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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

24

LORNA J. CONNELL, Executor and Trustee of the Estate and Trust of **STANLEY B. W. CONNELL, FIRST STATE BANK OF MAPLETON**, and **GATEWAY FOODS, INC.**,

Plaintiffs-Appellees,

vs.

FIDELITY AND GUARANTY LIFE INSURANCE CO.,

Defendant-Appellant.

Filed September 25, 1984

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83-458

Appeal from the Iowa District Court for Lucas County - James W. Brown, Judge.

Defendant appeals from judgment for plaintiff by a jury in an action for breach of life insurance contract, asserting that the contract was void because of fraud and equitable misrepresentation. AFFIRMED.

Henry A. Harmon and Stephen D. Hardy of Grefe & Sidney, Des Moines, for defendant-appellant.

William L. Shelton of Shelton, P.C., Chariton, for plaintiffs-appellees.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

Defendant, Fidelity and Guaranty Life Insurance Company (Fidelity), issued a $150,000 life insurance policy to Stanley B. W. Connell on January 11, 1979. Less than four months later, on May 5, 1979, Stanley suffered a subarachoid hemorrhage, from which he died on May 19, 1979. Plaintiffs commenced a breach of contract action in equity based on Fidelity's denial of liability under the life insurance policy. Fidelity raised the affirmative defenses of fraudulent and equitable misrepresentation. The trial court directed a verdict for plaintiffs on the contract and submitted the defenses to the jury. The jury found for the plaintiffs; Fidelity appeals from the overruling of its motion for new trial or judgment N.O.V.

This is an action at law. Our review is on errors assigned. Iowa R. App. P. 4. Henschel v. Hawkeye-Security Ins. Co., 178 N.W.2d 409, 412 (Iowa 1970).

Fidelity alleges that it was entitled to a directed verdict in this case because the evidence established equitable misrepresentation as a matter of law.

The Iowa Supreme Court has noted: "It is a well settled principle of equity that misrepresentations amounting to fraud in the inducement of a contract, whether innocent or not, give rise to a right of avoidance on the part of the defrauded party." First National Bank v. Brown, 181 N.W.2d 178, 182 (Iowa 1970). To establish fraud in law actions, it is necessary to prove representation, falsity, materiality, scienter, intent to deceive, reliance and resulting injury or damage. Id. at 181; Smith v. Peterson, 282 N.W.2d 761, 766 (Iowa Ct. App. 1979).

Fidelity alleges Stanley made material misrepresentations in twelve questions asked of him on the life insurance application form. The twelve questions and Stanley's answers were, in pertinent part, as follows:

1. a. Name and address of your personal physician? None regular
   b. Date and reason last consulted? Feb. 1971 Ruptured Left Achilles Tendon
   c. What treatment was given or medication prescribed? Surgical Repair . . . .

2. Have you ever been treated for or ever had any known indication of:

. . .

b. Dizziness, fainting, convulsions, headache; . . . ? [checked No]

. . .

d. Chest pain, palpitation, high blood pressure, . . . heart attack or other disorder of the heart or blood vessels? [checked No]

e. . . . ulcer, hernia, appendicitis, . . . or other disorder of the stomach . . . ? [checked Yes] Appendectomy April 1948 . . . .

. . .

g. Diabetes . . . ? [checked No]

. . .

5. Other than above, have you within the past 5 years:

a. Had any mental or physical disorder not listed? [checked No]

b. Had a checkup, consultation, illness, injury, surgery? [checked No]

c. Been a patient in a hospital . . . ? [checked No]

d. Had electrocardiogram, x-ray, other diagnostic test? [checked No]

e. Been advised to have any diagnostic test, hospitalization, or surgery which was not completed? [checked No]

Fidelity claims the answers to these questions were material as a matter of law, relying on Crandall v. Bankers Life Co., 245 Iowa 540, 549, 62 N.W.2d 169, 174 (1954), wherein the supreme court quotes Fountain & Herrington v. Mutual Life Insurance Co., 55 F.2d 120, 123 (4th Cir. 1932), as follows:

> Answers made in response to questions in the application as to prior illness, consultation with physicians and applications for other insurance, where the applicant, as here, declares that they are true and offers them as an inducement to the issuance of the policy, are deemed material as a matter of law.

