ORIGINAL

A37384/SHL/cyb/351215/vsc

SUPREME COURT OF FLORIDA
CASE NO. 90,747

District Court of Appeal
4th District No. 96-1418

ALLEN GREEN, as Personal Representative of the Estate of Harold Green, individually,

Petitioner,

vs.

LIFE & HEALTH OF AMERICA, a foreign corporation authorized to do business in the State of Florida,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

JEROLD HART, P.A.
Co-counsel for Petitioner, Allen Green
4000 Hollywood Boulevard
Hollywood, FL 33021

SHELLEY H. LEINICKE
WICKER, SMITH, TUTAN, O'HARA, McCOY, GRAHAM, & FORD, P.A.
Attorney for Petitioner, Allen Green
One East Broward Blvd., Ste. 500
P.O. Box 14460
Ft. Lauderdale, FL 33302
Phone: 954/467-6405
Fax: 954/467-6405

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE CASE AND FACTS*

This case presents a certified conflict between district courts of appeal as to whether answers made in an insurance application which contains "knowledge and belief" standard as drafted by the insurance company imposes a different standard of accuracy than provided in Florida Statute Section 627.409(1). In the case of ***Carter v. United of Omaha Life Insurance,*** 685 So.2d 2 (Fla. 1st DCA 1996), the court said that "since there appear to be genuine issues of material fact as to whether Mrs. Carter's answers on the policy application could be deemed material misstatements under the 'best knowledge and belief' standard drafted by the insurer, we reverse the summary final judgment on the question of the insurer's liability.. . ." In the instant case, the Fourth District affirmed a summary final judgment against petitioner Green under similar facts.

In March, 1991, Harold Green applied for a home health care benefits policy with Life & Health Insurance Company of America ("Life & Health"). (R. 1-4) This application contained a section which asked a series of questions regarding Mr. Green's health. The request for information included an inquiry as to whether Mr. Green "within the past five years had or been told you have the following conditions: , . . (12) Kidney ***failure, . . .*** (15) ***Chronic obstructive lung disease*** ". The response to both of these questions was "no". (R. 1-4, 5-9)

*The symbol "R" refers to the Index to the Record on Appeal.

Immediately above the signature line on the insurance application there is a statement which recites, in pertinent part, that "the answers are full, true and *complete to the best of my knowledge and belief,* All statements made herein are deemed *representations and not warranties. . . .* " (R. 5-9)

Over one year later, Green made a claim against the policy. Life & Health then reviewed Green's medical records and discovered that he suffered from chronic renal failure, Life & Health rescinded the policy and returned all previously paid premiums. Green filed suit against Life & Health seeking reimbursement pursuant to the insurance policy for the cost of his hospitalization and post hospitalization care. (R. 1-4) Life & Health defended on the basis that the policy was rescinded because of an alleged material misrepresentation in the application. (R. 61-62) It then moved for summary judgment asserting that the home health care benefits policy was issued to Green' based on his representations in the application that he did not suffer from kidney failure or chronic obstructive lung disease. (R. 95-97) Both parties relied on the deposition of Dr. Ross Nochimson, a doctor of internal medicine who had treated Mr. Green for many years. (R. 105-195) While, unbeknownst to Mr. Green, Dr. Nochimson wrote in his medical chart that Green suffered from chronic obstructive pulmonary disease ("COPD"), diabetes mellitus, gout, and chronic renal failure, Dr. Nochimson readily testified that he had told Green that he had "a little asthma" or "a little

---

'Shortly after initiation of the lawsuit, Harold Green died and his personal representative, Allen Green, was substituted as a party.

bronchitis", and "some sluggish kidneys. " Dr. Nochimson said that it is his practice to use layman's terms instead of medical terms when talking with patients about their conditions. Other treating physicians also testified that they never told Green that he suffered from either kidney failure or chronic obstructive lung disease. (Nochimson, Geronemus, Labi depositions) The Fourth District noted at page 2 of its opinion that the undisputed evidence established that Green had no knowledge that he suffered from either of these specific medical conditions and therefore any misrepresentation was unintentional.

