AMERICAN NATIONAL INSURANCE COMPANY *v.* CHAVEY.

4—2577

Opinion delivered May 30, 1932.

1. INSURANCE—QUESTIONS FOR JURY.—In an action on a life insurance policy *held* under the evidence that the court properly submitted to the jury the questions whether insured was in sound health when applying for the policy and whether she knowingly accepted the policy while in unsound health; the policy providing that representations in the application should not be considered as warranties.
2. INSURANCE—FORFEITURES.—Forfeitures will not be enforced unless the provisions of the policy are so plain and unequivocal as to admit of no other construction.
3. INSURANCE—HEALTH OF INSURED—FINDING OF JURY.—Evidence *held* to justify a finding that at the time insured applied for the policy she believed she was well, although she had been suffering from diabetes.

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

STATEMENT BY THE COURT.

Antoinette Chavey sued the American National Insurance Company to recover on a policy of life insurance in the sum of $500, which had been issued to her sister, Josephine Pause, and in which she was named as the beneficiary. The suit was defended on the ground that the insured was not in sound health at the date of the issuance of the policy, and that there was no liability on that account.

The application and the policy of insurance were both introduced in evidence. In the application, the insured waived any provision of law forbidding any physician from disclosing any information acquired while attending her in a professional capacity. Then follows a clause which reads as follows:

"I further agree that no obligation shall exist against said company on account of this application, although I may have deposited premiums hereon, unless said company shall issue a policy in pursuance hereof, and the same is delivered to me on the day it bears date,

and unless on said date I am alive and in good health, any statement of any agent to the contrary notwithstanding."

The policy itself provides that all statements made by the insured in the application shall, in the absence of fraud, be deemed representations and not warranties. It also contains a clause which reads as follows:

"Provided, however, that no obligation is assumed by the company prior to the date hereof, nor unless on said date the insured is alive and in sound health."

The policy was dated March 10, 1930. The premiums were duly paid until the death of the insured, which occurred on the 7th day of January, 1931. At the time of her death the insured was in the State Hospital at Little Rock, and had been there for three days. Prior to that time, she had resided at the home of Antoinette Chavey, who was the beneficiary in the policy. The death certificate showed that the insured died of diabetes mellitus, which is chronic in nature.

According to the testimony of four physicians, whose testimony was taken by the insurance company, they had treated the insured at various times for illness and found that she was suffering with diabetes mellitus. One of them testified that he had treated her for two and a half years prior to November, 1928, when he left Helena, Arkansas, where she resided. All of the physicians testified that in their opinion she was suffering from diabetes, and they thought that it was in a chronic form. Judging from her condition, they did not think she was in sound health on the 10th day of March, 1930.

According to the testimony of the representative of the insurance company, who secured the application of the insured for the policy, she had another policy in the company of an older date. In cases where policies for less than $750 were issued by the company, no medical examination was required. The policy in this suit was issued without medical examination. On cross-examination, the witness stated that one of the policies issued by his company on the life of the insured had been paid

upon for many years. He also stated that, at the time he took the application for the policy sued on, the insured was apparently in good health, judging from her appearance. At the time the application was accepted, she was working in a store on Cherry Street in Helena, Arkansas.

There was a verdict and judgment for the plaintiff, and the defendant has appealed.

W. G. Dinning, for appellant.

Jo M. Walker, for appellee.

HART, C. J., (after stating the facts). The court instructed the jury as follows: "The policy having been introduced, and it being admitted that all the premiums were paid at the time of the death of the deceased, and due proof made, the burden then shifts to the defendant to show that the deceased, in her application, knew that she was in unsound health, or that she accepted the policy while in unsound health; and if you find that the application was made or that the policy was delivered while the deceased was in unsound health, she knowing the same to be true, and made application knowing she was in unsound health, or accepted the policy knowing she was in unsound health, that would constitute fraud on the insurance company, and the beneficiary would not be entitled to recover."

It is earnestly insisted by counsel for the defendant that the court should have instructed a verdict in its favor because, under the undisputed evidence, the insured was not in sound health when the policy was delivered to her, and this was a condition precedent to the policy becoming effective.

Counsel for the defendant claims that the case is governed by *American National Insurance Company of Galveston, Texas,* v. *Lacey,* 182 Ark. 1158, 34 S. W. (2d) 757. We do not think so. In that case, the beneficiary knew that the insured took sick on the 27th day of February, 1929, and the policy was delivered to her for her brother on the 4th day of March, 1929. Her brother was taken to the hospital on February 27, 1929, and was confined to his bed with pneumonia until his death from that

disease on March 14, 1929. Hence there was no liability under the policy.

Here the facts are essentially different. The policy was issued on the 10th day of March, 1930, and the insured did not die until the 7th day of January, 1931. At the time the agent of the insurance company took her application, she was working in a store, and he testified that she appeared to be in sound health. It is true that the physicians testified that they had been treating her from time to time for diabetes in a chronic form for several years; but the fact that she lived for several years after she was treated, and was able to pursue her daily vocation of working in a store tended to show that she regarded herself, as did the agent of the company, as apparently being in sound health. The court properly submitted this question to the jury because the policy, by its own terms, provided that the representations in her application should not be considered as warranties.

The case falls within the principles of law decided in *Modern Woodmen of America* v. *Whitaker,* 173 Ark. 921, 293 S. W. 1045. In that case it was held that, in an action by the beneficiary to recover on a life insurance policy, nonexpert witnesses may state their opinions as to the physical condition of deceased on the day when he took the fraternal insurance certificate and stated that his health was good.

It was further held that, in an action by the beneficiary to recover on a life insurance policy, the jury's finding that deceased was in good health when he received the policy and stated that his health was good, was conclusive in view of the evidence where the issue was submitted on instructions that plaintiff must prove that no misrepresentation was made and that defendant must prove that deceased was sick when he received the policy. See also *United States Annuity & Life Insurance Company* v. *Peak,* 122 Ark. 58, 182 S. W. 565; *Id.* 129 Ark. 43, 195 S. W. 392, 1 A. L. R. 1259.

This is an application of the well-settled rule that forfeitures are not favored and will not be enforced

unless the provisions of the policy are so plain and unequivocal as to admit of no other construction.

The court properly submitted to the jury whether the insured knew that she was in sound health when she applied for the policy or whether she accepted the policy while in unsound health, knowing that to be a fact. The jury was justified in finding, under the evidence introduced, that, although she may have suffered from diabetes, she believed that she was well at the time she applied for the policy. The fact that she was pursuing her daily vocation of working in a store, and that her outward appearance indicated that she was in sound health, justified the jury in finding in her favor.

No other assignment of error is urged for a reversal of the judgment, and the judgment will therefore be affirmed.