value of said insurance policy, independent of the facts to be proven concerning a fraudulent practice, if any, should be decided as a matter of law in advance of trial and can in no way be determined by the trial jury as a question of fact.
>
> 5. That it is the understanding of this defendant that the State of Iowa has no objection to a pretrial determination by the court as to the issue raised herein.
>
> * * *
>
> 7. That in the alternative inasmuch as the State of Iowa cannot prove the value of the instrument to be in excess of $5,000 at the time of any alleged fraudulent practice, the court should determine what value, if any, said instrument had at the time of the alleged fraudulent practice and order the State of Iowa, prior to trial, to amend said trial information accordingly.

It is well settled that a party to a criminal proceeding will not be permitted to complain of error with respect to the admissions or exclusion of evidence where he himself had acquiesced in, committed, or invited error. Cf. State v. DeWitt, 286 N.W.2d 379 (Iowa 1979).

The trial court responded to the request of the defendant by determining as a matter of law the valuation question. He acquiesced in what he now predicates as error. I would conclude that this argument is waived.

I do not necessarily agree that value is an element of this crime. The predecessor statute did not make value an element. The former section provided:

> Any agent . . . who shall knowingly, by means of concealment of facts or false statements, procure or assist in procuring from any life insurance organization any policy or certificate of insurance, shall be punished by a fine of not to exceed $1,000 or by imprisonment in the county jail not to exceed 1 year, or by both, in the discretion of the court.

Iowa Code § 511.18 (1977).

The trial court here did not determine the value of the property. The trial court ruled that value could not be determined. The question then becomes whether or not the insurance policy had a value that could not be determined. The court, as requested by the defendant, made that determination as a matter of law. Since the trial court responded to the request of the defendant, it did not err.