STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY LEE OADE and THOMAS WALSH, Personal Representative of the Estate of SHEILAH CHOUINARD,

Plaintiffs-Appellants,

v

JACKSON NATIONAL LIFE INSURANCE COMPANY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
February 26, 1999

No. 202501
Ingham Circuit Court
LC No. 95-081352 NZ

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

Plaintiff beneficiaries brought this action for payment of life insurance benefits, contending that defendant wrongly denied their claim on the theory that the policy issued to the decedent never became effective. The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiffs appeal as of right. We reverse and remand for further proceedings.

Plaintiffs' decedent's application for a life insurance policy with defendant was signed on November 29, 1993. Questions on the application included whether the applicant had consulted or had been treated by medical personnel or had had certain tests performed within the previous five years. Plaintiffs' decedent indicated that he was being treated for high blood pressure and that he had been treated three times in the previous four years at a hospital for what his physician described as symptoms of stress. The policy was issued and delivered to the decedent on January 6, 1994. In the interim, on December 25, 1993, the decedent had undergone treatment in a hospital emergency room for shortness of breath and chest pain. After various tests were performed, a heart attack was ruled out. Plaintiffs' decedent did not inform defendant of this hospital visit. On January 7, 1994, one day after the policy was issued, the decedent passed a cardiovascular stress test (and in fact demonstrated "a slightly above average level of cardiovascular fitness" for someone his age) and his physician again concluded that his symptoms were stress-related. The decedent died of sudden cardiac arrest on September 1, 1994. Defendant claimed that as a result of the decedent's failure to advise it of the December 25, 1993

emergency room visit, he did not fulfill all the conditions precedent to his application ripening into an actual insurance contract, and the life insurance policy never became effective. Accordingly, defendant denied plaintiffs' claim as beneficiaries under the policy.

Plaintiffs argue that under *GP Enterprises, Inc v Jackson Nat'l Life Ins Co*, 202 Mich App 557, 565; 509 NW2d 780 (1993), the decedent met all the conditions necessary for the policy to become effective, namely that the decedent had paid his first premium, that the policy had been delivered to the decedent, and that the decedent's health remained unchanged during the time between application for and delivery of the policy. Defendant, on the other hand, argues that the decedent failed to meet a fourth condition precedent because he did not notify defendant of the intervening hospital visit, as required by the application. Parties may, by mutual agreement, put forth any and all conditions to be met before an insurance contract will become effective. *Karp v Metropolitan Life Ins Co*, 268 Mich 255, 258; 256 NW 330 (1934). However, the contract language must not conflict with applicable statutes. MCL 500.2218(1); MSA 24.12218(1) provides that no misrepresentation shall avoid a contract of insurance unless it is material. While defendant seeks to confine the materiality question to claims of recission, as distinguished from claims of a failure in contract formation, the statute is not so limited by its terms. Thus, so long as the status of the decedent's health did not change in some material respect, the failure to notify of a change to a specific answer in the application will not automatically result in the policy being voided.

Fair dealing requires insurance applicants to inform insurers of material changes in their physical condition that occur during the negotiation period if the changes would influence the insurer's decision to extend coverage to the applicant. *Prudential Ins Co of America v Ashe*, 266 Mich 667, 671; 254 NW 243 (1934). A change is "material" when the insurer would reject an applicant altogether. *Zulcosky v Farm Bureau Life Ins Co of Michigan*, 206 Mich App 95, 99-100; 520 NW2d 366 (1994). Changes which would induce the insurer to offer a policy at a higher rate, but not to completely refuse to make the contract, are not considered material. *Id*.

In this case, plaintiffs presented the deposition and affidavit of one of defendant's underwriters indicating that there was a possibility that the decedent would have been offered a policy at a higher rate if not the exact policy issued. This is evidence from which a reasonable trier of fact could conclude that the decedent's failure to inform defendant of his hospital visit was not material. Because it was unsettled whether the decedent's nondisclosure to defendant was material, summary disposition should not have been entered for either plaintiffs or defendant. The materiality of the decedent's nondisclosure remains a genuine issue of material fact to be decided by the trier of fact.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Barbara B. MacKenzie
/s/ Helene N. White