

1968

# The Prudential Insurance Company of America v. Opal Johnson, Individually and as Administratrix of the Estate of Clyde W. Johnson, Deceased : Brief of Respondent

Utah Supreme Court

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**In the Supreme Court of the  
State of Utah**

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**THE PRUDENTIAL INSURANCE  
COMPANY OF AMERICA,**

**Plaintiff and Appellant,**

**vs..**

**OPAL JOHNSON, individually and  
as Administratrix of the Estate of  
Clyde W. Johnson, deceased,  
Defendant and Respondent.**

**CASE  
NO. 11159**

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**BRIEF OF RESPONDENT**

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**Appeal from the Judgment of the Fourth District Court  
for Utah County**

**Honorable Joseph E. Nelson, Judge**

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**FILED**  
**JUL 15 1968**

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**Clerk, Supreme Court, Utah**

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# In the Supreme Court of the State of Utah

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THE PRUDENTIAL INSURANCE  
COMPANY OF AMERICA,

Plaintiff and Appellant,

vs..

OPAL JOHNSON, individually and  
as Administratrix of the Estate of  
Clyde W. Johnson, deceased,  
Defendant and Respondent.

**CASE**

**NO. 11159**

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## **BRIEF OF RESPONDENT**

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### **NATURE OF CASE**

Defendant, by counterclaim, is endeavoring to prevent cancellation of health and accident insurance with life insurance coverage.

### **DISPOSITION IN THE LOWER COURT**

Lower court held defendant was entitled to coverage and awarded judgment against plaintiff.

## **RELIEF SOUGHT ON APPEAL**

The affirming of trial court's decision.

## **STATEMENT OF FACTS**

The Statement of Facts of Appellant are essentially accurate. However, it is not conceded that defendant answered questions falsely but that the plaintiff's agent testified that they were falsely answered. The Findings of Fact of the trial court best state defendant's position and are as follows:

"That on October 17, 1957, at the solicitation of the plaintiff's agent, one Niles M. Wing, the defendant, Clyde W. Johnson, deceased, did make application and receive a Health and Accident policy from the plaintiff company, said policy containing an incontestable provision when it had been in effect for a period of two years; on the 2nd day of February, 1960, at the solicitation of the same agent, and upon being informed that he was no longer eligible to continue the policy issued on October 17, 1957, said defendant did purchase, on February 2, 1960, a Health and Accident policy which, again, contained an incontestable provision after having been in force and effect for a period of two years; after the policy purchased on February 2, 1960, had been in effect approximately five years, and at the urging of the same agent for the plaintiff company, one Niles M. Wing, this defendant did allow the previous policy to lapse and before said policy had lapsed did acquire, through said agent, on September 3, 1965, a new Health and Accident policy which insured the life of Clyde W. Johnson in the amount of \$2,000.00 payable to the defendant Opal Johnson, the administratrix of his estate. Said policy also pro-

vided medical and hospital benefits which were made payable to the insured or his estate, all as more fully appears from the said policy of insurance.

That the application for insurance completed on the 3d day of September, 1965, was completed by the agent, Niles M. Wing, and all answers inserted by him. The answers contained in Part II thereof, paragraphs 2 (a), (b), (c), and (d), 'Have you or any person in your family been treated for serious physical disorders or had been hospitalized during the post five years,' were false; that in fact the application upon its face showed that the defendant, Opal Johnson, had been hospitalized in 1959 for a bladder infection, and it was admitted by the plaintiff's agent, Niles M. Wing, that he was in error in answering this section of the application. Said answers were false in that the defendant, Clyde W. Johnson, had been afflicted with, prior thereto, a chronic heart disease which had been detected in March of 1964. The defendant, Clyde W. Johnson, following his being told of said heart disease, had continued to engage in his plumbing business upon a full time basis until shortly before open heart surgery in March of 1966, and as a direct result of said surgery did die.

That in the policies issued by the plaintiff company to the said decedent, Clyde W. Johnson, in 1957 and 1960, the following provisions were contained:

'Time Limit on Certain Defenses: (a) After two years from the date a person becomes covered under this Policy, no misstatements, except fraudulent misstatements, made by the applicant in the application for coverage of such person shall be used to void the Policy or to deny a claim or loss incurred after the expiration of such two year period.

(b) No claim for loss incurred with respect to any person after two years from the date such person becomes covered under this Policy shall be reduced or denied on the ground that a disease or physical condition not excluded from coverage by name or specific description effective on the date of loss had existed prior to the effective date of coverage of such person.'

That upon all three occasions, when the defendant, Clyde W. Johnson, deceased, acquired policies from the plaintiff company, it was pursuant to the solicitations and urging of one Niles M. Wing, their agent and employee."

## ARGUMENT

### POINT I

THE TRIAL COURT WAS CORRECT IN FINDING THAT POLICY NO. WP2 510 001 WAS IN FORCE AND EFFECT AT THE TIME OF THE DEATH OF INSURED.

