UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8504

PENNY SUE ADAMS, Guardian for
Adam Gaylord Bettis,

Plaintiff-Appellee,

versus

JOHN HANCOCK MUTUAL LIFE
INSURANCE CO., ET AL.,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-91-CA-433-A-A)

(February 27, 1995)

Before JONES and STEWART, Circuit Judges, and DUPLANTIER*, District Judge.

PER CURIAM:**

In this suit by Plaintiff-Appellee Penny Sue Adams to recover the proceeds of a life insurance policy, Defendants-Appellants John Hancock Mutual Life Insurance Company ("John Hancock") and Armed Forces Benefit Association ("Armed

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* District Judge of the Eastern District of Louisiana, sitting by designation.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Forces")))collectively, "the insurers"))appeal the denial of their motion for judgment as a matter of law. On appeal, the insurers challenge the jury's finding that they failed to return a copy of an insured's life insurance application, which finding as a matter of law precluded the insurers' affirmative defense of misrepresentation. Concluding that there is substantial evidence to support the jury's finding, we affirm.[1]

I.

FACTS AND PROCEEDINGS

In 1988, Captain Dale G. Bettis applied for life insurance from Armed Forces. On his application, Bettis represented that he was in good health and had not had any major illnesses, injuries, or diseases. On the strength of Bettis' representations, Armed Forces extended life insurance coverage to him. Two years later, Bettis))who, it turned out, had a history of cancer, heart disease, hypertension, depression, and alcoholism))died of cancer. Penny Sue Adams, Bettis' ex-wife, sought to collect the life insurance proceeds on behalf of their

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[1] The insurers also challenge the denial of their motion for new trial. We review the denial of a motion for new trial for abuse of discretion, that is, for clear error. Eyre v. McDonough Power Equip., Inc., 755 F.2d 416, 420 (5th Cir. 1985). The insurers argue that they were entitled to a new trial because the jury made inconsistent findings, suggesting the presence of jury confusion. The jury found, in response to special interrogatories, that Bettis had misrepresented his medical history and condition, but that the insurers had not returned the application. The insurers do not claim that these findings are inconsistent. Rather, as the basis for their claim of inconsistency, the insurers rely on a handwritten notation found on the form announcing that the jury had reached a verdict. This notation reads: "We the jury have reached a verdict and find for the defendant." This notation does not constitute part of the verdict and, therefore, amounts to mere surplusage. Because the jury's formal answers to special interrogatories are consistent, there is no relevant evidence of jury confusion which would necessitate a new trial. Likewise, there is not an "absolute absence" of evidence to support the jury's verdict; therefore, there was no abuse of discretion in the magistrate judge's denial of the motion for new trial.

minor son, Adam Gaylord Bettis, who was the beneficiary under the policy. Upon reviewing Bettis' medical records, however, Armed Forces determined that he had materially misrepresented his medical condition and history; and Armed Forces elected to refund the life insurance premiums in lieu of honoring the policy.

As the beneficiary's guardian, Adams filed suit against Armed Forces and its underwriter, John Hancock, to recover the proceeds of the subject life insurance policy. The insurers raised the affirmative defense of misrepresentation based on the statements made by Bettis in his application. Under Texas law, the insurers' misrepresentation defense required proof of five elements: (1) the making of a representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; (4) the intent to deceive the part of the insured in making same; and (5) the materiality of the representation. Mayes v. Massachusetts Mut. Life Ins. Co., 608 S.W.2d 612, 616 (Tex. 1980). As a prerequisite to this defense, the insurers were required, under Texas law, to have returned the application to him within a reasonable time.[2]

Adams seized on this requirement and denied that the insurers had returned the application to Bettis. She insisted that the insurers could deny coverage on grounds of false statements made in Bettis' application only if the insurers proved that they

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[2] Johnson v. Prudential Ins. Co. of Am., 519 S.W.2d 111, 115 (Tex. 1975) (holding that statements made in application were inadmissible when insurer had not returned application to insured). This requirement derives from article 3.50 of the Texas Insurance Code, specifically § 2(3) which provides: "[N]o statement made by any person insured shall be used in any contest unless a copy of the instrument containing the statement is or has been furnished to such person or to his beneficiary."