Dr. Nochimson testified that he never uses medical terminology such as "kidney failure" or "chronic obstructive pulmonary disease" when talking to patients. Dr. Nochimson further testified that he specifically recalled that he did not use such terms with Mr. Green because he did not wish to upset this patient. Further, Dr. Nochimson testified that he never discussed any such diagnosis with any other physician.

Dr. Nochimson testified:

> Answer. The thing I usually don't discuss big terminology with the patients. I mean, if he knew he had hypertension, I'd say, well, you have hypertension.
>
> Question. Alright. Fair enough.
>
> Answer. You know I'm saying? I don't like say, well you have hypertensive cardio vascular disease. I say you have -- some people don't even know what hypertension is. I just say your blood pressure is a little high.
>
> Question. Okay.

Answer. But I don't use like big terminology like afloscloritic cardio vascular disease or something like that.

Question. You tell them they have a blockage of the arteries.

Answer. Right. If they came in with a cough, I'd say they had a little bronchitis, you know, I would not say you have like emphysema or something terrible like that.

Question. Okay. Well let me ask you this. If they had -- let's emphysema since you just used it. If they had emphysema, you would note emphysema, correct, if that was your diagnosis.

Answer. If I felt that was what they were suffering from, I would write it down as a diagnosis.

Question. But you may not tell the patient and explain to him what you thought the diagnosis would be, you may not use that particular word.

Answer. That's right. I wouldn't. Because sometimes they get frightened when they hear that word so I wouldn't discuss it with them.

Question. Fair enough. But you may use -- you would use layman's terms to describe emphysema.

Answer. Right. I would say maybe you have a little problem with your lungs.

* * *

Question That you would have lung problems, kind of make it simple for them in layman's terms and candy coated.

Answer. Right.

(Nochimson depo. I., pp. 14-17)

Question. Okay. Do you use the term or the diagnosis of asthma and COPD interchangeably.

Answer. In my records, yes, but I don't tell the patient that you have COPD or asthma.

(Nochimson depo. I., p. 21)

Answer. I don't know any physician or pulmonary physician who tells their patient they have COPD. They either say you have asthma or emphysema or chronic bronchitis, but they don't say, sir, you have COPD.

Question Would they say you have chronic obstructive pulmonary disease,

Answer. No, I don't think a layman would understand that. They would say you have asthma or bronchitis or emphysema.

* * *

Answer. Let me say something. Most of the physicians down here I don't think use that term, chronic obstructive pulmonary disease to their patients. They use it as a diagnosis in their chart.

(Nochimson depo. I., p. 28)

Answer. Basically I told him that he had some sluggish kidneys, but I didn't tell him chronic renal failure.

Question, Do you know whether any other doctors told him chronic renal failure,

Answer. I don't think any other doctors did.

Question. So it is your testimony that you would not have used the words chronic renal failure with Mr. Green in discussing that particular problem with him.

Answer. No I would not.

(Nochimson depo. I., p. 31)

Question. And again, I assume, based on this discharge summary, you did not inform Mr. Green that he had COPD or chronic renal failure, it that correct.

Answer. No I wouldn't have told him that.

(Nochimson depo. I., p. 42)

> Question. And again, you would not have -- again [in hospital records] you noted chronic renal failure. You would not have told him that he had chronic renal failure.
>
> Answer. No. It's just something that -- I just write it down -- every time they come in, I write every diagnosis they have, so that when they come back the next time, I refer to that note and I know what tests or whatever I need to get at that time.

(Nochimson depo. I., p. 46)

> Question. And would you have told him at that point that he had chronic renal failure or would you have still been using the word slow kidney.
>
> Answer. I would say you're having some kidney problems, that's why I had the kidney doctor come by and see you.
>
> Question, Okay. But you wouldn't have used renal failure.
>
> Answer. No. I don't use the terms chronic renal failure or chronic obstructive pulmonary disease to the patient, I use --
>
> Question. How about kidney failure, would you have used that.
>
> Answer. Kidney failure. Let me say something, he was a very nervous man. I probably wouldn't have said your kidneys are failing.
>
> Question. So you would have sugar coated on this date too.
>
> Answer. Right.

