

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GRACE BURKERT,
Plaintiff,

v.

THE EQUITABLE LIFE ASSURANCE
SOCIETY OF THE UNITED STATES,
Defendant and
Third-Party Plaintiff,

v.

JACOB JAMISON, a minor, by and
through his natural parent and guardian
Cosima Jamison,
Third-Party Defendant.

CIVIL ACTION

NO. 99-1

DUBOIS, J.

March 20, 2001

MEMORANDUM

In this action against The Equitable Life Assurance Society of the United States (“Equitable” or “defendant”), plaintiff Grace Burkert (“plaintiff”) seeks to recover the proceeds of a life insurance policy issued by Equitable to Seth Jamison (“Jamison” or “decedent”) in which she and Jacob Jamison (“third-party defendant” and, together with plaintiff, “beneficiaries”) are named as beneficiaries. Equitable denies that insurance proceeds are owed under the policy on the ground that decedent made material misrepresentations regarding his drug

and alcohol use and treatment in the life insurance application. Equitable now moves for summary judgment. The Court, finding no genuine issues of material fact in dispute, concludes as a matter of law that decedent made material misrepresentations in bad faith in the application for insurance. Accordingly, defendant's motion for summary judgment will be granted.

I. BACKGROUND

On July 30, 1997, decedent applied to Equitable for a life insurance policy. As part of the application process, decedent completed a medical questionnaire entitled "Application Part 2" ("Application"), in which he answered questions regarding medical treatment and other health-related matters. Relevant to this case are decedent's affirmative answers to the questions asking whether he had illegally used controlled substances in the last ten years and whether he had received medical counseling or medical treatment regarding the use of alcohol or drugs. In the space provided on the Application for explaining his affirmative answers, decedent stated that, in the "late '80s–1990—occasional use of cocaine" and that he had received "inpatient treatment at Institute of Penna for 28 days [with] no problems since." Decedent signed the Application on August 8, 1997. In the space immediately above his signature, the Application provided: "The above statements and answers are true and complete to the best of my knowledge and belief. I agree that such statements and answers shall be part of the application for insurance or request for policy change or reinstatement, as the case may be. The Insurer may rely on them in acting on the application"

On August 22, 1997, decedent completed and signed a "Confidential Questionnaire" in which he informed Equitable, in response to a question, that he had used minimal quantities of

cocaine less than one time per month from 1988–1989. Continuing, in response to the question, “Have you used alcohol in combination with any drug,” decedent answered in the affirmative, explaining, “I used cocaine on approximately ten occasions while drinking over the above 2 year period.” In addition, in response to the question, “Did you ever stop using drugs and later return to using them?,” decedent answered “no.”

On September 3, 1997, decedent completed and signed an “Alcohol Use Questionnaire” in which, in response to a question asking decedent to describe his previous drinking habits and the reasons for any change, he responded, “In 1989–90 I drank daily for approx. 7–8 months, leading to my deciding to place myself into rehab.” In response to a question on the Alcohol Use Questionnaire asking plaintiff to describe any treatment or counseling he received for alcohol abuse or dependency, decedent stated, “4/90—In-patient voluntary rehab at Institute of Pa Hospital . . . 28 day program.” In response to a question on the Alcohol Use Questionnaire asking whether he had ever used alcohol in combination with controlled substances, decedent responded, “Yes—cocaine used (rarely) as set forth in Substance Questionnaire.”

In November, 1997, Equitable issued a life insurance policy to decedent providing \$1,000,000 in benefits. The policy designated Grace Burkert and Jacob Jamison as beneficiaries, with each receiving a 50% share.

Decedent died on January 10, 1998 in the Four Seasons Hotel in Toronto, Canada as a result of an overdose of heroin and cocaine. See Coroner’s Report (Exhibit H to Def.’s Mot. for Summ. J.). Because decedent died within two years of the issuance of the policy, Equitable initiated a routine claims investigation and assigned an investigator, John Maher, to investigate

the circumstances surrounding decedent's death. Maher hired Robert Young, an independent insurance investigator, to investigate the case.

In the course of his investigation, Young obtained records (the "treatment records") from Dr. Ann Spector, Ph.D.—a licensed psychologist with a marriage counseling practice who was counseling decedent and his wife, Cosima Jamison, in 1997—and Dr. Jean Forest, M.D.—a psychiatrist who treated decedent following his release from inpatient drug treatment and alcohol treatment. The treatment records revealed that decedent had abused alcohol and cocaine within five years prior to applying for life insurance and was treated for addiction to alcohol by Dr. Forest during that time, none of which was disclosed in his Application.

