

NATIONAL LIFE & ACCIDENT INSURANCE COMPANY  
*v.* DAVISON.

4-2848

Opinion delivered April 3, 1933.

1. INSURANCE—CONDITION AS TO DELIVERY OF POLICY.—A condition in a life insurance policy that it shall not take effect unless delivered during the lifetime and good health of the insured is a valid condition precedent to the insurer's liability.

2. INSURANCE—WAIVER OF CONDITION.—While a provision that there shall be no liability unless insured was in sound health at the delivery of the policy may be waived, such provision cannot be waived by a soliciting agent, having no authority to issue policies or pass upon applications.
3. INSURANCE—BREACH OF CONDITION—AMOUNT PAYABLE.—Where an applicant for a life insurance policy denied that she was afflicted with heart disease or dropsy, and she died therefrom on the day the policy was delivered, a clause limiting the insurer's liability to a return of premiums was binding and could not be waived by the agent delivering the policy.
4. INSURANCE—WAIVER OF FORFEITURE.—A waiver by an insurance company of one ground of forfeiture of a policy of which it has knowledge will not affect another forfeiture of which it is ignorant.

Appeal from Cross Circuit Court; *Neil Killough*, Judge; reversed.

STATEMENT BY THE COURT.

This appeal is from a judgment of the circuit court on appeal from the common pleas court of Cross County in favor of the beneficiary, Sadie Davison, on a policy of insurance issued by the appellant company on the life of Lucy Mitchell.

Appellant defended on the ground that the policy was a wagering contract, alleging Sadie Davison, the beneficiary, had suggested the taking of the policy and paid the premiums, having no insurable interest in the life of the insured; that insured had made false representations and warranties in her application for the insurance, answering that she had never had endocarditis, diabetes and several other diseases specified in the question in the application, and that both insured and the beneficiary knew when the application was made that the answers were not true, insured being afflicted with both endocarditis and dropsy at the time the application was made, of which diseases she died on the day the policy was delivered at the house of Sadie Davison, and to Sadie Davison in fact and not to the insured; that the insured was not in sound health at the time the application was made, nor upon the day of the attempted delivery of the policy, all of which was known to the beneficiary.

The case was tried in the court of common pleas, and judgment was recovered by the beneficiary, from which an appeal was taken to the circuit court where recovery was again had, and judgment rendered for the amount of the verdict with interest, penalty and attorney's fees, from which this appeal comes.

It appears from the testimony that Sadie Davison was not related to the insured by either blood or marriage, although she was present when the application was made. Several negroes were sitting around in her back yard on Wednesday, the day it was made. The agent and the superintendent of the defendant company came up, and Castleberry, the agent, said they ought to be able to write somebody in the crowd. Somebody said, "We haven't any money—it's a broke crowd." Castleberry then asked Lucy how about writing her some insurance, and she replied she didn't have any money, and Castleberry suggested that she borrow some money from Sadie. Lucy said she would if Sadie would lend her the money, and Castleberry said, "Sadie, loan this girl some money; she will pay you back." Lucy agreed to pay it back Saturday, and Sadie said, "I have got that kind of money." The inspector then began to write the application. To the question of whether any of her people had ever died with cancer or Bright's disease, etc, she answered, "No, not that I know of." He asked her when she had been treated by a doctor last, and she replied, "In July; Dr. Russell." She did not know what disease she had been treated for, and the agent said, "I will suggest chills and fever." Sadie went into the house, got 30c and brought it back to Lucy, who handed it to the agent, telling Sadie she would have to have 15 cents more, which Sadie supplied, and the inspector gave a receipt to Lucy. He did not read the questions and answers back to Lucy, the insured, after the application was written, and the agents left after the money was paid. Castleberry came back the next Wednesday a week later and Lucy paid the 30 cents back to Sadie on the following Saturday, after the application was written, and also gave her 30 cents more to pay the next premium when the agent returned. The agent of the company delivered the policy on

