IN THE SUPREME COURT OF THE STATE OF NEVADA

JOHN CRIMMINS AND CATHY CRIMMINS,

Appellants,

vs.

AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS, AND AMERICAN NATIONAL INSURANCE COMPANY,

Respondents.

No. 36292

FILED

MAR 08 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from an order granting summary judgment to the respondent insurer in an action for bad faith. Cathy Crimmins filed a claim with ANTEX in 1996 arising from surgery and chemotherapy treatments for stomach cancer. After conducting an investigation that revealed prior medical treatment and advice from other doctors that Mrs. Crimmins failed to disclose on her insurance application, ANTEX rescinded the insurance contract and refused to pay the claim. The district court ruled that Mrs. Crimmins made material misrepresentations on the application as a matter of law, and dismissed the Crimmins' remaining claims sua sponte.

1. Filing with insurance commissioner

The Crimmins first contend that, by failing to file the Confirmation of Presentation[1] with the insurance commissioner, ANTEX waived its defenses, including those contained in NRS 687B.110.[2] While the plain language of NRS 687B.120(1)[3] prevents an insurer from using an

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[1]This was the only document providing that any material omission or misrepresentation could provide grounds for rescission. Because there is no evidence in the record indicating that ANTEX filed the Confirmation of Presentation with the insurance commissioner, we must presume that the document was not filed.

[2]NRS 687B.110 provides, in pertinent part:

> All statements and descriptions in any application for an insurance policy . . . shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:
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> 1. Fraudulent; or
>
> 2. Material either to the acceptance of the risk, or to the hazard assumed by the insurer; or
>
> 3. The insurer in good faith would either not have issued the policy or contract, or would not have issued it at the same premium rate, or would not have issued a policy or contract in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss, if the true facts had been made known to the insurer as required either by the application for the policy or contract or otherwise.

[3]NRS 687B.120(1) provides in part:

> No life or health insurance policy or contract, . . . or application form where a written application is required and is to be made a part of the policy or

continued on next page . . .

unfiled and unapproved application form within the state, the statute does not impose further sanctions. We therefore do not agree that failure to comply with the provisions of NRS 687B.120 eliminates an insurer's statutory defenses.

Rather, we believe that noncompliance with NRS 687B.120 merely nullifies a form or contract, essentially making it as ineffective as if the document had never existed. Without further legislative guidance, we must construe these statutes as they are written. Thus, ANTEX retained its statutory defenses under NRS 687B.110 despite the nullity of the Confirmation of Presentation.[4]

2. Summary judgment standard

Summary judgment is appropriate only when, based upon the pleadings and discovery on file, no genuine issue of material fact exists for trial.[5] A genuine issue of material fact exists when a reasonable jury could return a verdict for the non-moving party.[6] The non-moving party must produce specific facts by competent evidence that demonstrate the

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. . . *continued*

> contract, . . . may be delivered or issued for delivery in this state, unless the form has been filed with and approved by the commissioner.

[4]The Crimmins presented no competent evidence below to refute the conclusion that ANTEX filed the application form itself with the insurance commissioner.

[5]See NRCP 56(c).

[6]See Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993).

presence of a genuine issue for trial.[7] A court must consider all evidence in a light most favorable to the non-moving party, and presume that the non-moving party's properly supported factual allegations are true.[8] Litigants are entitled to a trial on the merits if there is the slightest doubt as to the operative facts.[9] We review orders granting summary judgment de novo.[10]

3. Defenses under NRS 687B.110

An insured may not recover under a policy if he or she materially misrepresented facts on an application that affected the insurer's acceptance of the risk.[11] We have recently reaffirmed the general rule that the materiality of a misrepresentation is a factual question.[12] Further, an insured may not recover when, in good faith, the insurer would not have issued the policy or would have limited coverage had it known the true facts.[13] This court has previously reversed a summary

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[7]See Elizabeth E. v. ADT Security Systems West, 108 Nev. 889, 892, 839 P.2d 1308, 1310 (1992) (citing Michaels v. Sudek, 107 Nev. 332, 334, 810 P.2d 1212, 1213-14 (1991)).