On October 15, 1998, Equitable provided the beneficiaries with a Notice of Rescission of decedent's life insurance policy. Equitable informed the beneficiaries in its Notice of Rescission that "we have now learned of cocaine use within 5 years, as well as counseling for same by Dr. A. Spector and counseling for alcohol and/or drug use by Dr. J. Forest [which] was not disclosed in the application."

II. PROCEDURAL HISTORY

Plaintiff filed this action on January 4, 1999 as a breach of contract action for payment of life insurance proceeds under the policy based on her claim as a one-half beneficiary of the \$1,000,000 of life insurance proceeds under the policy. On February 19, 1999, Equitable filed an Answer and Counterclaim for Rescission and a Third-Party Complaint against Jacob Jamison. On March 29, 1999, plaintiff filed an Answer to defendant's counterclaim, and third-party defendant filed an Answer and Counterclaim to defendant's Third-Party Complaint. The

counterclaim and third-party complaint seek a formal declaration that the policy is void ab initio due to decedent's allegedly material misrepresentations concerning his drug and alcohol use and treatment. On April 6, 1999, defendant filed an Answer to third-party defendant's counterclaim.

On September 13, 1999, plaintiff filed a motion for a protective order to preclude Equitable from using treatment records from Drs. Spector and Forest in this case on the ground that the records were covered by Pennsylvania's psychotherapeutic privilege; defendant filed a response on October 4, 1999. On October 18, 1999, plaintiff filed a reply in support of her motion, and on October 25, 1999, defendant filed a sur-reply in opposition to the motion; plaintiff filed a sur-reply in support of her motion on October 28, 1999. The motion for a protective order was denied by this Court by Order dated April 18, 2000, on the grounds that plaintiff did not have standing to assert decedent's psychotherapeutic privilege and that the privilege had been waived.

On October 23, 2000, defendant filed a motion for summary judgment; plaintiff filed a memorandum in opposition to the motion for summary judgment on November 27, 2000. Defendant filed its reply brief on December 5, 2000 and a supplemental reply brief on December 14, 2000. Plaintiff submitted a letter dated December 15, 2000 in lieu of a formal sur-reply.

Defendant also filed a Motion to Bar Expert Testimony of Gordon Rose on October 23, 2000. Plaintiff filed a response on November 27, 2000; defendant filed a reply on December 5, 2000. The Court considered all submissions related to the motion for summary judgment and the submissions relating to the Motion to Bar the Expert Testimony of Gordon Rose in deciding the motion for summary judgment.

III. STANDARD OF REVIEW

“[I]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law[,]” summary judgment shall be granted. Fed. R. Civ. P. 56(c); see Celotex Corp. v. Catrett, 477 U.S. 317, 322–24, 106 S. Ct. 2548, 2552–53, 91 L. Ed. 2d 265 (1986). The Supreme Court has explained that Rule 56(c) requires “the threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986). Therefore, “a motion for summary judgment must be granted unless the party opposing the motion can adduce evidence which, when considered in light of that party’s burden of proof at trial, could be the basis for a jury finding in that party’s favor.” J.E. Mamiye & Sons, Inc. v. Fidelity Bank, 813 F.2d 610, 618 (3d Cir. 1987) (citing Anderson and Celotex Corp.).

In considering a motion for summary judgment, the evidence must be considered in the light most favorable to the non-moving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159, 90 S. Ct. 1598, 1609, 26 L. Ed. 2d 142 (1970) (quoting United States v. Diebold, 369 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962)). However, the party opposing summary judgment “must do more than simply show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). Therefore, “[i]f the evidence [offered by the non-moving party] is merely colorable or is not significantly probative, summary judgment may be

granted.” Anderson, 477 U.S. at 249–50, 106 S. Ct. at 2511 (citations omitted). On the other hand, if reasonable minds can differ as to the import of the proffered evidence that speaks to an issue of material fact, summary judgment should not be granted.

IV. ANALYSIS

Based on the treatment records of Drs. Spector and Forest and other evidence of decedent’s ongoing drug and alcohol use and treatment, defendant argues (1) that the undisputed facts of record establish that decedent made material misrepresentations on his Application regarding his drug and alcohol use and treatment, and (2) had the true nature of decedent’s drug and alcohol use and treatment been known, the insurance policy would not have been issued.