Lucy to Sadie, appellee, in the morning before Lucy died that afternoon, exactly two weeks from the day the application was written. Sadie paid the 30 cents to Mr. Castleberry that Lucy let her have for the purpose. She told the agent the day the policy was delivered that Lucy was real sick, and he should go to see her, to which she said he replied, "Let her die." Castleberry inquired where Lucy was staying, and Sadie told him she was in the next house, and said that the superintendent and agent walked up there. The policy was delivered to Sadie, who gave the insurance agents 30 cents and Lucy, the insured, died about 2 or 2:30 that afternoon. The insurance agents came back on the next Thursday and Sadie told them Lucy died the day before. Castleberry and the inspector on Friday evening came to get Sadie to sign some papers and take the money back Lucy had paid on the insurance, the inspector telling Sadie that his business there was to get her to sign a release and give back the money which Lucy, the insured, had paid for the insurance. This she refused to do, but she said Castleberry did get hold of the policy, asked to see it a minute and kept it. Appellee explained that Lucy Mitchell left the money with her to pay the second premium, saying that she did not know the insurance men, and, since it was written at her house, they would be there to collect the money. She said Lucy was at her house, left the money and appeared to be in as good health as anybody, that she did not appear to have anything the matter with her when the application was made. "That she could do around, dance around from the phonograph, wasn't bloated, wasn't swollen, was able to do house work; didn't complain of being sick; that she didn't know but what Lucy Mitchell's health was better than her own health." She said also that the insurance agent didn't ask Lucy if she had had Bright's disease, t. b. or cancer, or the other diseases mentioned in the question at the time the application was made, but whether any of her people had died of such diseases, and she told him, "no"; that the agent didn't ask her if she had any of these diseases; that she told the agent the name of the doctor who had treated her in July, and that she didn't know what for, and the agent suggested,

"chills and fever"; that she told the agents on the morning the policy was delivered that Lucy was sick; it was two weeks from the day the application was made, and the inspector replied, "Let her die." She also said that Lucy put her name as beneficiary in the policy because she was her dearest friend; that Lucy was eating at her home most of the time, and her trunk was there at her home.

Other witnesses testified about the occurrences about as already stated, and that the insurance agent wrote the application and signed it and didn't read it to Lucy after it was written. That he handed it to her to sign, and Lucy told him to sign it.

Evelyn Brown said she was there, and, when the agent asked who the policy should be made to, Lucy said, "Sadie Davison," and he did not ask her anything about who she wanted it willed to until he got the money; that she did not know Lucy was sick.

The insurance agent testified that he asked Lucy if she had had heart disease, etc., and not whether any of her family had, and she answered, "No." Testified that he was soliciting agent, and had no authority to pass upon the application, and did not know that there was anything wrong in issuing a policy to one not related to the insured. Sadie Davison suggested her name as beneficiary at the time the application was made and before the money was paid. Castleberry said that he made the remark when he walked up that it looked like a good place to write some insurance, and Sadie suggested that Lucy Mitchell might join. Lucy said she did not have the money, and Sadie replied that, if she wanted to join, she would pay the premium and help her keep it up if she would will her the policy; that Sadie Davison paid the first premium to him, 30 cents, at the time the policy was written at Sadie's house; said nobody told him anything about Lucy Mitchell being sick, and he knew nothing about it until he heard she was dead. Another 30 cents was collected from Sadie Davison after the policy was written, nobody else being present at the time. The policy was delivered to Sadie before Lucy died, and he collected the last 30 cents on the policy from Sadie and asked for Lucy,

and Sadie said she was not there, but that she, Sadie, would pay the insurance. He also said that she did not say anything about Lucy being sick, or tell Mr. Schmuck that she was sick, and did not tell him that Lucy was sick before she died.

Dr. Russell testified he treated insured during May, 1931, and for 3 or 4 months thereafter; that she had diabetes and heart trouble, endocarditis usually a fatal disease. He suggested she be sent to the hospital during the month of June or July. That endocarditis was the cause of her death. Sadie Davison talked to him about making out some kind of proof that would help her get the insurance after Lucy's death.

The husband of the insured testified that she took sick in 1931 and was treated about seven months before she died. She was taken to the hospital in Memphis and treated; that when he went to the undertaker Sadie told him that she had a policy on Lucy, and she would have paid the burial expenses if he had not been able to do so. That Sadie did not tell him anything about a policy until we got her into the coffin and going to the graveyard. "That Lucy was sick at the time the policy was taken, expecting to die any time."

