WILBON v. WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY.

Opinion delivered June 30, 1930.

1. INSURANCE—EFFECT OF FALSE REPRESENTATION.—Where answers in an application for life insurance constituted merely representations and not warranties, a misrepresentation will not avoid the policy unless wilfully or knowingly made with intent to deceive.
2. INSURANCE—FALSE REPRESENTATIONS BY INFANT.—An instruction that if the insured, a child under 10 years of age, or the beneficiary, his father, knew that the insured had had heart trouble preceding the application for insurance, and did not disclose that fact to the insurer before the policy was issued, but answered "No" to the inquiry whether the insured had had heart trouble, "with intent to deceive the company," they should find for the company, was erroneous, since insured, being of tender age, could not be expected to know whether the representations were true.
3. INSURANCE—FALSE REPRESENTATIONS BY BENEFICIARY.—Where insured was an infant of tender years, and his father as beneficiary certified that the answers made to the questions were complete and true, he was bound by such representations to the same extent only as if he had made such representations upon an application for insurance upon his own life.

Appeal from Phillips Circuit Court; *W. D. Davenport,* Judge; reversed.

STATEMENT OF FACTS.

This suit was brought by Levi Wilbon, named beneficiary in a policy of insurance issued by appellee company upon the life of his 10-year-old child, and from the judgment against him the appeal is prosecuted.

The answer admitted the execution and delivery of the policy and defended on the ground that the insured, Percy L. Wilbon, had a serious attack of heart trouble in December, 1928, and that the answer "No" was made to the question in the application for insurance inquiring whether the insured had ever had heart disease. Alleged that the answer was false and material and was wrongfully and knowingly made with the fraudulent intent to procure the policy.

Levi Wilbon, the father of the insured, lived in and was working at Helena at the time of the issuance of the policy, his wife and family living at Rondo in Lee County, the old home. He took out the policy of insurance March 19, 1929, on the life of his son who was at the time between 9 and 10 years old and living with the family in Rondo, while he lived in West Helena. He took out the policy because the agent, H. A. Fields, kept insisting and soliciting him to do so. He told the agent that the child was living at Rondo, and he replied that it was all right and he would attend to that. Said he answered the questions truthfully, and if the boy was sick at the time he did not know it. That he had been sick in December, but had recovered and gone back to school, and in April or May following his wife informed him that the boy was sick and he brought him to West Helena to Dr. Baker in June, and he died on July 5; admitted he was informed by his wife that Dr. White treated the boy at Rondo, and stated he had some kind of rheumatism. Said that he was not there and had no reason to think it was a serious illness as his son got up and went back to school after being treated by Dr. White. Denied that Dr. White told him that the boy had kidney trouble or anything of the kind, and said he knew nothing about it except upon informa-

tion from his wife. He paid the premium for six months, $4.14, and upon the death of the insured he made out the proof of loss and the company denied liability and offered to return him the premium paid, which he refused to accept. Admitted that upon his going home on Sunday Dr. White told him he ought to look after the boy more than he was doing, and, upon his asking why, said he had some kind of trouble that he ought to be looked after, but that he could cure him.

Dr. White testified that he had attended the boy in Rondo in December and found him in bad condition, his feet were swollen a little, his knee joints were swollen, and he had kidney trouble, to what extent he could not say. He had a very bad heart leakage and was unable to get out of bed. After about four weeks of treatment the boy got up and was around, and he "censured" the father for neglecting him; said he had the father listen to the leakage of the heart through the stethoscope and "I explained to the father that he had rheumatism." He thought it was the first of December or the middle of it when the father came home. The boy was afterwards sick from May to July, 1929, with acute nephritis and died on July 5th of that year. He declined to answer the question whether the condition for which he had treated the boy in December continued and was the same in the last illness of which he died.

The medical examiner did not discover or report any heart trouble in his certificate of examination, and answered that the applicant appeared to be in good health, and said he regarded him a risk of the first class. This application was signed Percy L. Wilbon by Levi Wilbon, father. A confidential report made on the risk by the agent, H. A. Fields, recommended the risk and advised the issuance of the policy.

Appellant answered the question in the application whether the insured had ever suffered from any number of named diseases, including "heart disease, disease of the liver or kidneys, etc." "No." Appellant, the bene-

ficiary, signed the application below the name of the insured consenting to the application and "certifying that the above answers are complete and true in every particular."

The agent stated that he did not know whether Levi Wilbon, appellant, had no knowledge that his son ever had any heart trouble, but knew that the boy lived at Rondo, and his father lived at West Helena, and that he had the boy brought to the doctor of the company for examination and he was passed by him.

There was some testimony tending to show that the kidney trouble, nephritis, might have been caused by a bad heart.

The policy contained a clause stating that the application and the policy constituted the entire contract, "and statements made by the insured or on his or her behalf shall, in the absence of fraud, be deemed representations and not warranties, etc."

The court instructed the jury giving instructions Nos. 2, 3, 4 and 5 over appellant's objections, and the verdict was rendered against appellant, and from the judgment thereon he prosecutes this appeal.

W. G. Dinning, for appellant.

Brewer & Cracraft, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the court erred in giving each of said instructions directing the jury that, if they found from a preponderance of the testimony that the assured had had heart trouble in December, preceding the application for insurance, and this was known either to the assured or the beneficiary, and was not disclosed to the defendant before the policy was issued, to find for the defendant. The provision in the policy relative to answers in the application being representations and not warranties is like those held to be representations in the cases of *Old Colony Life Insurance Co.* v. *Julian,* 175 Ark. 359, and *Bankers' Reserve Life Ins. Co.* v. *Crowley,* 171 Ark. 135. In the latter case it was said: "The questions propounded in the

application as set out above call for answers founded on the knowledge and belief of the applicant, and a misrepresentation or omission will not avoid the policy unless willfully and knowingly made with an intent to deceive." It is true the application appears to be signed by Percy L. Wilbon, but it is also signed by the father, appellant, with the statement required because of the applicant being under 15 years of age. There is no testimony tending to show that the under 10-year-old insured answered the questions in the application, except in the statements in the certificate thereto appearing to have been signed by him, and, if he had done so, being a minor of such tender age, he could not be expected to know whether the representations were correct and true, and certainly could not be held in making any misrepresentations to have made them wrongfully and knowingly with an intent to deceive such as would have avoided the policy. All of said instructions, therefore, telling the jury that if they found that the insured or the beneficiary knew that the insured had had heart trouble preceding the application for insurance and did not disclose the fact to the insurer before the policy was issued, and if either the assured or the beneficiary answered "No" to the inquiry if the assured had ever had heart trouble and either of them knew that he had had heart trouble, and if they found that either the assured or the beneficiary stated to the agent of the insuring company in answer to a question asked that the assured had never had heart trouble, "with the intent to deceive the company, etc.," they should find for the defendant, were incorrect and erroneous on that account and inherently wrong and necessarily call for a reversal of the case.

Since the beneficiary was not only required to consent to the application for insurance for his minor son, but to certify that the answers made to the questions in the application were complete and true in every particular, he was bound by such statements and representations to the same extent only, if they proved to be false,

as if he had made such representations upon an application for insurance upon his own life wrongfully and with an intent to deceive and not otherwise. The court therefore erred in giving each of the said instructions permitting the insurer to avoid liability on its policy if they found such misrepresentations had been knowingly made with the intent to deceive either by the insured or the beneficiary.

For this error the judgment must be reversed and the cause remanded for a new trial. It is so ordered.