

benefit of \$100,000. On April 26, 1999, Decedent submitted a conversion application ("Change Application") to increase the face amount of the policy to \$300,000. Defendant approved the change application, which became effective on May 28, 1999. Following an investigation which was triggered by Decedent's death within two years of the policy conversion, Defendant paid the original \$100,000 policy limit, but informed Plaintiffs that it was voiding the policy conversion because the Decedent had failed to disclose that she had Lupus, and therefore had made a material misrepresentation in the Change Application. Defendant offered a refund of all the premiums paid on the policy conversion.

Plaintiffs disputed that Decedent had made a material misrepresentation, and filed the instant action seeking payment on the conversion policy. In addition to the breach of insurance contract claim, Plaintiffs bring claims for negligence and bad faith. Defendant brings a counterclaim seeking a declaration that the policy is void ab initio on the basis of the alleged material misrepresentation. In the instant motion, Defendant seeks summary judgment on all claims and counterclaims.

II. Legal Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled

to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is "material" if it might affect the outcome of the case under governing law. Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial Celotex burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325. After the moving party has met its initial burden, "the adverse party's response, by affidavits or otherwise as provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). That is, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Under Rule 56, the Court must view the evidence presented on the

motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255. “[I]f the opponent [of summary judgment] has exceeded the ‘mere scintilla’ [of evidence] threshold and has offered a genuine issue of material fact, then the court cannot credit the movant’s version of events against the opponent, even if the quantity of the movant’s evidence far outweighs that of its opponent. Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

III. Discussion

A. Breach of Contract (Count I)/Counterclaim

The primary dispute in this case is whether the Change Application was void. In order to establish that a policy is void under Pennsylvania law, the Defendant has the burden to demonstrate that: (1) the representation made by the insured was false; (2) the insured knew the representation she made was false when made or the insured made the representation in bad faith; and (3) the representation was material to the risk being insured. Coolspring Stone Supply, Inc. v. American States Life Ins. Co., 10 F.3d 144, 148 (3d Cir. 1993) (citing Shafer v. John Hancock Mut. Life Ins. