

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3540
Summary Calendar

PATRICIA C. WARREN and
KEVIN L. COTTON,

Plaintiffs-Appellants,

versus

MASSACHUSETTS INDEMNITY & LIFE
INSURANCE COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CA 92-3753 "A" (5))

(January 26, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

The plaintiffs, beneficiaries of a life insurance policy, appeal the grant of summary judgment to the defendant life insurance company with respect to the validity of the policy. Because we agree that the decedent falsely answered material questions on the application for the policy with the intent to

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

deceive the defendant life insurance company, we affirm the judgment of the district court.

I

On August 8, 1990, Jessie J. Warren applied for a \$100,000 life insurance policy with Massachusetts Indemnity & Life Insurance Company ("MILICO"). On the application, Jessie Warren answered "No" to the following three questions:

1. In the past ten years have you been treated for or had any indication of: (e) drug dependency or drug use involving narcotics, depressants, stimulants, hallucinogenics or marijuana?
2. Are you now under observation or receiving treatment for any mental, physical or nervous condition?
3. Have you ever been convicted of a felony?

(Emphasis added).

Jessie listed his wife, Patricia Warren, as primary beneficiary and his son, Kevin Cotton, as one of the contingent beneficiaries.

On June 12, 1991, Jessie Warren died.¹ Patricia Warren and Kevin Cotton demanded payment from MILICO. After investigating the claim, MILICO refused to pay the \$100,000 benefit on the policy due to alleged misrepresentations by the decedent on the application.

II

In September 1992, Patricia Warren and Kevin Cotton filed suit in Louisiana state court for the proceeds of the \$100,000 life

¹Jessie Warren died from a gunshot wound inflicted by his wife, Patricia Warren, who is a plaintiff in this case. She was acquitted of criminal charges by a jury on May 13, 1993.

insurance policy. In 1993, MILICO removed the case to federal district court under 28 U.S.C. § 1441. MILICO moved for summary judgment based on voluminous evidence that the decedent had answered questions on the application for the life insurance policy falsely. Specifically, MILICO produced evidence that the decedent had previously been treated for drug abuse, was under medical observation at the time he completed the application, and had been convicted of three felonies. On June 23, the district court granted summary judgment to MILICO on the grounds that the decedent had made material misrepresentations with the intent to deceive MILICO. Plaintiffs filed this appeal.

III

We review summary judgments de novo applying the same standards used by the district court. United States v. Arron, 954 F.2d 249, 251 (5th Cir. 1992). To prevent summary judgment, the plaintiffs must raise more than a hypothetical possibility of a genuine issue of material fact. See Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1123 (5th Cir. 1988). Under Louisiana law, a life insurance company is not liable for the death benefit provided by one of its policies if the insured made a false statement on the application with the intent to deceive the insurance company and such statement materially affected the insurance company's decision to issue the policy. La. Rev. Stat. Ann. § 22:619(B) (West Supp. 1993); Johnson v. Occidental Life Ins. Co. of Cal., 368 So.2d 1032, 1036 (La. 1979). On appeal, the

plaintiffs do not challenge the materiality of the representations made by the decedent, but do challenge their falsity and the decedent's intent to deceive. Instead of pointing to significant evidence to support the truthfulness and sincerity of the decedent's statements, however, the plaintiffs attempt to challenge the validity of the conclusions drawn by the district court from the voluminous evidence presented by MILICO.

A

Plaintiffs initially contend that the district court erred in granting summary judgment to MILICO because the decedent's answers to the three questions were not false. See Johnson, 368 So.2d at 1036 (requiring false answers to vitiate liability based on an inadequate insurance application). This argument fails with respect to each of the three pertinent questions on the insurance application.

