1971

Patricia M. Burnham v. Bankers Life & Casualty Company, and Illinois Corporation : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

PATRICIA M. BURNHAM,
Plaintiff and Appellant,

vs.

BANKERS LIFE & CASUALTY COMPANY,
an Illinois corporation,
Defendant and Respondent.

Case No. 12261

RESPONDENT'S BRIEF

Appeal From Order of the District Court of the Third Judicial District in and for Salt Lake County, State of Utah
Honorable Marcellus K. Snow, *Judge*

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NATURE OF THE CASE

Originally this was an action commenced by Mrs. Patricia M. Burnham to recover as beneficiary under a reinstated $10,000 whole life insurance policy and an attached $40,000 decreasing term rider issued by respondent to Dr. Preston J. Burnham, deceased. The case previously came before this Court when plaintiff and appellant appealed from an order granting the defendant's Motion For Summary Judgment and dismissing plaintiff's complaint. (R. 57, 58). Plaintiff and appellant's second appeal to this Court is from an Order denying a Motion For Summary Judgment made after the case was remanded for trial following the first appeal. (R. 95).

DISPOSITION IN LOWER COURT

The first appeal to this court was from the granting of a Motion For Summary Judgment (R. 22) made by the defendant in the trial court. The Honorable Merrill C. Faux granted that motion on two grounds — First: under Utah Code Annotated, Section 31-22-18(2) the insurance company had the right upon reinstatement of the policy to ". . . exclude or restrict liability to the same extent that such liability could have been or was excluded or restricted when the policy or contract was originally issued, and such exclusion or restriction shall be effective from the date of reinstatement;" and second that "Dr. Burnham's failure to disclose (previous visits with a psychiatrist) prevented the insurer from exercising its right to evaluate what it might have learned from Dr. Fowler and to apply the restriction to the reinstated policy, and that this failure to disclose was a misrepresentation by omission and a fraud upon the insurer." (R. 56, 57). Plaintiff appealed from the granting of defendant's Motion For Summary Judgment (R. 68) and in *Burnham vs. Bankers Life & Casualty Company*, 24 Utah 2d 277, 470 P. 2d 261 (1970) this Court held that the trial court erred in granting the Motion For Summary Judgment and that the case should be

> ". . . remanded with the disposition in accordance with this opinion." 470 P. 2d at 261.

Plaintiff then filed a Motion For Judgment

(R. 76) which was denied (R. 78) and a Motion For Summary Judgment (R. 79) on grounds that

> ". . . there are no issues of material fact and that plaintiff is entitled to a summary judgment as a matter of law in accordance with the opinion of the Utah Supreme Court on June 2, 1970, and reported as 470 P. 2d 261." (R. 79)

Plaintiff's Motion For Summary Judgment was heard on September 21, 1970, and denied by the Honorable Marcellus K. Snow (R. 95). From a denial of her Motion For Summary Judgment plaintiff commenced the present appeal (R. 97, 106).

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the trial court's denial of plaintiff's Motion For Summary Judgment and instruction from this Court for the court below to proceed with a trial on the merits.

STATEMENT OF FACTS

The Court will recall from the *Burnham* opinion, *supra*, that plaintiff, Mrs. Preston J. Burnham, initially instituted this action to recover as beneficiary under a $40,000 decreasing term rider attached to a $10,000 whole life insurance policy issued by defendant, Bankers Life & Casualty Company, to Dr. Preston J. Burnham. The $40,000 term rider lapsed on April 1, 1967 because Dr. Preston J. Burnham failed to pay the premiums. The basic $10,000 whole life policy continued in force, however, because it was

supported by premiums paid from the cash reserve. On June 28, 1967, Dr. Burnham filed for reinstatement of the policy and paid the premiums which were then in default. Upon the death of Dr. Preston these premiums were returned to the plaintiff without prejudice to her right to bring this action. The defendant paid the basic coverage of $10,000 provided in the policy but refused to pay the amount claimed to be due under the term rider because Dr. Burnham had failed to list Dr. Herbert B. Fowler as a physician whom he had consulted when he applied for reinstatement of the $40,000 term policy.