In response, plaintiff first argues that Equitable cannot use either the Confidential Questionnaire or the Alcohol Use Questionnaire to contest the policy, contending that the questionnaires were neither a part of the Application nor attached to the policy. In addition, plaintiff argues that there are genuine issues of material fact in dispute—namely, (1) whether decedent’s answers to certain questions relating to drug and alcohol use on his Application were false; (2) whether decedent acted in bad faith in answering these questions; and (3) whether decedent’s answers to these questions were material.

A. Reliance on the Confidential Questionnaire and Alcohol Use Questionnaire

Plaintiff first argues that Equitable cannot rely on the Confidential Questionnaire and Alcohol Use Questionnaire (as distinguished from the Application) to contest the policy under the statute in force at the time the policy was issued. See Article 3, § 318 of the Insurance Company Law of May 17, 1921, P.L. 682, 40 Pa. Cons. Stat. Ann. § 441 (“former § 441”). In

addition, plaintiff argues that the insurance contract itself precludes the consideration of the questionnaires.

1. Admissibility of the Questionnaires Under 40 Pa. Cons. Stat. Ann. § 441

Plaintiff's first argument—that defendant may not rely on the two questionnaires to contest the policy—is grounded on a Pennsylvania statute that was in effect at the time decedent applied for the policy.¹ However, the statute was amended, effective November 4, 1997, to provide as follows:

No statement made by an insured shall be received in evidence in any controversy between the parties to, or a claimant or claimants interested in, a life insurance or health and accident insurance policy unless a copy of the document containing the statement is or has been furnished to such person or those legally acting on his behalf in the controversy.

40 Pa. Cons. Stat. Ann. § 441 (amended Nov. 4, 1997, P.L. 492, No. 51, effective immediately) (West 1999).

In Pennsylvania, it is well established that “[n]o statute shall be construed to be retroactive unless clearly and manifestly so intended by the General Assembly.” 1 Pa. Cons. Stat. Ann. § 1926 (West 1995). However, it is equally well established that legislation concerning purely procedural matters will be applied to pending litigation and cases commenced after a statute's passage. As explained by the Pennsylvania Supreme Court, “[t]he general rule in

¹ See Article 3, § 318 of the Insurance Company Law of May 17, 1921, P.L. 682, 40 Pa. Cons. Stat. Ann. § 441 (“All insurance policies . . . in which the application of the insured . . . form part of the policy or contract between the parties thereto, or have any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application as signed by the applicant . . . ; and, unless so attached and accompanying the policy, no such application . . . shall be received in evidence in any controversy between the parties to, or interested in, the policy. Nor shall such application . . . be considered a part of the policy or contract between such parties.”).

determining whether a statute will be applied retroactively is as follows: Legislation which affects rights will not be construed to be retroactive unless it is declared so in the act.”

Morabito’s Auto Sales v. Department of Transp., 552 Pa. 291, 295, 715 A.2d 384, 386 (1998) (internal quotations omitted).

This Court must decide which version of 40 Pa. Cons. Stat. Ann. § 441 applies to a case filed after the statute was amended in which an insurance policy issued prior to the amendment is in dispute. The Court concludes that the statute, as amended, does not affect any substantive rights and, thus, the amended version of the statute is applicable. A reading of the amended text of the statute makes clear that the statute concerns the admissibility of certain evidence in insurance disputes—as explained by one of the few courts to have examined the retroactivity of the new rule, “[a]lthough the line between substantive and procedural laws is not always a bright one, and can be difficult to determine, here it is clear that 40 P.S. § 441 merely specifies the procedures whereby documents are accepted into evidence.” Prousi v. UNUM Life Ins. Co. of America, 77 F. Supp. 2d 665, 669 (E.D. Pa. 1999), aff’d, ____ F.3d ____ (3d Cir. 2000). The Prousi court went on to explain that “the statute does not impose new legal burdens or affect [the insured’s] substantive rights.” Id. at 669. In its unpublished affirmance of the district court’s decision,² the Third Circuit wrote that “[t]he District Court correctly concluded that the statute at issue here is procedural in nature” Prousi v. UNUM Life Ins. Co. of America, No. 00-1069, at 4 (3d Cir. Dec. 12, 2000) (unreported).

² The Court notes that, under Third Circuit Internal Operating Procedures §§ 5.1, 5.3, 5.4, 5.6 and 5.8, this unreported memorandum opinion was not circulated to the non-panel active judges and has no precedential value. Nevertheless, this Court finds it instructive.

This Court concludes that the amended version of 40 Pa. Cons. Stat. Ann. § 441 governs this case. The amendment requires only that copies of statements of an insured be provided to plaintiff for them to be admissible in evidence. It is undisputed that copies of the two questionnaires were provided to plaintiff. Accordingly, because Equitable complied with 40 Pa. Cons. Stat. Ann. § 441, as amended, the questionnaires are admissible in evidence under the statute.