The record in the instant case indicates that James D. Wilson, M.D., prescribed for Stanley a medication to control blood pressure in 1973 after diagnosing Stanley's symptoms as hypertension. Dr. Wilson saw him again in 1975 when Stanley complained of headache and sinus tenderness. His blood pressure was elevated, so Dr. Wilson put him in the hospital to do a "hypertensive work-up" on

him. Dr. Wilson's diagnosis of Stanley was that he had arteriosclerotic heart disease and hypertension, and that he was a borderline non-insulin diabetic; he advised Stanley of this diagnosis and prescribed some medication indefinitely. It was possible that Stanley may have been taking a decongestant before the tests, which would have elevated his blood pressure somewhat. While Stanley was in the hospital, Dr. Wilson had prescribed the medication Dyazide, which can cause a false elevation in the glucose tolerance tests. Dr. Wilson gave Stanley an electrocardiogram, which showed no abnormalities. He did not give Stanley a stress test, did not find a heart murmer; Stanley did not complain of any circulatory problems or shortness of breath. Dr. Wilson apparently based his diagnosis of arteriosclerotic cardiovascular disease on the combination of Stanley's high blood pressure and Stanley's habits of smoking, drinking, and being overweight. Although Dr. Wilson prescribed some medication for Stanley's high blood pressure, he did not prescribe any for the arteriosclerotic cardiovascular disease because he felt "[t]here was no occasion for those."

Robert E. Anderson, M.D., testified that Dr. Wilson had a reputation of telling about ninety percent of the people he saw that they had high blood pressure and heart disease, that Dr. Wilson's opinions were very suspect if not completely worthless in his community, and that if Stanley had told Dr. Anderson that Dr. Wilson had diagnosed him as having high blood pressure, Dr. Anderson would not have been convinced that he had high blood pressure.

Stanley was admitted to a hospital again in 1977 complaining of chest pain. Because of the abnormal nature of the pain, the admitting doctor tentatively diagnosed the pain as caused by any of the following: myocardial ischemia (lack of oxygen to heart muscle), peptic ulcer, hernia, or hypertension. Four electrocardiograms and a series of x-rays were done on Stanley during the hospital stay. During the four-day diagnostic examination, no heart problems were indicated. Elevated blood pressure was determined to have been caused by the

decongestant Actifed. No blood pressure medicine was prescribed. He was discharged with a prescription for a nervous stomach medication.

Fidelity claims these facts show Stanley gave false answers to the questions on the insurance application form and that the trial court should have found these misrepresentations material as a matter of law and either directed a verdict in favor of Fidelity or instructed the jury that the misrepresentations were material. However, plaintiff directs us to Iowa Code section 511.31, which states, in pertinent part:

> In any case where the medical examiner, or physician acting as such, of any life insurance company . . . shall issue a certificate of health or declare the applicant a fit subject for insurance, or so report to the company . . . , it shall be thereby estopped from setting up in defense of the action on such policy or certificate that the assured was not in the condition of health required by the policy at the time of the issuance or delivery thereof, unless the same was procured by or through the fraud or deceit of the assured.

Iowa Code § 511.31 (1983).

In connection with Stanley's application for the Fidelity insurance policy, Stanley was given a brief medical examination by Dr. Anderson. Dr. Anderson recorded Stanley's answers to the form questions regarding his past medical history. He then gave Stanley a medical examination which included: a blood pressure reading; a pulse rate reading; a stethoscopic examination; ear, nose, and throat examinations; albumin, sugar, and specific gravity tests on his urine sample; and an electrocardiogram done by a hospital. No abnormalities in Stanley's physical condition were discovered by these tests.

Ordinarily in contract matters:

> where one party has superior knowledge of the facts, resulting in an inequality of condition or knowledge between the parties . . . . [t]he party with the superior knowledge then has the duty to disclose those material facts which may be favorable to him and unfavorable to the other party.

Smith v. Peterson, 282 N.W.2d at 767. Therefore, under ordinary contract theory,

Stanley had the duty to disclose the existence of previous tests and treatments because Fidelity had no way of knowing his previous medical history:

> The importance of a false statement by an applicant for a policy of insurance as to whether he has consulted physicians lies in the fact that he conceals from the insurer the fact of such consultations and thus deprives it of the opportunity of making an independent investigation and of obtaining further information, so as to enable it to decide for itself, in the light of the additional information, whether to enter into the proposed contract or what premium to charge.

43 Am Jur. 2d Insurance § 1068 (1968).

However, the Iowa Supreme Court has stated:

> It is the duty of every person, in transacting business, to use ordinary care and prudence. If false representations are made regarding matters of fact, and the means of knowledge is equally open to both parties, and then one party, instead of informing himself, sees fit to put himself in the hands of the other, whose intent is to mislead him, the law will give him no remedy for his injury.

McGibbons v. Wilder, 78 Iowa 531, 535, 43 N.W.520, 522 (1899).