A deposition taken of Dr. Fowler disclosed that Dr. Burnham had consulted with Dr. Fowler on a professional basis with respect to marital difficulties eighty times during the period from February 13, 1963 to November 9, 1965 (Dep. Dr. Fowler, p. 11). During certain consultations with Dr. Fowler, Dr. Burnham made such statements as "I wish I were dead" or "I would be better off dead" (Dep. Dr. Fowler, p. 24). On February 20, 1968 Dr. Burnham did in fact commit suicide.

By Affidavit of its attorney, Don J. Hanson, defendant asserted that had it known about Dr. Burnham's visits with Dr. Fowler, and particularly the expressions made by Dr. Burnham during those consultations, it would not have renewed the $40,000 rider (R. 24, 25). Based upon this Affidavit, the pleadings and the deposition of Dr. Fowler, defendant moved for a summary judgment (R. 22), which

Motion was granted, and a Memorandum Decision was issued by Judge Merrill C. Faux on November 14, 1969 (R. 56). The trial court concluded that under Utah Code Annotated, Section 31-22-18(2) the insurance company could

> ". . . exclude or restrict liability to the same extent that such liability could have been or was excluded or restricted when the policy or contract was originally issued, and such exclusion or restriction shall be effective from the date of reinstatement." (R. 56)

It was also held by the trial court that the failure of Dr. Burnham to disclose his visits with Dr. Fowler constituted a "misrepresentation by omission and a fraud upon the insurer" (R. 56). From the trial court's granting of defendant's Motion For Summary Judgment plaintiff appealed to this Court (R. 68).

In *Burnham vs. Bankers Life & Casualty Company*, 24 Utah 2d 277, 470 P. 2d 261 (1970) this Court held that the trial court erred in granting defendant's Motion For Summary Judgment and remanded the case for "disposition in accordance with this opinion" (R. 74), 470 P. 2d at 265. It was also held that Utah Code Annotated, Section 31-22-18(1), which provides

> "A reinstated policy of life insurance or annuity contract may be contested on account of fraud or misrepresentation of facts material to the reinstatement only for the same period following reinstatement and with the same

> conditions and exceptions as the policy provides with respect to contestability after original issuance"

did not govern this case since the original policy was issued in 1962 and the statute was enacted in 1963. This Court further held that

> "An application for reinstatement is (not) an offer to enter into a contract to reinstate the old policy but is merely a step to comply with the conditions specified by the company in the reinstatement clause of the insurance contract." 470 P. 2d at 265.

On remand the plaintiff moved first that a judgment for the plaintiff be entered, which was denied (R. 78), and then moved for summary judgment (R. 79). From an Order denying plaintiff's Motion For Summary Judgment (R. 95) the present appeal was commenced.

ARGUMENT

POINT I.

THE TRIAL COURT PROPERLY REFUSED TO GRANT PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE INCONTESTABILITY CLAUSE OF THE POLICY WAS RENEWED BY THE APPLICATION FOR REINSTATEMENT.

As we understand the opinion of this Court in *Burnham vs. Bankers Life & Casualty Company*, 24 Utah 2d 277, 470 P. 2d 261 (1970), the reinstatement aplication did not in contemplation of law constitute a new contract but merely a continuation of

the original policy. The opinion did not dispose of the question as to whether the incontestability clause of the original policy was revived by reinstatement of the policy. The incontestability clause of the policy provides:

> "This policy shall be incontestable after it has been in force during the lifetime of the Insured for 2 years from its date of issue, except for nonpayment of premiums, and except as to provisions relating to total and permanent disability benefits and provisions granting additional insurance specifically against death by accident, if any." (R. 9)

We cannot agree that Utah Code Annotated, Section 31-22-18(1), "was undoubtedly a legislative response to a serious omission in the law . . ." 470 P. 2d at 265. To the contrary, most of the nation's courts have held that where a policy has been in force and the two-year contestability period has run, the contestability clause runs anew when the policy has been reinstated, and the period begins from the time of reinstatement even though no statute is involved. The courts in the majority of jurisdictions have reasoned that reinstatement either effects a new contract of insurance, the terms of which are determined from the policy as originally issued, or renews the original contract in full with all of its terms. Consequently, the incontestability clause runs anew from the date of reinstatement. The effect of this line of reasoning is that the insurer may on grounds of fraud or other material misrepresentation contest the policy as re-