2. *Consideration of the Questionnaires Under the Insurance Contract*

Plaintiff next argues that defendant is precluded from relying on the questionnaires by the terms of the insurance contract itself. The contract provision on which plaintiff relies reads, in pertinent part, as follows: “This policy, and the attached copy of the initial application and all subsequent applications to change this policy, and all additional Policy Information sections added to this policy, make up the entire contract.” Insurance Policy at Page 16 (Exhibit O to Pl.’s Mem. in Opp’n to Def. Equitable’s Mot. for Summ. J.).

In response, defendant points to language from the insurance policy that permits reliance on representations contained in the initial application to contest the policy as follows:

When the Policy is Incontestable. We have the right to contest the validity of this policy based on material misstatements made in the initial application for this policy. . . . However, we will not contest the validity of the policy after it has been in effect during the lifetime of the insured person for two years from the date of issue shown in the Policy Information section. . . .

No statement shall be used to contest a claim unless contained in an application.

All statements made in an application are representations and not warranties.

Id. at 17 (“Contestability Clause”).

Defendant contends that the use of the phrase “an application” in the latter two sentences of the Contestability Clause permits it to rely on the questionnaires, arguing that each of them contained language suggesting that they constituted part of the insurance application.³ Defendant also claims that there is no dispute over whether the questionnaires were attached to the policy. Plaintiff disagrees, claiming that the questionnaires are not part of the Application and were not attached to the policy. In support of her position, plaintiff contends that the copy of the policy provided to her during discovery in this case did not have copies of the questionnaires attached. See Insurance Policy (Exhibit O to Pl.’s Mem. in Opp’n to Def. Equitable’s Mot. for Summ. J.).

The Court concludes that the parties have raised genuine issues of material fact as to whether the questionnaires were part of decedent’s insurance application and/or attached to the policy. Accordingly, defendant may not rely on the questionnaires in support of its motion for summary judgment. This ruling does not prevent plaintiff from relying on the questionnaires in opposing the motion for summary judgment, but plaintiff has not done so and the Court finds nothing in the questionnaires which is of assistance to plaintiff with respect to the issues raised by the motion. The Court now turns to decedent’s representations regarding drug and alcohol use in the Application.

³ Specifically, the Confidential Questionnaire contained the following representation: “INSTRUCTIONS: Fully complete this Questionnaire and forward it (in the envelope provided) to the Regional Medical Director. This information will be treated confidentially; it will be seen only by the underwriters who evaluate your application.” Confidential Questionnaire (Exhibit C to Def.’s Mot. for Summ. J.). In addition, the Alcohol Use Questionnaire referred to decedent’s application/policy number. See Exhibit D to Def.’s Mot. for Summ. J.

B. Questions Regarding Drug Use in Decedent's Insurance Application

Under Pennsylvania law, a life insurance policy is void ab initio where the applicant's representations are (1) false; (2) made fraudulently or otherwise made in bad faith; and (3) material to the risk assumed. Matinchek v. John Alden Life Ins. Co., 93 F.3d 96, 102 (3d Cir. 1996) (citing New York Life Ins. Co. v. Johnson, 923 F.2d 279, 281 (3d Cir. 1991); Shafer v. John Hancock Mut. Life Ins. Co., 410 Pa. 394, 189 A.2d 234, 236 (1963)).

1. False or Ambiguous Representations

Defendant asserts that decedent made false representations on his Application regarding his current and regular use of cocaine, treatment with an addiction specialist, and treatment and counseling for alcohol and drug use, including the withholding of the identity of physicians and health care providers who treated decedent for alcohol and drug use.

As discussed above, during the course of the investigation following decedent's death, Equitable discovered that decedent had undergone a course of treatment with two health care providers who had not been identified in his Application—Dr. Ann Spector and Dr. Jean Forest. Dr. Ann Spector was decedent's psychologist from May 14, 1997 to October 1, 1997. Dep. of Ann Rosen Spector at 17–18 (Exhibit I to Def.'s Mot. for Summ. J.). Dr. Spector individually counseled decedent on 17 occasions, 14 of which were prior to August 8, 1997, the date on which decedent signed the Application. At her deposition, Dr. Spector disclosed that decedent informed her that he was using cocaine more than six times per year.⁴ In addition, she testified

⁴ At the deposition of Dr. Spector, she testified regarding the meaning of her treatment note on decedent, dated June 27, 1997, as follows:

- Q. Just a few questions about that last [treatment] note. When it says, "I equals mushrooms," do you know what he was referring to with "mushrooms"?
- A. Uh-huh.

that decedent regularly discussed his cocaine and alcohol use with her—Dr. Spector’s recollection was that they talked about drug use and Dr. Spector’s recommendation that decedent get drug counseling “almost every week.” Id. at 49. See also Rothman Institute Consultation Report (dated Apr. 4, 1995) (Exhibit K to Def.’s Mot. for Summ. J.) (noting Dr. Rothman’s view that decedent was “less than an ideal candidate for total hip replacement. I have suggested weight reduction, abstinence from narcotics . . .”).