[8]See Perez v. Las Vegas Medical Center, 107 Nev. 1, 4, 805 P.2d 589, 590 (1991).

[9]See id.

[10]See Kopicko v. Young, 114 Nev. 1333, 1336, 971 P.2d 789, 791 (1998) (citing Bulbman, Inc. v. Nevada Bell, 108 Nev. 105, 110, 825 P.2d 588, 591 (1992)).

[11]See NRS 687B.110(2).

[12]See Powers v. United Servs. Auto. Ass'n, 114 Nev. 690, 697, 962 P.2d 596, 601 (1998).

[13]See NRS 687B.110(3).

judgment order when the insured produced evidence below disputing the insurer's contention that it would not have insured the appellant had it known of his other disability coverage.[14]

In Randono v. CUNA Mutual Insurance Group,[15] we held that a misrepresentation or omission does not have to be related to the actual cause of loss to allow an insurer to rescind.[16] Here, Mrs. Crimmins' alleged misrepresentations concerning her uterine fibroids and ovarian cyst were unrelated to her stomach cancer, the actual cause of loss. However, the insured in Randono produced no evidence below that contradicted an underwriter's affidavit stating that the insurer would have issued the policy at a higher rate.[17]

Despite ANTEX's contention that it would not have insured Mrs. Crimmins had it known of these unrelated conditions, ANTEX's underwriting guidelines arguably indicate that ANTEX would have excluded coverage of any conditions arising from the fibroids or cyst, but would have issued the policy at the same cost. Evidence also suggested that ANTEX's underwriting guidelines were discretionary, thereby allowing an underwriter to waive a condition if he or she so chose.

The record contains additional instances of conflicting testimony regarding materiality and interpretation of the disputed questions on the insurance application. For example, Dr. Zena Levine

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[14]See Schneider v. Continental Assurance Co., 110 Nev. 1270, 1271, 885 P.2d 572, 573 (1994).

[15]106 Nev. 371, 375, 793 P.2d 1324, 1326-27 (1990).

[16]See id. at 375, 793 P.2d at 1326-27.

[17]See id. at 373, 793 P.2d at 1325.

seemed to state at various points of her deposition testimony that Mrs. Crimmins both did and did not have an indication of cancer. Additionally, a claims manual allegedly used by ANTEX states that, when exploring rescission, the insurer should limit the period of concern to two years prior to the effective date of coverage. Mrs. Crimmins' indication of fibroids appeared more than two years before ANTEX's rescission.

Given the conflicting evidence in the record before us, we conclude that genuine issues of material fact exist and that ANTEX failed to establish a complete defense as a matter of law under any of the provisions of NRS 687B.110. Accordingly, we find that the district court erred in granting summary judgment. We remand for trial to allow a jury to decide these factual issues.

4. Estoppel

The Crimmins also argue that ANTEX is estopped from rescinding the policy because Dr. Tilles' records imparted actual or constructive knowledge of material facts at the time of application. Whether Dr. Tilles' records put ANTEX on notice to make further inquiry into Mrs. Crimmins' medical history is a factual issue. Again, the record contains conflicting evidence regarding which of Dr. Tilles' records ANTEX received and upon which alleged application omissions ANTEX relied in claiming misrepresentation.

We are therefore unable to determine whether ANTEX is or is not estopped from rescinding the policy as a matter of law. We remand to allow a finder of fact to determine upon what information ANTEX relied in claiming misrepresentation and whether Mrs. Crimmins' medical records

put ANTEX on notice to make further inquiry into her gynecological history. Having considered the parties' contentions,[18] we

REVERSE and REMAND for trial.

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

cc: Hon. Brent T. Adams, District Judge
Law Offices of Terry A. Friedman
Leverty & Associates
Allison MacKenzie Hartman Soumbeniotis & Russell
Attorney General/Carson City
Washoe District Court Clerk

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[18]We find no fault with ANTEX's completion of Question 18 on the application after conducting a follow-up telephone interview with Mrs. Crimmins.