instated within the time limit as specified in the contestability clause of the policy as issued, and following the expiration of such time is prohibited from making further contest. Thus, in *Lanier vs. New York Life Insurance Company*, 88 F. 2d 196, (5th Cir. 1937), Cert. denied 301 U.S. 693 (1937), where the incontestable clause agreement provided that "This policy shall be incontestable after two years from its date of issue except for nonpayment of premium," the court held that the insurer had two years from the date of reinstatement to contest the policy. In *New York Life Insurance Company vs. Seymour*, 45 F. 2d 47 (6th Cir. 1930), it was held that a two-year incontestable clause in a life insurance policy though not specifically made applicable in case of a reinstatement of the policy after a lapse might fairly be construed as having taken fresh effect when the policy again came into force by a reinstatement; and that the right to contest because of fraud in the reinstatement would expire two years after the date of reinstatement. The court stated that while this conclusion could not be predicated upon any precise language in the policy, it was a reasonable inference as to what the parties intended by reinstating a policy containing an incontestable clause.

In *McCary vs. John Hancock Mutual Life Insurance Company*, 236 C.A. 2d 501, 46 Cal. Reporter 121, 23 ALR 3rd 733 (1965), the incontestable clause provided that a life insurance policy's supplementary provision for family income should be incontestable

after it had been in force during the lifetime of the insured for two years from the date of issue except for nonpayment of premiums. An application for reinstatement of the policy was filled out after two years from the date of issue and contained a false representation by the insured as to his health. The insured died three months later, and it was contended by the beneficiary that the two-year limitation period in the clause barred the insurer after the expiration of the period from contesting the truthfulness of the insured's representations in the application for reinstatement. The court held that the insurer was not barred by the incontestable clause from defending against the reinstatement which it allowed in reliance upon the insured's representations.

Other courts have held that reinstatement is a contract to reinstate or revive the contract of insurance as issued, but that the incontestable clause becomes no part of the contract for reinstatement. As a result under such decisions, the insurer may contest the contract to reinstate upon grounds of fraud or the like at any time without reference to the incontestable clause in the policy as issued. The contract for the restoration of the policy like any other contract may be attacked at any time for fraud or other material misrepresentation in procurement without reference to the incontestable clause in the original policy.

In *McMahon vs. Continental Assurance Company*, 308 Ill. App. 27, 30 N.E. 2d 959 (1940), the

policy contained provisions for reinstatement at any time within its terms upon written application accompanied by evidence of insurability satisfactory to the insurer. The policy also contained a clause to the effect that the policy should be incontestable after two years from its date of execution except for nonpayment of premiums. The court in that case held that although the policy had been in force for more than two years when it lapsed for nonpayment of premiums, the insurer could urge as a defense to a recovery by the beneficiary that the reinstatement of the policy after it had lapsed was procured through fraudulent representations in the application for reinstatement, such a defense not constituting a contest or attack on the original policy but upon contract for the reinstatement thereof. The court further said that inasmuch as the insurer was induced to reinstate the policy of insurance as a result of the fraud of the insured, the policy was never in fact or law reinstated and that it necessarily followed that the situation was the same as if no contract for reinstatement was ever entered into.

In *Acacia Mutual Life Association vs. Kaul*, 114 NJE 491, 169 A. 36 (1933) neither the orginal policy nor the contract of reinstatement contained any provision limiting attack upon the reinstatement to the contestable period fixed in the policy. The court said that the reinstatement of the policy was neither the issuance of a new policy nor the reissuance of the original policy but merely a waiver of the lapse of the

original policy and the reinstatement thereof in full force, including the incontestable clause. The court held that the reinstatement could be attacked for fraudulent procurement notwithstanding the expiration of the limitation period of the incontestable clause in the original contract. The court noted that no contest could be made as to fraudulent misrepresentations in the original issuance of the policy since the one-year period of contestability had expired.