Rather than relying on the statements in the application, Fidelity, by requiring a medical examination, had a means of determining Stanley's health condition. It did not rely exclusively on any statements made by Stanley.

> In any case where cancellation is sought on the ground of fraud, actual or constructive, the fraud must have had a causal connection with the execution of the instrument involved, in that the party allegedly misled was induced thereby to execute the instrument, and did not execute it in reliance on his own judgment or investigation or on information received from a third person or persons.

13 Am. Jur. 2d Cancellation of Instruments § 18 (1968) (citing Clark v. Reeder, 158 U.S. 505, 15 S. Ct. 849, 39 L. Ed. 1070 (1894); Johansson v. Stephanson, 154 U.S. 625, 14 S. Ct. 1180, 23 L. Ed. 1009 (1877); Hoyt v. Hanbury, 128 U.S. 584, 9 S. Ct. 176, 32 L. Ed. 565; Wooley v. Simpson, 185 Okla. 224, 90 P.2d 943 (1939); Nolan v. Young, 220 S.W. 154 (Tex. Civ. App. 1920). There is little evidence that Fidelity would not have issued the policy had it known the true facts. In fact, there is some evidence, albeit offered by plaintiff, that Fidelity's underwriter's manual

would not have indicated a rejection of Stanley's application. Dr. Warren Hermann, a doctor of osteopathy, stated that under those guidelines, after reviewing the medical records in evidence, Stanley did not have any of the diseases claimed by Fidelity. Dr. Paul From, an internal medicine specialist from Des Moines, testified that he had studied the records, found no evidence of hypertension, diabetes, arteriosclerosis, or other heart disease. He stated that based on his experience as a medical consultant to several life insurance companies and his knowledge of Stanley's medical history, that he was insurable for life insurance when he applied at the standard rates. Dr. John Gustafson, a medical director for six life insurance companies in Des Moines, testified similarly. He stated that considering all the medical records introduced at trial, Stanley was still insurable under Fidelity's own underwriting manual.

In determining whether the misrepresentations were material as a matter of law, we note that:

> A fact is material if it substantially affects the interest of the party alleged to have been defrauded . . . . Materiality has been found where a fact influences a person to enter into a transaction, where it deceives him or induces him to act, or where the transaction would not have occurred without it.

Smith v. Peterson, 282 N.W.2d at 765. Clearly, the evidence is insufficient to find as a matter of law that Fidelity was induced by any alleged misstatements by Stanley to issue the insurance policy. The estoppel created by section 511.31 "is broad and sweeping . . . ." Mickel v. Mutual Life Ins. Co., 204 Iowa 1266, 1270, 213 N.W. 765, 767 (1927) (reviewing Iowa Code § 8770 (1924) or § 1812 (1897), now § 511.31 (1983)).

> The very evident purpose of the statute is to prevent the defeat of recovery on any policy where the company has, by its skilled agent, examined and passed upon the fitness of the applicant for insurance. The estoppel is directed to inquiry as to the condition of health, and it is quite immaterial what representations have been made or warranties given. The company, having investigated, and for itself ascertained and declared the condition of the assured

> to be such as required by its rules and regulations, will not be permitted to interpose as a defense the physical infirmities of the deceased, of which it knew, or might have known, as the result of its examination; and the fraud or deceit referred to is that of procuring the report or certificate of the physician, and not the policy, and there is no averment to the effect that the examiner was misled or deceived in any way, or that the report was the result of collusion between him and the assured.

Weimer v. Economic Life Assoc., 108 Iowa 451, 453, 79 N.W. 123, 123 (1899) (interpreting Iowa Code § 1812 (1897), now § 511.31 (1983)). The Eighth Circuit has stated:

> This estoppel is positive and not rebuttable. When the fact situation exists (as here), the statute exerts its full force and the provisions in the contract relating to innocent false statements in the application for insurance lose all influence whatever may be the fact as to the truth or falsity of such statements. Thus the effect of the statute is, in a practical sense, to change the contract while the method of bringing about that effect is through estoppel which is often regarded as remedial.

Mutual Life Insur. Co. v. Cunningham, 87 F.2d 842, 845 (8th Cir. 1937) (applying Iowa Code § 8770 (1931), now § 511.31 (1983)).