had returned the application to Bettis. Thus, to prevail on their misrepresentation defense, it became the insurers' burden to prove the elements of misrepresentation and timely return of the application.[3]

A jury trial was held before a magistrate judge. During Adams' case-in-chief, she testified that Bettis habitually retained all of his correspondence in files kept in his home office, and that she had conducted a search of Bettis' files and had been unable to locate the application. As Adams called all of the insurers' witnesses during her case-in-chief, the insurers sought to carry their burden of proof during that phase of the trial. With respect to the issue whether the application was returned to Bettis, the insurers elicited testimony from an officer of Armed Forces describing its routine practices and procedures for returning to its insureds copies of policies or certificates of insurance with original applications attached.

At the close of Adams' case-in-chief, the insurers moved for judgment as a matter of law on the question whether the application was returned to Bettis. The magistrate judge denied the motion and submitted the issue to the jury. In response to special interrogatories, the jury found that Bettis had misrepresented his medical condition and history in his application, but they also found that the insurers had failed to

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[3] See Johnson, 519 S.W.2d at 115; McCasland v. National Lloyds Ins. Co., 553 S.W.2d 6, 8 (Tex. Civ. App.))Waco 1977) (holding that insurer failed to carry its burden of proving return of application to insured), rev'd on other grounds, 566 S.W.2d 565 (Tex. 1978) (holding that beneficiary waived error by failing to raise issue in trial court).

return his application. The insurers promptly moved for a post-verdict judgment as a matter of law or, in the alternative, a new trial. The magistrate judge denied both motions and, in accordance with the jury's findings, entered judgment in favor of Adams. On appeal, the insurers argue that the magistrate judge erred in denying their motion for judgment as a matter of law and their alternate motion for new trial.

II.

ANALYSIS

The insurers contend that they are entitled to judgment as a matter of law on the issue whether the application was returned to Bettis.[4] We review the denial of such a motion de novo, under the same standard applied by the lower court.[5] Judgment as a matter of law is appropriate "[i]f the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict."[6] Such a judgment is not appropriate if "there is substantial evidence opposed to the motion[], that is, evidence of such quality and weight that reasonable and fair-minded

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4 "Reviewing a denial of a motion for [judgment as a matter of law] made at the end of trial and reviewing the sufficiency of the evidence are one and the same thing." McCann v. Texas City Ref., Inc., 984 F.2d 667, 671 (5th Cir. 1993).

5 Crist v. Dickson Welding, Inc., 957 F.2d 1281, 1285 (5th Cir.), cert. denied, ___ U.S. ___, 113 S. Ct. 187 (1992).

6 Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).

men in the exercise of impartial judgment might reach different conclusions."[7]

As an initial matter, we must decide whether the insurers properly preserved this point of error. At the close of Adams' case-in-chief, the insurers moved for judgment as a matter of law on the issue whether the application was returned to Bettis. Following the denial of their motion, the insurers put on no additional witnesses and did nothing more than offer two documents into evidence, both without objection. These documents had no bearing on the issue whether the application was returned to Bettis. After these two documents were admitted the insurers rested, but they failed to reurge their motion for judgment as a matter of law. On submission of the issue concerning the application's return, the jury found against the insurers. Post-verdict, the insurers again moved for judgment as a matter of law, which motion was denied. The insurers' initial motion alerted Adams to the possible deficiencies in her proof, and the insurers' subsequent actions could not be understood as a waiver of the insurers' challenge. As the purposes of Rule 50(b) clearly have been served in this instance, the insurers' failure to renew their motion at the close of all the evidence does not prevent them from raising this argument on appeal.[8]

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[7] Id.

[8] We recognize that in prior cases when nonrenewal of a motion for judgment as a matter of law has been excused the district court had deferred its ruling on the motion. See, e.g., Miller v. Rowan Cos., Inc., 815 F.2d 1021, 1024-25 (5th Cir. 1987). Although the district court did not take the motion under advisement in the instant case, the case subsequently presented by the insurers was essentially no case at all. As such, the failure to renew the motion was

In support of their motion for judgment as a matter of law, the insurers rely on presumptive or inferential evidence of Armed Forces' practices and procedures for ensuring that applications are returned to insureds. During Adams' case-in-chief, John M. Willsey, who oversaw the processing of applications, testified on cross examination about Armed Forces mailing practices at the time in question.

