IN THE COURT OF APPEALS OF TENNESSEE

FILED

January 29, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STEVE GILLIAM d/b/a STEVE'S AUTO TRIM AND UPHOLSTERY Plaintiff-Appellant	:	KNOX CHANCERY 03A01-9509-CH-00314
vs.	:	HON. SHARON J. BELL CHANCELLOR
AUTO OWNERS MUTUAL INSURANCE COMPANY Defendant-Appellee	:	AFFIRMED AND REMANDED

A. BENJAMIN STRAND, JR., WITH STRAND & GODDARD, OF DANDRIDGE, TENNESSEE, FOR APPELLANT

LINDA J. MOWLES and ERIC S. NOWINSKI, WITH LEWIS, KING, KRIEG, WALDROP & CATRON, OF KNOXVILLE, TENNESSEE, FOR APPELLEE

O P I N I O N

Sanders, Sr.J.

Plaintiff has appealed from a decree sustaining Defendant's motion for summary judgment based on material misrepresentations in Plaintiff's application for insurance, which increased the risk of loss to Defendant.

In August, 1993, the Defendant-Appellee, Auto Owners Mutual Insurance Company (Auto Owners), issued a comprehensive coverage insurance policy to the Plaintiff-Appellant, Steve Gilliam, d/b/a Steve's Auto Trim and Upholstery (Mr. Gilliam). As pertinent, the policy insured against loss or damage to Mr. Gilliam's premises, equipment, inventory or property of other parties in his possession, resulting from fire or theft. Approximately two months later a fire occurred in the building occupied by Mr. Gilliam, destroying or damaging the building, equipment, inventory and automobiles in Mr. Gilliam's possession which belonged to third parties. Mr. Gilliam filed a claim under the policy with Auto Owners for approximately $85,000, which it declined to pay, and that precipitated this litigation.

The Plaintiff filed suit asking for compensation for his damages resulting from the fire and for the value of certain fixtures and equipment stolen from the premises after the fire and a bad faith penalty against Auto Owners for failure to pay his claim pursuant to T.C.A. § 56-7-105.

Auto Owners, for answer, admitted it had issued a comprehensive insurance policy which was in force at the time of the fire. It admitted the provisions of the policy would extend coverage to Plaintiff's losses if the policy were enforceable. As an affirmative defense, however, Auto Owners averred the Plaintiff had made material misrepresentations in the application for the insurance regarding prior losses, prior insurance, and the value of his inventory, which increased its risk of loss.

Subsequently, the Defendant filed a motion for summary judgment. It alleged there were no genuine issues of material fact and Defendant was entitled to judgment as a matter of law. In support of its motion, it relied on the affidavit of Edna Nix, the affidavit of Carolyn Harris, Plaintiff's application for insurance, certified copies of offense reports of the Knox County Sheriff's Department, and excerpts from the sworn statement of the Plaintiff.

In response to the motion for summary judgment, the Plaintiff filed an affidavit and also stated he relied on the application for insurance.

The affidavit of Edna Nix stated she is an insurance agent of Powell Insurers, Inc., of Knoxville which took Mr. Gilliam's application for the Auto Owners insurance policy. Ms. Nix asked Mr. Gilliam the questions on the application and wrote on the application the answers given by him. After the application was completed, Mr. Gilliam went over the application line by line with Ms. Nix and verified it was correct. The application, as completed by Ms. Nix and signed by Mr. Gilliam, as pertinent, stated Mr. Gilliam had no property losses for the three-year period of 1990 through 1993. It showed the limits of liability for personal property to be $30,000. It stated the applicant was presently carrying SMP insurance coverage which would expire 8-3-93 and the insurance company was Grange.

The excerpts from Mr. Gilliam's sworn statement, as pertinent, show he was asked the following questions and that he gave the following answers:

"Q. Before you took out this Auto Owners policy on your business, had you had insurance on it?

"A. Yeah, I had some several years back.

"Q. How many years back, do you know?

"A. I'm not sure.

"Q. Who was it with?

"A. I don't have any idea."

* * *

"Q. The agent told the company that you had insurance prior to the Auto Owners policy being issued, and it was with Grange. Do you know where she would have gotten that information?

"A. No, sir.

"Q. The agent also told the company that you had had no prior losses. Did you tell her that?

"A. No, sir.

"Q. Did she talk to you about prior losses?

"A. Yes, sir.

"Q. Did you sign an application?

"A. Yes, sir, I believe I did."

* * *

"Q. Did you know you had that much stuff in there when you took out this insurance?

"A. I figured there was 80 or 90 thousand dollars worth of stuff in there.

"Q. When you took out the insurance?

"A. Yes.

"Q. You figured you had 80 to 90 thousand?

"A. I didn't try to sell it to the insurance company, I tried to buy some protection for me in case something actually happened.

"Q. Did you figure you had 80 to 90 thousand dollars worth of stuff in there?

