**UNITED STATES COURT OF APPEALS**
**For the Fifth Circuit**

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No. 93-5502
Summary Calendar

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SECURITY FIRST NATIONAL BANK,

Plaintiff,

FEDERAL INSURANCE CO.,
Consolidated Plaintiff/
Third-Party Defendant,
Appellee,

VERSUS

PROGRESSIVE CASUALTY INS. CO.,

Defendant/Third-Party Plaintiff,

TYRONE G. HARRIS,

Defendant/Third-Party
Defendant, Appellant,

SANDRA PERAL HARRIS

Defendant.

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Appeal from the United States District Court
for the Western District of Louisiana

(90-CV-2100 (Cons. w/90-2185))

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(July 18, 1994)

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

PER CURIAM*:

Plaintiff-Appellee Federal Insurance Co. ("Federal") sought a declaratory judgment that it was not liable under Louisiana law on a fire insurance policy issued to Defendant-Appellant Tyrone G. Harris. Federal claimed that it was not liable due to, inter alia, false representations made by Harris in his application for insurance in which he stated that: 1) he had suffered only a $4,000 loss from a recent burglary and vandalism of his home, and 2) at the time of the application his home was equipped with a monitored burglar alarm system. In fact, however, the actual loss from the theft and vandalism was approximately $40,000, and Harris's home had no burglar alarm system whatsoever.

After a hung jury produced a mistrial, the district court granted Federal a judgment as a matter of law. Finding that those false statements on Harris's application were material and made with the intent to deceive, the court concluded that Federal was entitled to avoid liability under Louisiana law. In turn we conclude that no reasonable fact-finder could find otherwise, and therefore affirm.

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*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

## I

## FACTS AND PROCEEDINGS

In 1988 Harris built a large house in a rural area approximately five and one-half miles south of Grambling, Louisiana. Harris had difficulty obtaining insurance for his home but eventually found a company willing to provide coverage. In October, 1989 his home was extensively burglarized and vandalized, which led to the cancellation of that insurance coverage in November 1989.

Following this cancellation, Harris asked Larry Joyner, an insurance agent, to assist him in once again obtaining insurance on his house. The first several companies contacted by Joyner declined to insure Harris's house. Eventually, however, Joyner came into contact with agents for Federal, who indicated that Federal would be interested in providing this insurance and, accordingly, sent Joyner an application for insurance. It is undisputed that together Joyner and Harris filled out the application; it is also undisputed that the application contains at least four misstatements of fact.[1]

Of particular significance here is the fact that the application contains a statement that the loss from the October 1989 burglary and vandalism was only $4,000. In truth, Harris suffered at least $40,000 in damages from that unfortunate event.

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[1]Harris claims that Joyner made several of these misstatements without his knowledge. As we conclude in Section II infra that Harris is legally responsible for all statements made by Joyner in preparing this application, this factual dispute is immaterial.

Of equal significance is the fact that the application also contains a statement that Harris's "home has a burglar alarm attached to Lincoln Parish Sheriff's Office"))a statement that was patently false. In truth, his home had no burglar alarm system whatsoever. None contend that Federal was aware of these false representations when the application was received and acted on by Federal.

Based on the application as thus completed and submitted, Federal issued a fire insurance policy covering Harris's home, effective March 15, 1990. Less than one month later, on April 10, 1990, the insured property was destroyed by fire under suspicious circumstances.

Federal investigated the fire and Harris's claim, then filed this declaratory judgment action in district court seeking a ruling that Federal was not liable on the fire insurance policy issued to Harris. Federal alleged, inter alia, that Harris had made material misstatements in his application for insurance, entitling Federal to avoid responsibility under the subject policy of insurance. Harris filed an answer and a counterclaim, seeking recovery on the policy. After procedural wrangling not relevant here, this case was tried to a jury, which was unable to reach a verdict.[2]

[2]This case was consolidated with an action by the holder of a mortgage on Harris's property against the insurance company that had issued the mortgagee a policy on that property. The consolidated case was eventually settled; the insurance company, however, also brought third-party claims in the instant case against Federal and Harris. These claims are still pending. Nonetheless, we have jurisdiction to here this appeal under 28 U.S.C. §1291, as a final judgement was entered under Federal Rule of Civil Procedure 54(b) on Harris's and Federal's claims against

Following the resulting mistrial Federal moved for and was granted a judgment as a matter or law. Harris timely appealed.