(Nochimson depo. I., pp. 56-57)

Dr. Ceronemus, another of Mr. Green's treating physicians, testified similarly saying:

Question. Is there anything in your chart to make you have the understanding or the impression that Mr. Green had an appreciation of his disease of chronic renal failure.

Answer. I did not make a notation that I explained anything, so I don't have anything that says we discussed it.. . .

(Deposition Dr. Geronemus, p. 15)

Question. Okay. And you don't remember what you told Harold Green in the hospital.

Answer. I have no recollection.

Question. Is losing a little kidney function the same as failure, or are they differences there.

Answer. Renal failure is usually defined as a loss of most of the kidney function.

Question. Loss of most. That means you're on dialysis.

Answer. It means you're either on dialysis or about -- or close to needing dialysis.

* * *

Question. Loss of kidney function and renal failure. They're not equal.

Answer. Well, loss of kidney function is really renal insufficiency and renal failure is the last stage.

Question. At the end.

Answer. Yes.

Question. You wouldn't have renal failure at the initial stage of kidney problems.

Answer. Of a chronic kidney problem, no.

* * *

Question. And it is -- and we know that renal insufficiency is different than chronic renal failure, correct.

Answer. Yes.

(Deposition Dr. Geronemus, pp. 44-46)

Virtually the same testimony was given by yet another of Mr. Green's doctors, Dr. Labi, who stated:

Question.. . Would you have told that patient that he or she had chronic obstructive pulmonary disease.

Answer. You know, rarely we tell a patient they have COPD, per se. We tell them what they have is asthma, emphysema, bronchitis. A lot of times they don't understand what COPD is.

Question. So my question is, you don't know whether it was a habit of yours back in 1989 to tell the patient he had COPD.

Answer. Specifically that.

Question. Yes.

Answer. No, I don't do that to this date. I tell them whether they have asthma, emphysema, bronchitis.

(Dr. Labi depo. p. 14)

Question. Would you have, back in 1989, discuss all of your impression with the patient.

Answer. Not necessarily.

(Dr. Labi depo. p. 17)

Answer.. . A lot of patients don't know a specific term of COPD as to what exactly it means with regard to their disease process. They more identify with asthma, chronic emphysema.

(Dr. Labi depo. p. 19)

Green's son testified by affidavit that he accompanied his father to all doctors' appointments and that at no time did any doctor state that Green had kidney failure or suggest any kidney dialysis, Rather, Green's various physicians stated only that he had slow kidneys or small kidneys:

> I was present at any elective visit to my father's internist or any specialist. . . . At no time were we ever told that my father had kidney failure. As a matter of fact, he was not taking epogen, nor was he recommended for kidney dialysis in February of 1991. He was only told in the past that he had slow kidneys or small kidneys by his various physicians.
>
> I was never advised by any doctor that my father had chronic obstructive pulmonary disease. I was only told that he had bronchitis and/or a touch of asthma which became pronounced only during the stressful period of my mother's death. In fact, after my mother died, my father lived with us for five months in New York and never needed to see a physician. Also the term "chronic obstructive lung disease" was never used in any discussion by a physician to my father or me. I would have known because my father discussed all health-related matters in detail with me."

(R. 211-212)

Life & Health's motion for summary final judgment asserted that Mr. Green's insurance application contained a non-intentional misrepresentation which prevented recovery under the policy. (R. 95-97) Relying on the case of *Continental Assurance* Co. *v. Carroll,* 485 So.2d 406 (Fla. 1986), the trial court granted summary final judgment in favor of the insurance company. (R. 230-231) In a split decision, the Fourth District Court of Appeal affirmed the ruling of the

trial court but certified the conflict between the instant case and the First District's holding in ***Carter, supra.*** The Fourth District also acknowledged that the federal Eleventh Circuit Court of Appeals has addressed the same argument on several occasions and reached the same decision as in the ***Carter, supra*** case.