It is respectfully submitted that this court did not intend to overrule the case of *Gressler vs. New York Life Insurance Company*, 108 Utah 173, 156 P. 2d 212 (1945), which squarely holds that an insurance company is entitled to make a fair investigation of an insured prior to reinstating the policy. We submit that this Court's opinion in *Burnham vs. Bankers Life & Casualty Company, supra*, cannot be construed to deprive insurers of their right to investigate the insurability of an applicant upon application for reinstatement of a policy, a conclusion which the appellant has attempted to assert in the present appeal. We respectfully urge this court not to adopt a rule which would immediately revive an insurance policy upon the mere submission of a reinstatement application regardless of whether the application contained misrepresentations of material fact or fraudulent statements.

POINT II.

THE QUESTION OF WHETHER DR. BURNHAM FURNISHED EVIDENCE OF INSURABILITY SATISFACTORY TO THE INSURER WAS NOT DISPOSED OF IN BURNHAM VS. BANKERS LIFE & CASUALTY COMPANY, 24 UTAH 2d 277, 470 P. 2d 261 (1970).

We take issue at the outset with appellant's allegation that the "only defense to payment relied upon by defendant" is by way of a provision in the reinstatement application (Brief of Appellant, p. 6). Defendant's Amended Answer alleges:

> ". . . that at said time and place the deceased made a material misrepresentation of material facts and that if said facts had been known to the defendant at said time, said policy would not have been reinstated." (R. 15)

Contrary to appellant's assertions, we rely on the language of the "reinstatement" clause contained in the original policy. That clause states:

> "This policy may be reinstated (unless previously surrendered for its cash value) at any time within 5 years after default in premium payment, *upon furnishing evidence of insurability satisfactory to the Company*, and the payment of all past due premiums with interest compounded at 5% per annum . . ." (R. 9) (Emphasis added)

It is our contention that Dr. Burnham's failure to disclose the nature and extent of his visits with Dr Fowler constituted a material misrepresentation of material facts which made it impossible for the in-

surance company to determine whether satisfactory evidence of insurability had in fact been furnished by Dr. Burnham. As this Court pointed out in *Burnham, supra,* and in *Gressler vs. New York Life Insurance Company,* 108 Utah 173, 156 P. 2d 212 (1945)

> ". . . under Utah law a life insurance policy with a clause providing for reinstatement after lapse for nonpayment of premiums upon presentation of evidence of insurability satisfactory to the insurer, is not entirely terminated upon default of the premium payment, for the insured has a contractual right under the policy to reinstate fully *upon compliance with the conditions for reinstatement contained in the policy.*" 470 P. 2d at 264. (Emphasis added)

It was further stated:

> ". . . By the reinstatement clause, the insured was given an absolute right to reinstate upon payment of the amount in default and *production of evidence of insurability satisfactory to the company.*" Id. (Emphasis added)

This Court further emphasized the contingent rather than absolute right of an insured to reinstate a policy as follows:

> ". . . Under the reinstatement clause the insurer was accorded the right to require whatever evidence of insurability it deemed satisfactory *and a fair opportunity to make a complete investigation prior to reinstatement.* When the insurer finally determined that the

conditions for reinstatement had been fulfilled, the original policy was again in full force and effect as if there had been no prior lapse." Id. (Emphasis added)

This Court could not have made it more clear that the right to reinstate a lapsed insurance policy is contingent upon the insured's furnishing evidence of insurability satisfactory to the company and that the company has the right to make a complete investigation of such evidence prior to reinstatement.

It was further noted in *Burnham, supra,* that the granting of a summary judgment was improper because there remained disputed issues of material fact:

> "First, unless the misrepresentations in the negotiation for an insurance policy are made with intent to deceive and materially affect either the acceptance of the risk or the hazard assumed by the insurer, the insurance contract cannot be avoided by an insurance company. Mere falsity of answers to questions propounded are insufficient if not knowingly made with intent to deceive and defraud. Second, whether or not a misstatement in an application is material to the risk, while it is for the jury to determine, depends not upon what the insurer or the insured may think about the materiality or the importance of the false information given or the true information withheld, but upon what those engaged in the insurance business, acting reasonably and naturally in accordance with the usual practice among insurance companies under such circumstances, would have done had they known

> the truth, that is, whether reasonably careful and intelligent men would have regarded the facts stated as substantially increasing the chances of the happening of the event insured against so as to cause a rejection of the application." 470 P. 2d at 263.