"A. Yes, sir.

"Q. So you only took out I believe 50 thousand dollars on your --

"A. I took out 30 thousand.

"Q. Okay.

"A. Thirty thousand on contents.

"Q. Okay. I believe you said earlier the reason you did that was you just wanted to cover some of the --

"A. I just wanted to make sure that, you know, that I could afford to pay for the insurance."

The records of the Knox County Sheriff's Department show the Plaintiff had break-ins at his place of business on five occasions between September 3, 1990, and January, 1992.

In Mr. Gilliam's affidavit, as pertinent, he stated he went to the office of Powell Insurers on August 3, 1993, and Edna Nix took information to fill out the application for insurance. She asked him a series of questions about his inventory, kind of equipment, and about the building he was leasing. He told her he had insurance through Betty Hart. He didn't recall whether or not Ms. Nix asked him if he had insurance with any other company. He said he told Ms. Nix before filling out the application for insurance that he had had two or three break-ins at his business within two to three years. When representatives of either Powell Insurers or Auto Owners came to his place of business after he had made the application for insurance, he told them he had several break-ins within the last two or three years. He also told them the

value of his inventory. Mr. Gilliam further said he didn't know he had to insure his property for its actual value. He only wanted $30,000 coverage and didn't know his claim would be denied because he was underinsured. He also said he didn't know why Ms. Nix would list Grange as his present insurance company because he had not had insurance on his business for at least one year. He denied he went over the application of insurance with Ms. Nix line by line.

The affidavit of Carolyn Harris stated she is the underwriting manager of the Brentwood underwriting branch of Auto Owners Insurance in Brentwood, Tennessee. The application of Plaintiff for insurance which was dated August 3, 1993, reflected the Plaintiff had incurred no losses during the three-year period prior to the application date. The application also stated the business was presently being insured by Grange. The affidavit further stated it had come to affiant's attention that Appellant's business had been burglarized on at least five separate occasions during the three-year period prior to August 3, 1992. None of those burglaries were reported on the application for insurance. It also had come to affiant's attention that Plaintiff did not have insurance for several years prior to filing his application for insurance with Auto Owners. Further, in Plaintiff's application for insurance he applied for $30,000 worth of coverage for the contents of his commercial property; he is now claiming, however, there was between $80,000 and $90,000 worth of property on the premises at the time of the fire. The affidavit concludes as follows: "These incorrect statements increased the risk of loss to Auto Owners and had Auto Owners had been aware of the prior losses, the fact that

there was no insurance on the property for several years prior to this application, and the fact that there was allegedly between $80,000 and $90,000 worth of property on the premises with only $30,000 coverage, Auto Owners would not have accepted the application nor written the policy. That as an underwriting manager, I am familiar with the usage and practice prevailing among reputable insurance companies in making premium rates and accepting or rejecting applications for insurance. A reputable insurance company would either increase the premium rates or refuse to accept or write an insurance policy if the insurance company became aware that an applicant had either several prior losses, no insurance coverage on the property for several years previous and/or substantially less coverage that [sic] the value of the property which the applicant seeks to insure."

Upon the hearing of the motion for summary judgment, the chancellor found: "[T]here is no genuine issue of material fact in this action, and that the Defendant is entitled to judgment as a matter of law due to the fact that Plaintiff's application for insurance contained material misrepresentations which increased the risk of loss to Defendant, thereby allowing the Defendant to void said insurance policy." The chancellor dismissed the complaint and the Plaintiff has appealed, saying the court was in error. We cannot agree, and affirm.

The pivotal issue on this appeal is governed by the provisions of T.C.A. § 56-7-103 and the large number of reported cases construing the application of the provisions of this statute in this jurisdiction. It provides:

> 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. (Emphasis ours.)

In applying the provisions of the statute, our courts have held any misrepresentation which naturally and reasonably influences the judgment of the insurer in making the contract is a misrepresentation which "increases the risk of loss" within the meaning of the statute. See **Tegethoff v. Metropolitan Life Insurance Co.**, 57 Tenn.App. 695, 424 S.W.2d 565 (1966); **Bauer v. Mutual of Omaha Insurance Co.**, 62 Tenn.App. 189, 460 S.W.2d 366 (1969); **Lane v. Travelers Indemnity Co.**, 499 S.W.2d 643 (Tenn.App.1973).

The decree of the chancellor in the case at bar is supported by **Sine v. Tennessee Farmers Mutual Insurance Co.**, 861 S.W.2d 838 (Tenn.App.1993) and **Giles v. Allstate Insurance Company**, 871 S.W.2d 154 (Tenn.App. 1993).

The decree of the chancellor is affirmed. The cost of this appeal is taxed to the Appellant and the case is remanded to the trial court for any further necessary proceedings.

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Clifford E. Sanders, Sr.J.

CONCUR:

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Herschel P. Franks, J.

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Don T. McMurray, J.