ISSUE

WHETHER THE SECTION 627.409 TEST FOR RECISION OF A POLICY (ANY MISSTATEMENT, WHETHER INTENTIONAL OR NOT, WHICH IS MATERIAL TO ACCEPTANCE OF THE RISK) SHOULD BE UNAVAILABLE TO AN INSURANCE WHERE ITS APPLICATION SETS FORTH A "KNOWLEDGE AND BELIEF" STANDARD FOR PROVIDING INFORMATION. LIFE & HEALTH SHOULD BE PRECLUDED FROM SUMMARY JUDGMENT BASED ON THE TERMS OF ITS OWN INSURANCE APPLICATION.

ARGUMENT SUMMARY

It is respectfully submitted that this Court should resolve the inter-district conflict by adopting the holding of ***Carter v. United of Omaha Life Insurance, 685*** So.2d 2 (Fla. 1st DCA 1996) and disapproving the decision of the Fourth District Court of Appeal. The ***Carter*** case, which follows the reasoning of three factually similar Eleventh Circuit Court of Appeal decisions, correctly determined that "knowledge and belief" language in a contract application drafted by an insurance company imposes a different standard of accuracy than is provided in Florida Statute Section 627.409(1). Where a "knowledge and belief" provision used by an insurer in a policy application establishes a less stringent standard for determination of misrepresentations, omissions, concealment of facts, and incorrect statements than the standard authorized by Section 627.409(1), Florida Statutes, the insurer is not entitled to summary final judgment based on answers on the policy application.

ARGUMENT

THE SECTION 627.409 TEST FOR RECISION OF A POLICY (ANY MISSTATEMENT, WHETHER INTENTIONAL OR NOT, WHICH IS MATERIAL TO ACCEPTANCE OF THE RISK) SHOULD BE UNAVAILABLE TO AN INSURANCE WHERE ITS APPLICATION SETS FORTH A "KNOWLEDGE AND BELIEF" STANDARD FOR PROVIDING INFORMATION. LIFE & HEALTH SHOULD BE PRECLUDED FROM SUMMARY JUDGMENT BASED ON THE TERMS OF ITS OWN INSURANCE APPLICATION.

Section 627.409, Fla. Stat. (1991) states, in pertinent part:

> (A) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by or in behalf of the insured or annuitant, shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts, and incorrect statements shall not prevent a recovery under the policy or contract unless:
>
> (a) They are fraudulent;
>
> (b) They are material either to the acceptance of the risk or to the hazard assumed by the insurer; or
>
> (c) The insurer in good faith would either not have issued the policy or contract, would not have issued it at the same premium rate, would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

As the court noted in the case of *Carter v. United of Omaha Life Insurance,* 685 So.2d 2, 6 (Fla. 1st DCA 1996), because "the statute does not contain a knowledge or intent element, even unintentional or unknowing misstatements may prevent recovery under a policy, if such statements alter the risk

or the likelihood of coverage. " As the Curter court further noted, the statute does not, however, consider the effect of an insurer's decision to set a less stringent standard for completing the application, In an analogous case, the appellate court held that "policy language which voids the contract only if the misrepresentations are intentional controls over the contrary provisions of Section 627.409. " ***Strickland Imports v. Underwriters at Lloyds, London,*** 668 So.2d 251, 253 (Fla. 1st DCA 1996); ***See, also: Travelers Insurance Cos. v. Chandler, 569*** So.2d 1337 (Fla. 1st DCA 1990) (Florida law does not prevent an insurer from offering a broader definition of uninsured motor vehicle than set by statute, thereby permitting greater insurance coverage). The Eleventh Circuit Court of Appeal has repeatedly held that "knowledge and belief" language in an application for an insurance contract which is drafted by the insurer imposes a different standard of accuracy than set forth in §627.409(1). In ruling in a factually similar case, the court stated that an insurer that sets its own standard for judging misrepresentations and concealment cannot rely on a statute which imposed more stringent requirements on the insured. ***William Penn Life Insurance Co. of New York v. Sands,*** 912 F.2d 1359 at 1363 (11th Cir. 1990). See, ***also: National Union Fire Ins. v. Sahlan, 999*** F.2d 1432 (11th Cir. 1993); ***Hauser v. Life General Security, Ins. Co., 56*** F.3d 1330 (11th Cir. 1995).