Although it was respondent's belief in the first *Burnham* appeal that reasonable minds could not differ on the question of whether Dr. Burnham's failure to disclose eighty visits with a psychiatrist was intentional and material to the risk, this Court rejected that argument, pointing out that these were questions "for the jury to determine." Id. Appellant in her Brief at page 7 recognizes that there are fact issues remaining for trial, but asserts that respondent is precluded from raising those issues because it relies solely on the language contained in the reinstatement application. We disagree. We do not believe this Court intended to hold that an insured has the absolute right to reinstate a lapsed insurance policy notwithstanding misrepresentations of material facts contained in the reinstatement application. Such a rule would completely nullify the reinstatement clause of the policy, which states that reinstatement is contingent upon the insured's furnishing evidence of insurability satisfactory to the company. Moreover, it is clear that an insurance company must be given a fair opportunity to make a complete investigation of an insured prior to reinstatement, and the company must rely on the accuracy of information contained in the application, as it did in the case of

Dr. Burnham. If such information is false or misleading and the company relies on the information in reinstating a policy, it should certainly be given an opportunity to assert that the insured failed to furnish satisfactory evidence of insurabiilty as required by the original policy. Any other rule would completely nullify the language in the reinstatement clause.

In *Gressler vs. New York Life Insurance Company, supra,* the Court specifically held that the mere filing of an application for reinstatement did not of itself revive the policy. The Court stated:

> "We cannot accept this view that when the applicant filed the application to revive together with the necessary papers accompanying it, and '*there then existed no valid objection to the form or substance of such application, or papers or the proof furnished therewith*' the Company could 'do but one thing, viz., revive the policy.' (Emphasis added) The condition for reviving the policy was not only the presentation at the Home Office of evidence of insurability but such evidence 'satisfactory to the company.' This did not mean that answers to questions submitted by the Company which would show insurability must be accepted by the Company, nor that the Company could not ask further questions. This phrase "satisfactory to the Company' implies that the Company must have opportunity to determine whether the evidence is satisfactory to it and that means an opportunity to conduct an investigation to determine whether the answers were correct or whether the investigation disclosed further matters in

regard to which the Company may desire to interrogate the applicant." 163 P. 2d at 329

Thus an insurance policy does not automatically become reinstated upon the mailing of an application form, nor at any other time before the insurance company has had an opportunity to make an investigation of the insured. The reason for a question in the reinstatement application form which requires the insured to list physicians with whom he has consulted is so that the insurance company may investigate and determine the nature of the treatment given by the physicians. An insurance company would have particular interest in visits made by an insured to a psychiatrist, especially where suicidal expressions were made. It is respectfully submitted, therefore, that there were a numberof issues which were not resolved by the *Burnham* opinion and which were left to the determination of the trial court. These factual questions include (1) whether Dr. Preston J. Burnham committed a fraud upon the insurance company when he failed to disclose eighty prior visits with Dr. Fowler; (2) whether the omission by Dr. Burnham was intentional; (3) whether the omission was material to the risk; and (4) whether a reasonably careful and intelligent insurer would have rejected Dr. Burnham's application on the basis of the omission. In view of the remaining issues, the trial court did not err in refusing to grant plaintiff's Motion For Summary Judgment.

CONCLUSION

It is apparent from the *Burnham* opinion that this Court did not intend to nullify the incontestability clause or the reinstatement clause of Dr. Burnham's original policy which states that reinstatement is contingent upon the furnishing of evidence of insurability satisfactory to the company. Language by this Court in the *Burnham* opinion makes it absolutely clear that the only issues decided in the first appeal were (1) that the trial court erred in granting defendant's motion for summary judgment because issues of material fact remained for trial; (2) that Section 31-22-18(1) which allows an additional contestability period after reinstatement was not applicable; and (3) that the reinstatement application did not constitute an offer to make a new contract of insurance but was simply a step toward compliance with the conditions specified in the reinstatement clause of the original insurance contract.

It is submitted that this Court did not by its decision attempt to decide any questions of fact nor did it attempt to state what law should govern the case except with respect to Section 31-22-18(1) and the nullified provision in the reinstatement application. Respondent, therefore, submits that the trial court properly denied plaintiff's motion for summary

judgment and that the case should be set down for trial to determine those questions of fact set out in the *Burnham* opinion.

Respectfully submitted,

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