In addition, decedent was under the care of Dr. Jean Forest, an addiction specialist, from January 27, 1992 to January 23, 1995. See Dep. of Jean Forest, M.D. at 15, 21 (Exhibit N to Def.’s Mot. for Summ. J.). After decedent’s initial visit on January 27, 1992, Dr. Forest treated decedent individually on a weekly basis through April 1992 with approximately monthly visits for the rest of 1992; he then started in group sessions in the fall of 1992 through July 1994. See Summary of Records on Seth Jamison (as part of Dr. Forest’s records on decedent) (Exhibit M to Def.’s Mot. for Summ. J.). The counseling concerned decedent’s problems with “abstinence

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- Q. What was he referring to?
A. Mushrooms that you eat in Jamaica that are natural psilocybin[].
Q. It says, “use of cocaine greater than six times a year.” Was he referring to the present tense?
A. Yes, he was.
Q. He was telling you that he had been using cocaine more than six times a year?
A. Correct.
Q. And that was as of June of 1997?
A. Correct.
. . .
Q. He said, “Whatever coke is there will get done no matter how much”?
A. Correct.
Q. And he was talking about the present tense?
A. Correct.

Dep. of Ann Rosen Spector at 41–42 (July 24, 2000) (Exhibit I to Def.’s Mot. for Summ. J.).

from alcohol, cocaine, food and smoking.” Id. In addition to regular counseling, at decedent’s request, Dr. Forest prescribed Antabuse, a drug that causes illness if a person drinks when taking the drug, on May 11, 1992. Dep. of Jean Forest, M.D. at 34 (Exhibit N to Def.’s Mot. for Summ. J.). Subsequently, on December 16, 1994, she prescribed 20 milligrams of Prozac for 30 days. Id. at 43. On January 6, 1995, the Prozac prescription was increased to 40 milligrams per day. Id. at 44.⁵ Finally, at Dr. Forest’s last session with decedent, on January 23, 1995, she increased decedent’s Prozac prescription again, this time to 40 milligrams in the morning and 20 milligrams at noon. Id. at 45.

The treatment notes and deposition testimony of Drs. Spector and Forest disclose a pattern of drug abuse and treatment, including regular use of cocaine and periods of drinking. Despite this, it is plaintiff’s position that decedent’s answer to question six of the Application was not false; plaintiff argues that decedent gave a truthful answer when he explained his drug and alcohol use and treatment as follows: “late 80s–1990—occasional use of cocaine—in patient treatment at Institute of Penna for 28 days no problems since.”

Arguing that this representation is true as to decedent’s drug use in the late 1980s to 1990 and that, in decedent’s opinion, he was not having any “problems” with drug or alcohol use since that time, plaintiff contends that decedent’s representations in the initial application were not false. The Court disagrees. Question 6(a) of the Application asks whether the proposed insured has used narcotics and other drugs within the last ten years—not whether the proposed insured’s alcohol or drug use is, or has been, a problem. Question 6(b) asks whether the proposed insured

⁵ The deposition testimony indicates that this occurred on 4/6/95, while Dr. Forest’s treatment notes indicate that is occurred on 1/6/95. Compare Exhibit M to Def.’s Mot. for Summ. J. with Dep. of Jean Forest, M.D. at 44 (Exhibit N to Def.’s Mot. for Summ. J.).

has received medical counseling or medical treatment regarding the use of alcohol or drugs. Although decedent's partial answers were perhaps truthful with respect to decedent's prior drug and alcohol use and treatment, his answers were not "true and complete" as required by the Application.⁶ It is clear from the evidence that decedent answered question six falsely in at least two respects: (1) there is substantial evidence that decedent failed to disclose his continued use of illegal controlled substances beyond 1990; and (2) decedent failed to disclose significant addiction treatment by Dr. Forest, including prescriptions for Antabuse and Prozac.

