

STATE OF MICHIGAN
COURT OF APPEALS

JOAN BOEHMER, Independent Personal
Representative of the Estate of HENRY GEORGE
BOEHMER, Deceased, and JOAN BOEHMER,
Individually,

UNPUBLISHED
January 29, 1999

Plaintiffs-Appellees,

v

FARM BUREAU LIFE INSURANCE COMPANY
OF MICHIGAN,

No. 203860
Calhoun Circuit Court
LC No. 95-003163 NZ

Defendant-Appellant.

Before: Kelly, P.J., and Gribbs and Fitzgerald, JJ.

PER CURIAM.

Defendant appeals as of right a judgment entered in favor of plaintiff¹ after a bench trial in this insurance contract case. We affirm.

Defendant first argues that it was entitled to rescind the life insurance policy issued to Henry George Boehmer because there is no dispute that Boehmer made material misrepresentations on his application for life insurance. We review a trial court's denial of summary disposition *de novo*. *Hawkins v Mercy Health Services, Inc*, 230 Mich App 315, 324; 583 NW2d 725 (1998). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court considers all documentary evidence available to us in a light most favorable to the nonmoving party in order to determine whether there is a genuine issue with respect to any material fact. *Hawkins, supra* at 324.

An insurer has the right to assert any available defense against the insured within the statutorily prescribed time of two years. MCL 500.4432; MSA 24.14432; *Drouillard v Metropolitan Life Ins Co*, 107 Mich App 608, 615; 310 NW2d 15 (1981). Insurers are permitted to void a policy where there has been a material misrepresentation of fact that affected either the acceptance of the risk or the hazard assumed by the insurer. MCL 500.2218; MSA 24.12218²; *Wiedmayer v Midland Mutual Life Ins Co*, 414 Mich 369, 374; 324 NW2d 752 (1982). An insurance company has the burden of

proving its claim of misrepresentation. *Smith v Globe Life Ins Co*, 223 Mich App 264, 273; 565 NW2d 877 (1997), lv gtd 458 Mich 860 (1998).

Defendant relied mainly on Dr. Stinar's deposition testimony and the exhibits attached to that deposition in support of its assertion that Boehmer knew at the time he applied for life insurance that he had emphysema. However, Dr. Stinar testified that he would have told Boehmer that he had an obstructive airway problem and that he had to stop smoking. Moreover, it was Dr. Stinar's practice to not use words like "emphysema" when talking to patients. Dr. Stinar also would have told Boehmer that if he did not stop smoking he would experience more respiratory infections and problems. Dr. Stinar first evaluated Boehmer on October 5, 1998. On October 20, 1988, Dr. Stinar saw Boehmer again and Dr. Stinar's notes indicated that Boehmer's condition was nearly normal. Dr. Stinar diagnosed Boehmer with chronic obstructive lung disease. Therefore, there was a genuine issue of material fact regarding whether Boehmer misrepresented his condition considering that his testing and treatment for his shortness of breath was a one-time occurrence as Boehmer indicated on his application for life insurance.

There was also a genuine issue of material fact regarding whether any misrepresentation was material. Defendant supported its motion for summary disposition with an affidavit by one of its underwriting consultants stating that defendant would have rejected Boehmer's application for insurance had it known of Boehmer's history of emphysema or obstructive lung disease. However, defendant had Dr. Roth's records, which indicated that Boehmer had chronic obstructive pulmonary disease (COPD). Moreover, defendant was aware that at the time of the COPD diagnosis that Boehmer smoked cigarettes and that he continued to smoke a pack a day. Thus, there was a question of fact whether any misrepresentation was material in light of the fact that defendant knew Boehmer had COPD. Therefore, the trial court properly denied defendant's motion for summary disposition. *Zulcosky, supra* at 97.

Defendant also argues that the trial court erred in granting judgment in plaintiff's favor because the evidence adduced at trial established that Boehmer made material misrepresentations on his application for life insurance which, had defendant known the true facts, would have prevented defendant from issuing the policy. We review a trial court's findings of fact for clear error. *Bracco v Michigan Technological Univ*, 231 Mich App 578, 585; ___ NW2d ___ (1998). Questions of law are reviewed de novo on appeal. *Port Huron, supra* at 624.