First, the plaintiffs argue that the decedent's answer to the first question was truthful, i.e., that he had not been "treated for or had any indication of drug use." In 1990, the decedent pled guilty to two felonies: possession of cocaine and criminal damage to property. As a result of his plea, the decedent was placed on probation and required to undergo treatment at the New Orleans Substance Abuse Clinic ("NOSAC"). The plaintiffs argue that although the NOSAC records, which MILICO introduced, show that the decedent underwent several months of treatment after a conviction for possession of cocaine, they do not show that he underwent

treatment for "drug use." Plaintiffs argue that the decedent was merely treated for alcohol abuse. This argument ignores that the 1990 cocaine conviction itself, which triggered the decedent's treatment at NOSAC, constituted an "indication of drug use" and the fact that the decedent attended several group drug treatment sessions at NOSAC. Accordingly, we are satisfied that the decedent answered the first question falsely.

Second, the plaintiffs argue that despite the statement of a doctor who treated the decedent for a physical condition a few weeks prior to the August 8, 1990 application date, the decedent was not under observation for any "mental, physical or nervous condition" on August 8. This ignores the undisputed evidence that the decedent was also being treated by NOSAC from April 26, 1990 to September 13, 1990--including the August 8 application date. Thus, we are satisfied that the decedent answered the second question falsely.

Finally, the plaintiffs argue that despite the decedent's three prior felony convictions, he could honestly state on August 8 that he had never been convicted of a felony because, under Louisiana law, his 1990 convictions had been expunged from his record. The plaintiffs cite Louisiana Revised Statute § 40:983 for the proposition that when a person pleads guilty and the court places them on probation, such "discharge" will "not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime" La. Rev. Stat.

Ann. § 40:983 (West 1992). This argument ignores the portion the referenced statute that provides that the relevant "discharge" takes place upon the "fulfillment of the terms and conditions of probation" ² Id. The above expunging provision was not applicable to the decedent because he had not completed his probation for the 1990 convictions at the time he completed the application on August 8, 1990.³ Further, this argument ignores the decedent's 1987 felony conviction for possession of cocaine. Accordingly, we are satisfied that the decedent answered the third question falsely.

B

Next, the plaintiffs argue that even if the decedent answered the three questions on the application falsely, the district court erred in granting summary judgment because MILICO failed to provide any evidence of the decedent's intent to deceive. See Johnson, 368 So.2d at 1036 (requiring intent to deceive to vitiate liability based on inadequate insurance application). The courts have recognized the "inherent difficulties of proving [the decedent's] intent." See id. at 1036; Benton v. Shelter Mut. Ins. Co., 550 So.2d 832 (La.Ct.App. 2d Cir. 1989). Here, however, there is

²We also note that La. Rev. Stat. Ann. § 40:983 only applies to a person who has not previously been convicted of the possession of cocaine. The decedent had been previously convicted of possessing cocaine in 1987.

³We do not address whether the statute, even if applicable, would have had any effect on the falsity of the decedent's answer.

compelling evidence of the decedent's intent to deceive MILICO. After admission to the substance abuse clinic, NOSAC, following his two 1990 felony convictions, the decedent completed a questionnaire on April 19, 1990, in which he stated that he had been convicted of possession of cocaine in 1987 and served two years of probation for that offense. Possession of cocaine is a felony under Louisiana law. See Rev. Stat. Ann. § 40:967(C) (West 1992) (providing that possession of cocaine may yield a sentence of five years of imprisonment at hard labor); § 14:2(4) (West 1986) (defining a felony to include those crimes for which the offender may be sentenced to imprisonment at hard labor). Less than four months later, on August 8, the decedent represented to MILICO that he had never been convicted of a felony. We agree with the district court that "a side[-]by[-]side review of [the] NOSAC questionnaire with the MILICO Insurance Application Form . . . admits but one conclusion--that is that the latter representation was made with the intent to deceive the insurance company."

IV

Because the plaintiffs' arguments failed to raise a genuine issue of material fact with respect to either the falsity of the decedent's statements or the decedent's intent to deceive MILICO, the district court did not err in granting summary judgment. The judgment of the district court is therefore

A F F I R M E D.