The court instructed the jury, refusing to give a peremptory instruction for appellant, and also one allowing the jury to find for appellant if they found that the insured was suffering from any pulmonary disease, chronic bronchitis, cancer, disease of the heart, liver or kidneys, at the time she applied for the insurance, and from the judgment on the verdict against it the appeal is prosecuted.

*Roy Penix*, for appellant.

*Giles Dearing*, for appellee.

KIRBY, J., (after stating the facts). It is undisputed that Sadie Davison was in no way related to the insured, nor did she have an insurable interest in her life as the court told the jury. It is likewise undisputed that the insured, Lucy Mitchell, was suffering from heart disease and dropsy and not in sound health on the day of the application, nor on the date of the issuance of the policy, and that the policy was never delivered to Lucy Mitchell.

It is insisted that, because of the provision in the application that "no obligation shall exist against the company unless the policy of insurance issued in pursuance thereof shall be delivered to the insured," the policy was void for want of delivery. An insurance company may limit its liability to recovery of premiums paid if an insured was not in sound health on the date of the policy, and a condition that the policy shall not take effect unless delivered during the lifetime and good health of the insured is a valid condition precedent to the liability of the company. 37 C. J. 405; *American National Ins. Co. v. Lacey*, 182 Ark. 1158, 34 S. W. (2d) 757; *Jenkins v. International Life Ins. Co.*, 149 Ark. 265, 232 S. W. 3; *Pyramid Life Ins. Co. v. Belmont*, 177 Ark. 576, 7 S. W. (2d) 32; 37 C. J. 400.

Although a provision in the policy that there should be no liability of the insurance company unless the insured was in sound health at the time the delivery was made can be waived, this policy limited the liability of the company to the return of the premiums paid, the company having the right to declare the policy void at any time within the contestable period if it discovered that the insured suffered with certain kinds of diseases, heart disease, etc., and was a provision that could not be waived merely by a soliciting agent having no authority to issue policies or pass upon applications; and under the terms of the policy it was stipulated that there could be no waiver thereof except "by being specifically recited in the 'Space for Indorsements'," which was not done in this case. *Souza v. Metropolitan Life Ins. Co.*, 270 Mass. 189, 170 N. E. 62.

The undisputed testimony here shows that the insured was afflicted with both heart disease and dropsy when the application for the policy was made, wherein it was stated that she had had neither disease, and that she died of said diseases within two weeks from the date of the application, and on the afternoon of the day the policy of insurance was delivered, not to the insured but to the beneficiary who had no insurable interest in the life of the insured. Under these circumstances the clause in the policy limiting the liability to the return of

the premiums, etc., and giving the company the right to declare the policy void would be binding, and was such a condition as could not be waived by the agent delivering the policy. *National Life Ins. Co. v. Jackson*, 161 Ark. 297, 256 S. W. 378.

The soliciting agent and the superintendent of the company, respectively, had no authority to waive any provisions of the policy or to pass on the application for the insurance, it being necessary for it to be submitted to the home office. *Sadler v. Fireman's Fund*, 185 Ark. 480, 47 S. W. (2d) 1086; *American Ins. Co. v. Hampton*, 54 Ark. 75, 14 S. W. 1092; *Inter-Southern Life Ins. Co. v. Holzauer*, 177 Ark. 927, 9 S. W. (2d) 26.

The contention that there was a waiver of the provision of the policy relative to Bright's disease and diseases of the heart, kidneys and liver, etc., by the statement, conceding it to be true, of appellee that she notified the agent delivering the policy on the day of its delivery that the insured was sick and he should go to see her, is not warranted, since it could not have given knowledge to the company that the insured was suffering from heart disease and dropsy, both of which diseases she stated she had never had at the time of her application for the policy two weeks before. In other words, it would not be notice that the sickness of the insured resulted from any of the diseases mentioned in the said warranty or representation in the application. 14 R. C. L. 1172-73.

As said in *Planters' Mutual Ins. Co. v. Loyd*, 67 Ark. 585, 56 S. W. 44: "Nor will an act which impliedly waives one ground of forfeiture affect another forfeiture of which the company and its agent were ignorant."

The undisputed testimony shows that appellee had no insurable interest in the life of the insured, and the jury could have found that the suggestion was made by her that she would furnish the money to pay the premium if the insured would make the policy payable to her. The court should have instructed the verdict on the ground that the policy had not been delivered to the insured during her lifetime.

The judgment is reversed, and the cause dismissed