II

DISCUSSION

Under Louisiana law, an insurance company may avoid liability on a policy if it shows that statements made in the application for that policy were: 1) false, 2) material, and 3) made with the intent to deceive.[3] Federal is entitled to a judgement as a matter of law if it can show that no reasonable finder of fact could fail to conclude that the challenged statements satisfied the requisite elements.[4] Harris does not contest that his statements regarding the burglary loss and the burglar alarm were false; he only questions the sufficiency of Federal's proof that those statements were material and made with the intent to deceive.

A false statement on an insurance application is material if "knowledge of the facts would have influenced the insurer in determining whether to assume the risk or in fixing the applicable premium."[5] Harris insists that his false statements regarding the burglary loss and the burglar alarm were not material, contending that Federal failed to prove as a matter of law that it would not

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each other.

[3]E.g., Wohlman v. Paul Revere Life Ins. Co., 980 F.2d 283, 285-86 (5th Cir. 1992); Coleman v. Occidental Life Ins. Co., 418 So.2d 645, 646 (La. 1982).

[4]See, e.g., Becker v. PaineWebber, Inc., 962 F.2d 524, 526 (5th Cir. 1992); FED. R. CIV. P. 50.

[5]Wohlman, 980 F.2d at 286.

have insured Harris' house had the true facts been known. But this is not the proper test. Rather, the proper test is whether knowledge of such facts would have influenced Federal's decision to assume the risk or to set the premium at a particular amount.

As Federal explains, a large loss suggests that the property is far more vulnerable than the vulnerability that would be suggested by a small loss. According to Federal, absence of the monitored burglar alarm system suggests the same thing: Such an absence, says Federal, makes it far more likely that another burglary would take place, especially when this absence is considered in light of the magnitude of the burglary that occurred only months earlier.

Viewing these facts and inferences in the light most favorable to Harris))as we must))we are still left with the unalterable conclusion that no reasonable fact-finder could fail to determine that knowledge of the actual state of affairs would have, at a minimum, influenced Federal's setting of the premium. Accordingly, Harris's claim that his statements were not material is without merit.[6]

Next, Harris insists that Federal did not adduce sufficient

[6]Federal altered Harris insurance application by changing the distance between Harris's house and the nearest fire department from 3 miles to 5 miles))a false statement. Harris contends that this alteration estops Federal from asserting a misrepresentation defense, although he does not provide any legal support for this contention. We decline to fashion such a rule. Nonetheless, we find this alteration by Federal troubling, as the very party seeking to avoid liability based on misstatements on an insurance application has itself tainted that application. Indeed, had there been any doubt as to which party made which alteration, then judgment as a matter of law would have been inappropriate.

proof that Harris had the requisite intent to deceive. Intent to deceive may be proved either directly or from facts and circumstances surrounding the application process which indicate that the insured had knowledge of the falsity of his statements and that he knew, or that it is a reasonable assumption that he knew, of the materiality of those statements.[7] Harris does not contend that the false statements about the burglary loss and burglar alarm were insufficient to show intent to deceive. Instead, he seeks to avoid responsibility by attributing those statements to Joyner.

As the district court observed, though, Harris's argument is foreclosed by Louisiana Revised Statute §22:1162, which provides that an "insurance broker" is "deemed for all purposes to be the representative of the insured."[8] And here Joyner qualifies as an "insurance broker" under §22:1162:[9] The uncontroverted evidence shows that Harris engaged Joyner))who was an independent agent))to solicit several insurance companies to provide coverage for Harris's house. Under Louisiana law, Harris is vicariously responsible for all statements made by Joyner that show an intent to deceive. Thus, Harris cannot prevail on his argument irrespective of who actually falsified the application, him or Joyner.

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[7] E.g., id.; Coleman, 418 So.2d at 647.

[8] LA. REV. STAT. ANN. §22:1161. Although this section was repealed in 1993, Harris does not claim that this repeal affects this case.

[9] See id.; Manzella v. Paul Revere Life Ins. Co., 872 F.2d 96, 98 (5th Cir. 1989).

## III

## CONCLUSION

The insured property was destroyed by fire under suspicious circumstances less than one month after Federal issued a fire insurance policy to Harris. The application for the policy led Federal to believe mistakenly that the insured property was protected by a monitored burglar alarm system, and that the property had suffered a loss of only $4,000))instead of the actual loss of $40,000))from a recent burglary. Under these circumstances we conclude that no reasonable trier of fact could have failed to find that these misstatements were material and))whether made by Harris personally or attributed to him by law))were made with the intent to deceive. Accordingly, the judgment of the district court is

AFFIRMED.