Under Fed. R. Evid. 406, "[e]vidence of . . . the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the . . . organization on a particular occasion was in conformity with the . . . routine practice." As evidence of an organization's routine practices are highly probative,[9] Willsey's testimony constitutes substantial evidence that Bettis' application was received by Armed Forces, processed in accordance with its routine practice, placed in an envelope as part of Armed Forces' standard welcome package, and ultimately mailed to Bettis at the address on the application. Under Texas Law, evidence that a letter was properly addressed, stamped, and mailed gives rise to a rebuttable presumption that it was received by the addressee in

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insignificant. Thus, this case is unlike Purcell v. Seguin State Bank & Trust Co., 999 F.2d 950, 956-57 (5th Cir. 1993), and McCann v. Texas City Ref., Inc., 984 F.2d 667, 971-72 (5th Cir. 1993), in which we declined to excuse noncompliance with Rule 50(b) because the motion had not been taken under advisement and the movant had offered substantial evidence subsequent to the motion.

[9] Cf. Reyes v. Missouri Pac. R.R. Co., 589 F.2d 791, 794 (5th Cir. 1979).

due course.[10] "The matters of proper addressing, stamping, and mailing may be proved by circumstantial evidence, such as the customary mailing routine in connection with the sender's business."[11] Thus, Willsey's testimony created a rebuttable presumption that Bettis received from Armed Forces a welcome package which included his original application.

Adams argues that her testimony constituted substantial evidence that the application was not returned. Specifically, Adams points to her testimony that she searched Bettis' files after his death, but was unable to locate the application or any other documents that would have been included as part of the welcome package.[12] Adams contends that the absence of the application is substantial evidence that it was not returned by Armed Forces.

Standing alone, evidence that an application cannot be located by a third party two years after it would have been received is at most a scintilla or modicum of evidence that the application was not returned. As such, it would likely be insufficient to raise a jury issue on the question whether the application was returned to Bettis. But Adams' testimony of the absence of the application is not her only evidence; she also

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[10] Hot Shot Messenger Serv., Inc. v. State, 798 S.W.2d 413, 415 (Tex.App.))Austin 1990, writ denied); Jimmy Swaggart Ministries v. City of Arlington, 718 S.W.2d 83, 86 (Tex. App.))Fort Worth 1986, no writ); Gulf Ins. Co. v. Cherry, 704 S.W.2d 459. 461 (Tex. App.))Dallas 1986, writ ref'd n.r.e.).

[11] Hot Shot, 798 S.W.2d at 415; accord Jimmy Swaggart, 718 S.W.2d at 86.

[12] Adams did locate payment records for the period from April 1989 to Bettis' death (no payment records were located for the period from April 1988 through March 1989). In addition, Adams located materials related to previous coverage from Armed Forces, including a previous application for such insurance.

relies on evidence of Bettis' habit of retaining all of the correspondence he received in the mail.[13] Adams testified that Bettis kept well-organized files in his home office, and that he was a "pack rat" who "kept all of his affairs, paperwork, et cetera, in file boxes." Given the testimony that Bettis had a habit of retaining all of his correspondence in the files that Adams searched, but that Adams was nevertheless unable to locate the application in Bettis' files, a reasonable jury could conclude that the application had not been returned to Bettis. This is particularly so when, as here, the only evidence to the contrary, i.e., Armed Forces' routine practice, is even more inferential. Therefore the magistrate judge did not err in denying the insurers' motion for judgment as a matter of law.

III.

CONCLUSION

Inasmuch as there is conflicting "evidence of such quality and weight that reasonable and fair minded men in the exercise of impartial judgment might reach different conclusions"[14] whether the application was returned to Bettis, the magistrate's denial of the insurers' motion for judgment as a matter of law is **AFFIRMED**.

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[13] "Evidence of the habit of a person . . . is relevant to prove that the conduct of the person . . . on a particular occasion was in conformity with the habit." FED. R. EVID. 406; Reyes v. Missouri Pac. R.R. Co., 589 F.2d 791, 794 (5th Cir. 1979).

[14] Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969) (en banc).