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

4-3431

Opinion delivered April 30, 1934.

1. INSURANCE—MISREPRESENTATIONS AS TO HEALTH.—Misrepresentations as to health will not avoid a life policy unless wilfully or knowingly made with intent to deceive.
2. INSURANCE—FORFEITURE—BURDEN OF PROOF.—An insurer has the burden to show that false and material representations which induced the issuance of the policy were made by insured knowingly and wilfully with intent to deceive insurer.
3. INSURANCE—FALSE REPRESENTATIONS—EVIDENCE.—In an action on a life policy in which insurer claimed that insured wilfully and knowingly misrepresented his physical condition with intent to deceive insurer, evidence *held* to sustain a finding that insured was in good health at the time of making the application.
4. EVIDENCE—AUTHENTICATION OF HOSPITAL RECORDS.—In an action on a life policy in which the defense was that insured had wilfully and knowingly misrepresented his physical condition, testimony of a file clerk in a hospital respecting insured's hospital records *held* properly excluded.
5. INSURANCE—RELEASE—JURY QUESTION.—In an action on a life policy, the question whether fraud was practiced on the beneficiary in securing a release *held* for the jury, where the release was secured by taking the beneficiary by surprise and by requiring her to act immediately.

Appeal from Pulaski Circuit Court, Third Division; *Marvin Harris,* Judge; affirmed.

STATEMENT BY THE COURT.

This suit was brought by appellee, mother of Ernest T. Redd, named beneficiary in a policy of insurance on his life issued by the appellant company in the sum of $530 and delivered to him on March 7, 1932.

The policy provided that, upon the proper proof of death of insured, the company would pay the sum of $530 to the beneficiary named therein. Insured died on March 8, 1933; claim blanks were furnished by R. A. Sanders, agent of appellant company, filled out by him and submitted to the company at its district office, together with the policy and receipt book. No further proof or information was called for by the company, which denied liability on the policy.

It was admitted that the policy was in full force and effect and paid up to and including March 8, 1933, the date of the death of insured. On March 31, 1933, the manager of appellant company, F. P. Robinson, while in possession of the policy and receipts, induced the beneficiary through misrepresentations of the terms thereof to accept $13.50 in full payment of said policy, for which claim had been made in the sum of $530 the full amount thereof.

The appellant defended on the ground that false representations and warranties had been made by the insured about his being in good health at the time the policy was delivered to him; and because of his false answer to the question about the last sickness in which he had had the attention of a physician.

Mrs. Threlkeld, appellee, testified to the date of the application for the policy and its subsequent delivery; stated Ernest was in the room at the time with her and Mrs. Nalley; that he was in good health when the policy was delivered and in good health when the application was made and prior thereto; that, after insured's death, Mr. Sanders took up the policy and receipt book about 10 or 11, after her son died at 9. He came from the county hospital and told her that her son was dead; that her son did not have influenza in January. Mr. Sanders did all the writing on the claim blanks, and Mr. Robinson gave her the check for $13.50. He stated to her that under the terms of the policy that was all she could get and he paid the money out of his vest pocket. She had broken her glasses and could not read without them, and, when he asked her to sign the papers, he stated that she could not collect anything else, and the company at that time had the policy and she did not know the terms or conditions of it. He insisted upon her taking the $13.50, saying that was all she could get; that, if she had known she was entitled to $530, she would not have taken the other; and the agent misrepresented the terms of the policy to her. Her boy had not been ill prior to March 17, 1932, but had an operation in 1927. He worked in wood saws and was taken ill on March 17, 1932, with

a chill. He weighed around 170 and worked the biggest part of the month of February, 1932, at wood saws. She denied having made any statement for her son to brush up, that the agent of the insurance company was approaching, and she wanted to get him insured; denied asking Sanders to assist her in collecting the insurance; denied asking him to get the other papers the policy required; and said he did not tell her anything about the other papers, and she did not know that a physician's certificate was required.

Mrs. Nalley testified that she was at insured's house every day during the years 1929, '30, '31, '32 and to the 19th day of February, 1933, and would see the insured nearly every day; that he was not ill and seemed to be in perfect health, and that she lived next door to him up to February 19, 1933; that she was present when Sanders, the agent, wrote the application in the front room and his mother was also present.

Mr. J. M. Williams testified that he had been acquainted with the insured for three or four years until he died; that he lived next door and saw him nearly every day; and on or about March 8, 1932, he was a stout, robust young man, and weighed 165 or 170 pounds and seemed to be in perfect health.

It was also shown that the company had denied liability, and had refused to return the policy and receipt book.