Fidelity claims section 511.31 is inapplicable to this case because an examining physician merely signed the application as a witness, but did not "issue a certificate of health or declare the applicant a fit subject for insurance . . . ." as required by the code. But this is not necessary: "Where, in answer to one or more questions, or in some other way, the examiner, in words or in language so meaning, declares that applicant is a fit subject for insurance, it is sufficient." Weimer v. Economic Life Assoc., 108 Iowa at 453, 79 N.W. at 123. In the instant case, the physician's examination was suggested by the insurance agent. Dr. Anderson conducted the examination and filled in the form, signing it as "Witness (Medical Examiner . . .)." Therefore, the physician was declaring the applicant insurable. We find section 511.31 applicable to this case.

Fidelity argues that it is excused from the estoppel of section 511.31 by the final clause of that section, which provides that the estoppel is not applicable

where the physician's certificate "was procured by or through the fraud or deceit of the assured." Iowa Code § 511.31 (1983). Under Fidelity's theory, Stanley defrauded Fidelity by giving false answers to Dr. Anderson's questions; therefore it should not be estopped by its use of a physician's certificate in issuing the policy.

The supreme court has stated:

> We have frequently held that to establish the affirmative defense of fraud required by this section, the proof must be clear, satisfactory, and convincing, and must show (1) a material representation of an existing fact (2) its falsity (3) scienter (4) intent that it be relied upon (5) that the examining physician relied and acted thereon and (6) that the company was thereby defrauded.

Equitable Life Insur. Co. v. Mann, 233 Iowa 293, 295-96, 7 N.W.2d 566, 567 (1943).

The trial court concluded that the elements of contract were established and directed a verdict for plaintiffs that an insurance contract was consummated. We concur in this result. See Service Life Ins. Co. of Omaha v. McCullough, 234 Iowa 817, 13 N.W.2d 440 (1944); Equitable Life Ins. Co. of Iowa v. Mann, 233 Iowa 293, 7 N.W.2d 566 (1943). The issues of fraud and misrepresentation were then submitted to the jury. Defendant complains that the wrong standard of proof was used. The court instructed that it was defendant's burden to prove fraudulent misrepresentation by a preponderance of the evidence which is clear, satisfactory, and convincing. In Hall v. Wright, 261 Iowa 758, 767, 156 N.W.2d 661, 667 (1968), the supreme court stated:

> Fraud must be established by clear and satisfactory evidence. . . . But the quantity of evidence required is no more than will outweigh the evidence on the other side; that is, a preponderance of proof, and no more, is demanded. . . . The evidence must be clear and satisfactory in character.
>
> . . . While the evidence must be clear and convincing, such clear and convincing proof may be met by a preponderance of the evidence. . . .

See also, Crandell v. Bankers Life Co., 245 Iowa 540, 549, 62 N.W.2d 169, 174

(1954). The trial court's instruction comported well with these authorities. No error was made

Fidelity further claims error in the trial court's refusal to instruct the jury on the provisions of section 511.18 regarding fraud in procuring insurance. It claims the statute relieves defendant of having to prove materiality, intent to deceive and justifiable reliance as elements of its fraud defense We hold the trial court correctly ruled on this issue. The statute is a criminal statute of no relevance to the issues here Moreover, we find the trial court's instructions adequately presented the jury with the defenses raised by defendant

We have considered all of the issues raised by defendant and find them nonmeritorious. The trial court correctly denied the motion for judgment N.O.V. or new trial.

AFFIRMED.

All judges concur except Sackett, J., who dissents.

SACKETT, J. (dissenting)

The defendant is correct in claiming that the trial court erred in failing to instruct the jury that answers to questions on an application for life insurance are material as a matter of law. The Iowa Supreme Court has made its position clear on this issue in the case of Crandall v. Bankers Life Co. Answers made in response to questions in an application for life insurance coverage concerning prior illness, consultation with doctors and applications for other insurance where the applicant declares them to be true and offers them as an inducement to the issuance of the policy are deemed material as a matter of law. Crandall, 245 Iowa 540, 549, 62 N.W.2d 169, 174 (1954). This is the latest expression of the Iowa law in this area.

Crandall is, on its facts, in all practicality a blueprint of the facts in the case at bar. There an insured died of a heart attack. There the insured stated in his application that he suffered from no ailment or disease of the heart. There the insured misstated about his previous consultations with doctors. There the insured signed his application stating he had read his answers and they were true These are the facts in the case before us. There the case went to a jury and the claimant widow was denied benefits.

It was improper for the trial court in the case at bar to direct a verdict against the defendant and extend coverage to the widow of the decedent. Rather, Iowa law, and specifically the clear import of the Crandall case, mandates that a jury question is generated as to whether the statements made on the application are false and if made for the purpose of inducing the insurance company to extend coverage. It is exceedingly clear that the defendant does not have a burden to prove that these statements are material, were made with the intention to deceive, and that they were justifiably relied upon.