As a general rule, failures to disclose relevant information on an insurance application may constitute a false representation. See Matinchek v. John Alden Life Insurance Co., 93 F.3d 96, 98–99, 102 (3d Cir. 1996) (suggesting, in dicta, that insured's failure to disclose the true nature of his medical condition and course of treatment constituted material misrepresentations); Van Riper v. The Equitable Life Assurance Soc'y of the U.S., 561 F. Supp. 26 (E.D. Pa. 1982) (granting summary judgment to defendant where insured's false or incomplete answers were found to be material misrepresentations as a matter of law); Piccinini v. Teachers Protective Mut. Life Ins. Co., 316 Pa. Super. 519, 463 A.2d 1017 (Pa. Super. Ct. 1983) (finding failure to disclose medical treatment material).

In Matinchek, the insured failed to disclose (1) that he was suffering from a diabetic condition; (2) that he had seen a doctor other than his personal physician; and (3) that he was not taking any medication when in fact, he "was taking (or supposed to have been taking) Diabeta."

⁶ As noted supra Part I, the Application stated: "The above statements and answers are true and complete to the best of my knowledge and belief. I agree that such statements and answers shall be part of the application for insurance or request for policy change or reinstatement, as the case may be. The Insurer may rely on them in acting on the application"

Matinчек, 93 F.3d at 98. The Matinчек court concluded that, “[f]rom the blatant nature of [the] misstatements, it may be inferred that Matinчек knew that his statements were false at the time he completed the enrollment form.” Id. at 102. As in Matinчек, decedent’s misrepresentations in this case were blatant—as he revealed to Dr. Spector, he was using cocaine at least six times per year when he applied for the policy. He also failed to disclose almost two full years of medical treatment by Dr. Forest.

In addition to plaintiff’s contention that decedent’s answers were not false, plaintiff avers that decedent’s answers were, at worst, ambiguous, which triggered a duty on the part of the insurer to investigate further before undertaking the risk.⁷ As a general rule, insurers have a duty to investigate potential ambiguity in insurance applications. See, e.g., Bujak v. Old Line Life Ins. Co., 1998 U.S. Dist. LEXIS 16831 (E.D. Pa. Apr. 14, 1998), at *4–5 (observing that, under Pennsylvania law, when an insurer issues a policy based on an ambiguous, unresponsive or incomplete answer, the insurer waives the right to assert the falseness or materiality of the question and answer). However, there is no duty to investigate consistent, or unambiguous, statements. See, e.g., Shafer v. John Hancock Mut. Life Ins. Co., 410 Pa. 394, 189 A.2d 234

⁷ Plaintiff does not rely on the deposition testimony of her expert, Gordon K. Rose (“Mr. Rose”), in response to the motion for summary judgment. In a motion currently pending before this Court, defendant seeks to bar Mr. Rose’s expert testimony.

Mr. Rose’s deposition testimony concerns three main topics: (1) whether the information provided by decedent on the questionnaires and Application was inaccurate and/or ambiguous; (2) Mr. Rose’s opinion that decedent’s answers regarding his drug use should have been disregarded in evaluating his insurance application as most recreational drug users do not believe they have a problem; and (3) whether insurance industry standards required further investigation of decedent’s drug or alcohol use.

The Court has reviewed the Motion to Bar and related submissions in connection with the motion for summary judgment and concludes that Mr. Rose’s testimony on these topics does not raise any issues of material fact sufficient to defeat the motion for summary judgment.

(1963) (finding no duty to investigate statements made under Pennsylvania law when the representations made by insured were clear); Park v. The Equitable Life Assurance Soc’y of the U.S., 1992 WL 372332, at *3 (E.D. Pa. Dec. 8, 2000) (holding that, under New Jersey law, “if information uncovered by the insurance company is consistent with the prospective insured’s statements in the application, no duty of further investigation arises”) (citing Gallagher v. New England Mut. Life Ins. Co., 19 N.J. 14, 114 A.2d 857, 862 (N.J. 1955)).

