IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

TENNESSEE FARMERS MUTUAL INSURANCE COMPANY	)	HAWKINS COUNTY
	)	03A01-9504-CH-00124
Plaintiff-Appellee	)	
v.	)	HON. DENNIS H. INMAN, CHANCELLOR
JAMES FRANKLIN BALL and DELORIS BALL	)	
Defendants-Appellants	)	VACATED AND REMANDED

PHILLIP L. BOYD OF ROGERSVILLE FOR APPELLANTS

THOMAS L. KILDAY OF GREENEVILLE FOR APPELLEE

OPINION

Goddard, P.J.

This is a suit by Tennessee Farmers Mutual Insurance Company against James Franklin Ball and his wife Deloris Ball to recover monies it contends was erroneously paid to them in settlement of this claim under a fire insurance policy. The Trial Court granted a summary judgment in Tennessee Farmers'

favor in the amount of $40,340, plus pre-judgment interest from the date of Tennessee Farmer's payment to the Balls.

The judgment was predicated upon a finding by the Trial Court that Mr. Ball had made misrepresentations in his application for insurance which increased the risk of loss.

Mr. Ball appeals, contending the Trial Court's grant of summary judgment was erroneous.

Although much testimony was introduced which would be material at trial, we will detail only those facts which we deem dispositive of this appeal. In doing so we will view the evidence in a light most favorable to the Balls and indulge any reasonable inferences to be drawn therefrom in their favor. Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993).

In December 1988 J. Fred Wright and wife Naomi M. Wright, who for some reason were unable to deal directly with Harry Moberley and Barbara J. Beck, the owners of property adjoining them, importuned Mr. Ball to purchase the property with an interest free loan from Mr. Wright and then convey the property to the Wrights.

In furtherance of this plan the Wrights gave Mr. Ball $12,500 in December and the following January another $12,500, which indebtednesses were evidenced by promissory notes.

On January 3, 1989, the Balls and the Wrights memorialized their understanding by entering into a written contract, which recited that the Balls contemplated purchasing the property in question and, if purchased, agreed to sell it to the Wrights for the sum of $25,000 with the sale to be consummated on or before November 1, 1989. This agreement also contained the following two provisions:

> 2. The parties acknowledge that the subject property is presently being rented for the sum of $175.00 per month. During the period of time from the date first parties become the record owners of the property to the date the sale is consummated between first and second parties, second parties shall receive the monthly rental payments.
>
> 3. For and in consideration of the first parties executing a warranty deed to second parties on or about November 1, 1989, second parties agree to deliver over to first parties, marked "paid in full" two promissory notes in the amount of $12,500 each . . . (Remainder of sentence illegible.)

On January 30 Mr. Ball applied for and obtained a fire insurance policy from Tennessee Farmers and represented that the purchase price was $32,000, rather than the $25,000 which he ultimately paid, and that the Balls were the sole owners of the property.

A second agreement was entered into between the Balls and the Wrights which, as to the typed portion, was dated and acknowledged, the "____ day of February, 1989." This date, however, was stricken and November 30, 1990, a date subsequent to the fire, was inserted in handwriting. In addition to providing

for the sale of the property, this agreement provided the following:

> WHEREAS, the parties of the first part have agreed to retain the house thereon, which we agree to tear down the structure and move same[1] from the land within six months from the date of conveyance. WHEREAS, the parties of the second part hereby agrees to allow the parties of the first part to remove the structure from the above referenced real estate.

On February 8 the Balls acquired the property upon paying $25,000, less an indebtedness of approximately $16,000, which was secured by a deed of trust on the property.

On May 24, after he had made certain improvements, Mr. Ball, upon the suggestion of an agent of Tennessee Farmers, increased the coverage to $38,500.

On November 25 the house was destroyed by fire of unexplained origin.

On November 30, 1990, the Balls conveyed the property to the Wrights. This deed contained the following representation by Mr. Ball:

> I hereby swear or affirm that the actual or true value of this transfer, whichever is greater is $25,000.00.

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[1] Mr. Ball testified he had the option of tearing down the house or moving it.

On December 31 a proof of loss was submitted by the Balls, which represented that no other person had an interest in the property at the time the policy issued, and there had been no change in any interest. They further represented that the actual cash value of the house at the time of the fire was $40,000.

Thereupon, Tennessee Farmers paid the Balls $40,340, which included loss of contents.

The Trial Court found the following misrepresentations on the part of Mr. Ball:

> On January 30, 1989, the defendant Mr. Ball applied to the plaintiff insurance company for a policy of fire and extended coverage on the Moberley property.
>
> The application signed by Mr. Ball recited that the purchase price of the property was $32,000.00, that it had a market value of $32,000.00, and that the cost to rebuild the house on this lot would be $40,00.00.
>
> The application also recited that the applicant was the "sole owner" of the property.
>
> . . . .
>
> Clearly, there were misrepresentations upon the application for insurance. Mr. Ball recited that the purchase price of the property was $32,000.00. In actuality, it was but $25,000.00.
>
> He recited that was the sole owner, notwithstanding that at that time he had already agreed to transfer the property to the Wrights, giving them at the very least an equitable ownership in the property.

The Trial Court noted the provisions of T.C.A. 56-7-103:

> **56-7-103. Misrepresentation or warranty will not avoid policy--Exceptions.--** No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the insured or in the insured's behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increases the risk of loss.

Upon doing so, the Trial Court, in resolving the issues of the false answers and of the intent to deceive, apparently gave consideration to the deposition of Mr. Ball and of the affidavit of Michael W. Deason, who had been associated with Allstate Insurance Company for over 23 years, and was at the time his affidavit was given a senior account agent for Allstate in Kingsport. Mr. Deason concluded his affidavit as follows:

> In reviewing the application and from information I have received, all of the information appears to be properly answered. I see no errors or inaccuracies in the application itself.
>
> It is the responsibility of the insurance company through its agents and/or other means to inspect the premises upon which an application is written for coverage. The insurance company has sixty days to accept or reject coverage if the property does not meet the guidelines or requirements. Failure to perform these responsibilities would be the negligence of the company and not the insured.
>
> As a result of the documents I have seen, it does not appear that there have been any material misrepresentations by the defendants on the applications or at any other time. It, likewise, does not appear that the information contained in the application or any other documents were material to the plaintiff, nor did it increase the risk of loss.

The Trial Court then correctly stated the following:

> Whether the answers were false and given with intent to deceive are questions of fact for the jury; whether false answers materially increase the risk of loss is a question for the court. Womack v. Blue Cross and Blue Shield, Inc., et al, 593 SW2d 294 (Tenn. 1980); see also, Broyles v. Ford Life Ins. Co., 594 SW2d 691, (Tenn. 1980).

While it is undoubtedly true that whether a misrepresentation increases the risk of loss is a question for the Court rather than the jury, it does not follow that on a motion for summary judgment the Court can disregard competent evidence touching on the question. Under our summary judgment procedure we are required to disregard the testimony of witnesses for Tennessee Farmers that the misrepresentations would increase the risk of loss, which leaves the only evidence in the record that it would not, rendering the Trial Court's grant of summary judgment inappropriate.

In summary, we find that there is a genuine dispute of a material fact--whether the misrepresentations of Mr. Ball increased the risk of loss--and that summary judgment was improperly granted.

For the foregoing reasons the judgment of the Trial Court is vacated and the cause remanded for further proceedings not inconsistent with this opinion. Costs of appeal are adjudged against Tennessee Farmers.

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Houston M. Goddard, P.J.

CONCUR:

_____
Don T. McMurray, J.

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Charles D. Susano, Jr., J.