A. Plaintiff should be estopped to deny coverage after policies with same company in force for some eight years and new policies substituted at urging of plaintiff's agent.

It would appear unconcionable to allow plaintiff to deny coverage after eight years when changes of policies were made at urging and request of plaintiff's agent. Especially so when the agent testified that the answers were incorrect in other respects and that he personally did not understand the meaning of the questions (TR. 51-52). Certainly if the plaintiff's agent didn't know the meaning of the questions, the deceased cannot be deprived of coverage because it is claimed he gave an erroneous answer.

When on the face of an application for insurance a question appears to have been imperfectly answered, and



the insurer issues a policy without further inquiry, it waives the wont of imperfection in the answer.

See *Mutual Insurance Co. vs. Berry* 81 Ark. 92, 98 S.W. 693; *Mutual Reserve Fund Life Insurance Assoc. v. Farmer*, 65 Ark. 581, 47 S.W. 850; *Phoenix Mutual Life Insurance Co. v. Raddin*, 120 U.S. 190, 30 L. ed. 646, 7 Sup. Ct. Rep. 500.

Also, an insurance company cannot itself make a mistake of fact in a contract and then claim a forfeiture against the insured because of a misstatement.

*Gray v. Stone*, 102 Ark. 146, 143 S.W. 114; *Dwelling House Insurance Co. v. Brodie*, 52 Ark. 11, 4 L.R.A. 458, 11 S.W. 1016; *Franklin Life Insurance Co. v. Galigos*, 71 Ark. 295, 73 S.W. 102; *Mutual Reserve Fund Life Assoc. v. Farmer*, 65 Ark. 581, 57 S.W. 850.

It is a well established precept of law that the Court will make every effort to protect the interests of the insured as against the insurer by virtue of his having presumed to have had less knowledge as to the contents of the policy and the interpretation thereof.

See *Leon G. Pritchett v. Equitable Life and Casualty Insurance Co.*, 18 Utah 2d, Page 279, 421 P. 2d 943.

B. The respondent is entitled to the coverage of Policy No. WP2 510 001 by virtue of the insured having had coverage with the appellant without lapse since 1957.

The plaintiff, through their agent Niles M. Wing, sold three separate policies to the defendant, Clyde W. Johnson, deceased. The first policy dated October 17, 1957, was in effect until the second policy was obtained on February 2, 1960. The second policy was in effect until November 8,

1965, and in the interim, the same agent had induced the defendant to purchase a new insurance policy on the 3rd day of September, 1965, which was in effect until his death. Therefore, the uncontested facts show that the defendant, Clyde W. Johnson, deceased, was insured with the same general type of policy from 1957 until his death. Plaintiff admits that in each policy there was an incontestable provision of a maximum of two years (Par. 11, Pre-trial Order). This means that on the first two policies taken out by the decedent, had they stayed in effect, that the plaintiff would have no defense to any material misrepresentation as to pre-existing health conditions.

This fact is the first basis upon which the defendant contends that the plaintiff should be estopped from asserting that the incontestable provision should not apply as of the effective date of the policy taken out either on October 17, 1957, or February 2, 1960. It would appear to the defendant to be unconceivable to allow the plaintiff company, through its agent, to induce the deceased defendant to change policies when he had a vested right and, according to their own declarations, apparently knew of a change in his health condition. It is obvious that the defendant would not jeopardize his position which had, as I say, become a vested one, had he known that in doing so he would be jeopardizing the security of his family.

In supporting such position, the defendant cites for the Court's consideration 29 A.A.J. § 1127 which states:

"Where a company assumes outstanding policies of the original insurer, agrees to be liable in the same manner as the original insurer, and delivers to the in-

sured a new certificate in lieu of the original, it has been held that the period for defending against the policy is regulated by the incontestability provisions of the original policy."

See 110 A.L.R. 1139, 85 A.L.R. 240, 105 A.L.R. 997, which annotations contain numerous cases which defendant contends are pertinent.

See also *Wood v. Cosmopolitan Insurance Co.*, 266 Ill. App. 556, in which a policy was issued in 1926 containing a one year incontestable provision. Later the defendant assumed the outstanding policy of the insured and agreed to be liable in the same manner. Death occurred within two years of taking the new policy and defendant raised the defense of the two year incontestable provision, and the Court held that the period of the first policy applied.

Point I B (2), Page 15 of appellant's brief is ridiculous. What he is saying is that if the applicant had a pre-existing disease or physical condition and falsefied as to this fact, that no matter how long the policy was in force the incontestable provision would not apply. I feel this position is so absurd that it warrants no comment. The terms of the policy speak for themselves in this regard.

See 29 A, A.J. § 1114.

## CONCLUSION

The policy on which deceased was paying premiums at time of death should be held to have been in force. Plaintiff company should be estopped to deny coverage when their agent erroneously completed the application by his

own admission and, further, the incontestable provision of previous policy should apply to the substituted policy.

Respectfully submitted,

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