Elizabeth Kellogg, witness for defendant, testified that she was custodian of the records at the county hospital; that she did not make the records; they were made by the doctors and nurses and she just filed them; that she had in her possession the records pertaining to the insured, Ernest T. Redd. Objection was made to the introduction of these records, and appellant contends the court erred in excluding same.

F. P. Robinson testified that he explained to the beneficiary that the insurance claim had been rejected and would not be paid—nor any part of it, and he took a receipt for $13.50 from her. After the application was made for insurance, a supervisor was sent out to check

over things, and he approved the application and the policy was issued; said on cross-examination with reference to why he told the beneficiary she could not recover $530 on the policy: "I wouldn't discuss it with her among a lot of noise and other people, because I knew that she was going to be disappointed, but I wanted to make it plain to her. It was unfortunate for both of us," and that he read part of the receipt to her; didn't recall whether he read printed part to her, and he had insurance policy and receipt at that time and didn't point out conditions in the policy, and assumed it wasn't necessary.

Dr. John R. May testified that he examined the deceased in January, 1933, and found no advanced stage of tuberculosis; did not make any report to the plaintiff, and had no other record in his possession with reference to the particular patient made by himself.

Dr. Frank F. Whitehead testified by deposition that he was an interne from June 1, 1931, to June 1, 1933, at the county hospital, and was there on April 16, 1932, and made a personal examination of deceased, who was admitted in April, 1932. That he found him to be suffering with pulmonary tuberculosis, which was a fairly advanced case.

There were no objections to the instructions given by the court, and the jury returned a verdict in favor of appellee, and from the judgment thereon this appeal is prosecuted.

Barber & Henry, for appellant.

John L. Sullivan, for appellee.

KIRBY, J., (after stating the facts). Appellant insists that the policy of insurance was avoided because the insured in his application therefor wilfully and knowingly made misrepresentations with the intent to deceive the company as to his physical condition. There is no evidence here, however, directly tending to show any such representations, or that such misrepresentations had been wilfully and knowingly made as to his physical condition. Three witnesses, two of them disinterested, testified that insured was in apparent good health both

at the time the application for insurance was made and at the time of the delivery of the policy; that the insured weighed at that time from 165 to 170 pounds. The agent of the company who delivered the policy also stated that insured was in apparent good health at that time.

A misrepresentation will not avoid the policy unless wilfully or knowingly made with intent to deceive. *Wilbon* v. *Washington Fidelity National Ins. Co.,* 182 Ark. 57, 29 S. W. (2d) 680; *Metropolitan Life Ins. Co.* v. *Johnson,* 105 Ark. 101, 150 S. W. 393.

The burden was upon appellant to show that false and material representations, which induced the issuance of the policy, were made to it by the insured knowingly and wilfully and with the intent to deceive the insurer; but appellant not only failed to discharge the burden, but the preponderance of the testimony appears to support the proposition that insured was in good health at the time of the making of the application and the delivery of the policy.

No error was committed in excluding the testimony of Helen Robinson of the general hospital and Elizabeth Kellogg of the county hospital about the records of deceased in both these hospitals. Both testified that they were merely custodians of the records in the respective hospitals; that the records were made by the doctors and nurses; and that their duty consisted in placing them in the files. No reason was given why the doctors and nurses were not able to testify, and they were the proper parties to do so, and the records were properly excluded. The excluded evidence, if admitted, would have been merely cumulative to the testimony of Drs. May and Whitehead, whose testimony was introduced, and would have served merely to bolster it up. If the records were admissible, they should have been introduced by the parties who made them, so that appellee could have the opportunity to cross-examine the witnesses upon the items therein. *Roberson* v. *Roberson,* 188 Ark. 1018, 69 S. W. (2d) 275.

The waiver signed by the insured, relative to the production of testimony by physicians and nurses, did

not remove the restrictions imposed upon the above witnesses under § 4149, Crawford & Moses' Digest, since they were neither physicians nor nurses and made no records of any kind in the case.

There is no testimony or evidence showing that the insured knew that he had tuberculosis before making the application and receiving the policy from appellant company; and it was a question for the jury to determine whether fraud was practiced on the appellee in securing the release, and same has been decided against the appellant. *Harper* v. *Bankers' Reserve Life Co.,* 185 Ark. 1082, 51 S. W. (2d) 526.

The settlement was obtained by taking the beneficiary by surprise and requiring her to act at once, without having the policy in her possession or learning its provisions and without an opportunity to take legal advice or ascertain the facts. *Order of Commercial Travellers* v. *McAdam,* 125 Fed. 358, 61 C. C. A. 22.

The case was submitted under instructions to which there were no objections; the testimony is amply sufficient to support the verdict; and, finding no error in the record, the judgment is affirmed.