In the ***Sands*** case, Pelligrino truthfully answered an insurance application based on his "knowledge and belief" that he did not have cancer or a blood disorder. Pelligrino subsequently tested positive for the HIV virus and was

diagnosed as having AIDS. The court ruled that because the applicant did not know of this disease at the time the application was completed, the "misstatement" was irrelevant under Florida law. The court explained that the responses to the application questions were "neither misstatements nor misrepresentations; they were entirely truthful and accurate. " Because of this, Florida Statute $627.409 did not apply because "in order for an insurer to rescind a policy due to a misstatement in the insured's application, 'such misrepresentation or nondisclosure must be in response to an insurer's request for that information.' [Citation omitted] Here, Penn Life only requested the disclosure of information to the best of the insured's knowledge and belief. This is precisely the information that was provided . . ." *Id*. at 1364, The court then explained that if Penn Life wished to retain the ability to void the contract based upon any inaccuracy, the "knowledge and belief" language should not have been included. According to the court,

> such language would reasonably induce an insurance applicant to believe that they were covered under the policy if they answered the questions to the best of their knowledge and the insurer subsequently issued the policy. To permit an insurer to rescind a policy containing "knowledge and belief" language due to an unknowing misstatement not only contravenes the terms of the contract itself, but is unfair as well. Insurance applicants faced with a policy that unambiguously stated that it could be voided for unknowing misstatement might have rejected those terms and sought another policy, or they might have undergone a full physical examination to ensure that their beliefs as to their health conformed to their representation. Conversely, had Penn Life really thought it essential to know the actual physical condition of its applicants, it could have mandated a physical examination as a condition of issuing a policy."

Id. at 1365. ***See also: Le Master v. USAA Life Ins. Co., 922*** F.Supp. 581 (M.D. Fla. 1996).

The ***Sands*** case is in full accord with Florida decisions. The court specifically notes that the qualifiers of "knowledge and belief" apply "only so far as that belief is not clearly contradicted by the factual knowledge on which it is based." ***Id.*** at 1365. Therefore, an insurance applicant who has been specifically told of a medical condition (which the parties stipulated did not occur here) could not truthfully give a negative response to an inquiry on that aspect of his health.

As the court stated in ***the*** case of ***National Union Fire Ins. v. Sahlan, supra,*** the insurance company could easily have established a higher standard of accuracy for responses on the insurance application (such as "the statements set forth herein are true") and omitted the "knowledge and belief" qualifier that governs here. Life & Health through the insurance application in issue, could expect Mr. Green only to accurately represent what he personally knew and cannot impose a higher burden on him. To hold otherwise permits the insurance carrier to mislead or deceive an applicant as to the degree of accuracy (i.e., his own belief, versus a medical corroboration) required on an application. Even the statute says that "any statement or description made by . . . an insured . . . in an application . . . is a representation and is not a warranty." Fla. Stat. § 627.409. The plain meaning of the statute cannot be changed by an application that seeks information that is only within the applicant's "knowledge and belief. " The policy of insurance and the application must be construed most favorably to the insured or applicant.

In contrast to the application used by Life & Health and the ***Sands*** insurer, the insurance application in *Sahlan* included a provision that "statements set forth herein are true". The court held that the insurance did not apply because of an inaccuracy in the application, even if it was an unknowing misrepresentation because of the higher standard set forth in the application of absolute truth rather than "knowledge and belief. " This case follows the long-standing Florida case law which holds that an innocent, but incorrect answer on an insurance application will not vitiate coverage. ***Independent Fire Insurance Co. v. Horn,*** 343 So.2d 862 (Fla. 1st DCA 1976); ***Talley v. National Standard Life Insurance Co.,*** 178 So.2d 624 (Fla. 2d DCA 1965).