Plaintiff’s expert, Gordon K. Rose (“Mr. Rose”) testified in his deposition that, in his opinion, decedent’s answers were ambiguous and that a reasonable underwriter should have more thoroughly investigated decedent’s affirmative answers with respect to his drug and alcohol use and treatment. The Court disagrees. With respect to the first part of the opinion, the Court concludes that decedent’s answers were consistent and unambiguous. Additionally, the test results from decedent’s physical examination did not belie the representations made in his Application. See Paramedical Report of the Equitable Life Assurance Soc’y of the U.S. (Exhibit C to Pl.’s Mem. in Opp’n to Def. Equitable’s Mot. for Summ. J.) (indicating that decedent tested negative for cocaine, positive for nicotine). Cf. Park, 1992 WL 372332, at *3–4 (discussing duty of investigation where insured’s test results were positive for nicotine use but insured had indicated on his application that he was a non-smoker). In the absence of ambiguity or inconsistent answers in an application, notwithstanding Mr. Rose’s opinion to the contrary, Pennsylvania law does not impose a duty on insurers to investigate. See Shafer, 410 Pa. 394, 189 A.2d 234.⁸

⁸ Mr. Rose also testified at his deposition that decedent’s answers regarding his drug and alcohol use should have been disregarded since, in his opinion, most drug and alcohol users do not believe they have a problem. Again, his opinion is contrary to Pennsylvania law, which

2. *Bad Faith*

The second step of the inquiry as to whether an insurance policy is void ab initio concerns whether the allegedly false statements were made fraudulently or otherwise in bad faith. “Courts applying Pennsylvania law to [the issue of misrepresentations regarding alcohol use] have uniformly held that misstatements regarding alcohol abuse are deemed to be made in bad faith as a matter of law.” Wilson v. Metropolitan Ins. and Annuity Co., 1995 WL 11983, at *3 (E.D. Pa. Jan. 4, 1995) (citing Van Riper v. The Equitable Life Assurance Soc’y of the U.S., 561 F. Supp. 26 (E.D. Pa. 1982)). Although it appears that no court applying Pennsylvania law has squarely addressed the issue of misrepresentations regarding drug use, the Court concludes that misstatements regarding drug use should also be deemed to be made in bad faith as a matter of law. See generally Wesley v. Union Nat’l Life, 919 F. Supp. 232 (S.D. Miss. 1995) (concluding that misrepresentations regarding cocaine are material as a matter of law); 6 Couch on Insurance § 88:20 (3d ed. & Supp. 2000) (discussing the materiality of misrepresentations regarding drugs and narcotics). Furthermore, as explained by the Third Circuit, in cases involving representations to an insurer, “[f]raud is presumed . . . from knowledge of the falsity.” Coolspring Stone Supply, Inc. v. American States Life Ins. Co., 10 F.3d 144, 148 (3d Cir. 1993).

In light of substantial evidence that decedent regularly used cocaine and alcohol, the Court concludes that decedent’s representation regarding his use of cocaine in 1988–90, with “no problems since,” was made fraudulently and in bad faith. In addition, the Court concludes that decedent’s representations regarding his history of medical counseling and treatment for drug and

expressly provides that insurers have a right to rely on representations made by a proposed insured. See Shafer, 410 Pa. at 400, 189 A.2d at 237 (writing that the insurance company “had every right to rely” on statements made by the insured regarding his prior medical history).

alcohol treatment were made in bad faith as a matter of law. As explained by the Pennsylvania Superior Court:

where it is established by uncontradicted documentary evidence that the insured has . . . undergone medical or surgical treatment so recently, or of such a serious nature, that a person of ordinary intelligence could not have forgotten these incidents in answering a direct and pointed question in an application for insurance, bad faith may be inferred as a matter of law if the insured denies in his answer that any physician has been consulted, or any medical or surgical treatment has been received

Grimes v. Prudential Ins. Co. of America, 401 Pa. Super. 245, 249, 585 A.2d 29, 31 (Pa. Super. Ct. 1991) (quoting Freedman v. Mut. Life Ins. Co. of New York, 342 Pa. 404, 409, 21 A.2d 81, 84 (1941)).

In this case, it is uncontested that decedent underwent a course of treatment for a period of two years with an addiction specialist, during which he was prescribed both Antabuse and Prozac. A person of ordinary intelligence could not have forgotten a course of treatment like decedent's, particularly when asked a direct and pointed question about his or her history of treatment for drug or alcohol abuse. The Court thus concludes that decedent's representations regarding his treatment for drug and alcohol abuse were made in bad faith as a matter of law.

3. *Materiality of Decedent's Misrepresentations*

"A misrepresented fact is considered material if the insurer would have refused to insure the risk or would have demanded a higher premium had the fact been disclosed." Wilson v. Metropolitan Ins. and Annuity Co., 1995 WL 11983, at *3 (E.D. Pa. Jan. 4, 1995) (citing New York Life Ins. Co. v. Johnson, 923 F.2d 279 (3d Cir. 1991); A.G. Allebach, Inc. v. Hurley, 373 Pa. Super. 41 (Pa. Super. Ct. 1988)). Courts applying Pennsylvania law have repeatedly held that

false answers relating to the insured's treatment for alcoholism and alcohol use are material as a matter of law. See, e.g., Hews v. The Equitable Life Assurance Soc'y of the U.S., 143 F. 850 (3d Cir. 1906); Wilson, 1995 WL 11983 (alcohol dependency); Van Riper v. The Equitable Life Assurance Soc'y of the U.S., 561 F. Supp. 26, 31 (E.D. Pa. 1982) (same); see also New York Life Ins. Co., 923 F.2d 279 (smoking).