The cases on which defendant relies involve an insurance applicant's failure to disclose information. *Wiedmayer, supra* at 370-371; *Gen'l American Life Ins Co v Wojciechowski*, 314 Mich 275, 280-281; 22 NW2d 371 (1946); *Dedic v Prudential Ins Co of America*, 14 Mich App 274, 276; 165 NW2d 295 (1968). However, Boehmer did not fail to disclose anything, and the trial court's findings in this regard are not clearly erroneous. *Bracco, supra*. Boehmer answered "yes" to the question of whether he had "ever been treated for or ever had any KNOWN indication of. . . shortness of breath, persistent hoarseness or cough, blood spitting, bronchitis, pleurisy, asthma, emphysema, tuberculosis, or chronic respiratory disorder." Defendant's agent, David Simpson, recorded Boehmer's answer and circled the words "shortness of breath." The detailed explanation provided:

Shortness of breath. Was working around flour @ Kellogg's at the time was given an inhaler-used it for 1 week

The treatment date was indicated as 1988.

On October 5, 1988, Dr. Stinar evaluated Boehmer on the request of Dr. Zaplitny of Kellogg Company. Kellogg Company was performing screening breathing tests on its employees and from Boehmer's test, Dr. Zaplitny could not tell whether Boehmer had any lung disease so Dr. Zaplitny referred Boehmer to Dr. Stinar. Dr. Stinar saw Boehmer twice, once on October 5, 1988, and once on October 20, 1988. During his deposition, Dr. Stinar testified that when he examined Boehmer, no diagnosis of lung disease had been made. Dr. Stinar performed a full pulmonary function test, on October 5, 1988, which revealed that Boehmer had a "severe obstructive impairment with loss of diffusion capacity, most compatible with emphysema." Dr. Stinar's diagnosis was that Boehmer had chronic obstructive lung disease. Dr. Stinar gave Boehmer a pill and an inhaler which he prescribed to make Boehmer's airways wider. Boehmer used the inhaler about three or four times. Dr. Stinar testified that he would have told Boehmer that he had an obstructive airway problem and that he had to stop smoking. It was Dr. Stinar's practice to not use words like "emphysema" when talking to patients. Dr. Stinar also would have told Boehmer that if he did not stop smoking he would experience more respiratory infections and problems. On October 20, 1988, Dr. Stinar saw Boehmer again and Dr. Stinar's notes indicated that the medicine had helped Boehmer and that he was close to normal.

Plaintiff lived with Boehmer from 1980 up until his death in 1993. Boehmer smoked one to two packs of cigarettes a day. Plaintiff was not aware that Boehmer saw or was treated by Dr. Zaplitny during the time that plaintiff and Boehmer lived together. During the time plaintiff lived with Boehmer, his condition stayed the same. Plaintiff was surprised when Boehmer was given the inhaler in 1988 because his condition had not changed. Boehmer never indicated to plaintiff that he had a lung disease, emphysema or any respiratory disorder.

Accordingly, Boehmer did not make any misrepresentations on his application for life insurance which would have entitled defendant to rescind the policy. Boehmer saw Dr. Stinar twice in October, 1988. Dr. Stinar gave Boehmer medication which Boehmer only used three or four times. Dr. Stinar's notes regarding Boehmer's second visit indicate that Boehmer's examination was unremarkable and that he was close to normal. Boehmer never returned to Dr. Stinar for continued care and defendant presented no evidence of any visits to physicians or medical treatment from 1988 to Boehmer's death. Richardson had no evidence that anyone ever told Boehmer that he had emphysema, chronic obstructive pulmonary disease, or chronic respiratory disorder.

Affirmed.

/s/ Michael J. Kelly

/s/ Roman S. Gibbs

/s/ E. Thomas Fitzgerald

¹ Joan Boehmer is a party to this suit in both an individual and representative capacity. However, throughout the proceedings, the parties and the lower court referred to plaintiff in the singular. To avoid further confusion, this Court will continue to refer to plaintiff in the singular.

² This statutory provision applies to life insurance policies as well as disability policies. *Smith, infra* at 271.