The case of ***Continental Assurance Co. v. Carroll, 485*** So.2d 406 (Fla. 1986) which was relied upon by the both the trial court and the district court, is factually distinguishable and not dispositive. The ***Carroll*** case involved a plaintiff who had been specifically informed that her child (the insured) had developed a heart murmur and required both an EKG and x-rays. There was, therefore, an obvious, knowing misstatement on the insurance application in answering "yes" to an inquiry "is child, to the best of your knowledge and belief, in good health and free from deformity or defect."

The ***Carroll*** case should not control in the instant action because the insurance application in this case does not inquire generally about an applicant's possible kidney "problems" or lung "problems", but rather the application refers specifically to kidney ***failure*** or ***chronic obstructive lung disease.*** This specificity

in the application is critical. These are discreet medical conditions that were specifically selected by the insurance company, as drafter of this insurance contract. Life & Health cannot now claim that it expected applicants to advise whether they had any other type of kidney or lung "problems". Life & Health chose not to inquire in a more general, generic fashion, and did not select terms which a layman could readily understand, It is hornbook law that the terms of an insurance contract are construed against the drafter and, further, that an insurance application is part of the insurance contract. If Life & Health did not believe that the language it selected for its insurance application was relevant and material, then why was it there?

In the case of *Hauser* ***v. Life General Security Ins. Co., supra,*** the court stated that the "knowledge and belief" standard in an insurance application requires a credibility determination that can be made only by a jury. This legal premise which was also followed by ***the Carter*** court establishes that summary judgment was inappropriate. ***See also, Underwriters National Assurance Co. v. Harrison, 338*** So.2d 58 (Fla. 3d DCA 1976).

As the ***Carter*** court determined, the "knowledge and belief" provision used by the insurance company in Green's policy application establishes a less stringent standard for determination of misrepresentations, omissions, or incorrect statements than is authorized by §627.409(1). Because of this, there are genuine issues of material fact as to whether Green's answers on his policy application could be deemed to be material misstatements under the "knowledge and belief" standard as

selected and drafted by Life & Health. Just as in the *Carter* case, the district court in the instant action should have reversed the summary final judgment on the question of the insurance company's liability and remanded the case to the trial court for further proceedings based on the failure of Life & Health to meet its burden of proof.

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the district court erred in affirming the summary final judgment in this cause. Because the insurance company drafted a "knowledge and belief" standard for completing its insurance application, it cannot rely on the stricter standard authorized by Florida Statute Section 627.409(1), and therefore genuine issues of material fact exist as to whether Green's answers on his policy application could be deemed material misstatements under this less stringent standard. Accordingly, summary final judgment on the question of the insurer's liability was incorrect. It is respectfully requested that this Honorable Court reverse the ruling of the district court and remand this case to **the** trial court for further proceedings.

Respectfully submitted,

JEROLD HART, P.A.
Co-counsel for Petitioner
4000 Hollywood Boulevard
Hollywood, FL 33021

SHELLEY H. LEINICKE
WICKER, SMITH, TUTAN, O'HARA,
McCOY, GRAHAM, & FORD, P.A.
Attorney for Petitioner
One East Broward Blvd., Ste. 500
P.O. Box 14460
Ft. Lauderdale, FL 33302
Phone: 954/467-6405
Fax: 954/467-6405

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 14th day of July, 1997, to: Nancy Gregoire, Esq., Bunnell, Woulfe, Keller & Gillespie, P.A., Suite 400, 888 East Las Olas Boulevard, Fort Lauderdale, Florida 33301, Attorney for Respondent.

WICKER, SMITH, TUTAN, O'HARA,
MCCOY, GRAHAM, & FORD, P.A.
Attorney for Petitioner
One East Broward Blvd., Ste. 500
P.O. Box 14460
Ft. Lauderdale, FL 33302
Phone: 954/467-6405
Fax: 954/467-6405

By: _____
SHELLEY H. LEINICKE
Florida Bar No. 230170