Knowledge of the true nature of decedent's drug and alcohol use would have caused Equitable to decline the risk or require higher premiums. See Aff. of Paul Howman (Exhibit A to Def.'s Mot. for Summ. J.) (stating that no policy would have been issued to decedent had an accurate history of his drug use, counseling and treatment been disclosed); Dep. of Diane Scherber at 148–52 (Exhibit O to Def.'s Mot. for Summ. J.) (testifying that, in her capacity as an insurance underwriter, she would have declined decedent's file had she learned of decedent's drug use as disclosed to Dr. Spector); Dep. of Robert Allan Coates, M.D. at 47–50 (Exhibit P to Def.'s Mot. for Summ. J.) (testifying that decedent's file would have been declined had the insurer known about decedent's addiction treatment in from 1995–97). Plaintiff's own expert, Gordon K. Rose, also admitted that it would have been a "correct" decision to decline to issue a policy to decedent had it been disclosed that he was currently using cocaine more than six times per year. See Dep. of Gordon K. Rose at 92–93 (Exhibit Q to Def.'s Mot. for Summ. J.).

Lastly, decedent's misrepresentations about his drug and alcohol treatment were material as a matter of law. See Piccinini v. Teachers Protective Mut. Life Ins. Co., 316 Pa. Super. 519, 529, 463 A.2d 1017, 1024 (Pa. Super. Ct. 1983) (acknowledging that "statements relating to medical treatment are material to the risk incurred by an insurer"); Grimes v. Prudential Ins. Co. of America, 401 Pa. Super. 245, 250, 585 A.2d 29, 32 (Pa. Super. Ct. 1991) (same).

V. CONCLUSION

For the foregoing reasons, the Court concludes that Equitable has established that decedent's representations regarding his drug and alcohol use and treatment were (1) false, (2) made fraudulently or in bad faith, and (3) material as a matter of law. Accordingly, the Court concludes that the insurance policy is void ab initio and that defendant is entitled to summary judgment. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

GRACE BURKERT, Plaintiff,	:	CIVIL ACTION
	:	
v.	:	
	:	
THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,	:	
Defendant and Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
JACOB JAMISON, a minor, by and through his natural parent and guardian Cosima Jamison,	:	
Third-Party Defendant.	:	NO. 99-1

ORDER

AND NOW, this 20th day of March, 2001, upon consideration of Defendant, The Equitable Life Assurance Society of the United States' Motion for Summary Judgment (Document No. 31, filed October 23, 2000), Plaintiff's Memorandum in Opposition to Defendant Equitable's Motion for Summary Judgment (Document No. 34, filed November 27, 2000), Reply Brief in Support of Motion for Summary Judgment of Defendant Equitable Life Assurance Society of the United States (Document No. 37, filed December 5, 2000), Supplemental Reply Brief in Support of Motion for Summary Judgment of Defendant Equitable Life Assurance Society of the United States (Document No. 39, filed December 14, 2000), and plaintiff's letter dated December 15, 2000; and the Motion of Defendant/Third-Party Plaintiff to Bar Expert

Testimony of Gordon K. Rose (Document No. 30, filed October 23, 2000), Plaintiff's Answer to Motion of Equitable to Bar Expert Testimony of Gordon K. Rose (Document No. 33, filed November 27, 2000), and Defendant/Third-Party Plaintiff's Answer to Defendant's Motion to Bar Expert Testimony of Gordon K. Rose (Document No. 38, filed December 5, 2000); **IT IS ORDERED** as follows:

1. Defendant, The Equitable Life Assurance Society of the United States' Motion for Summary Judgment (Document No. 31) is **GRANTED** and judgment is **ENTERED** in **FAVOR** of Defendant and Third-Party Plaintiff, The Equitable Life Assurance Society of the United States, and **AGAINST** Plaintiff, Grace Burkert, and Third-Party Defendant, Jacob Jamison; and
2. The Motion of Defendant/Third-Party Plaintiff to Bar Expert Testimony of Gordon K. Rose (Document No. 30) is **DENIED AS MOOT**.

BY THE COURT:

JAN E. DUBOIS, J.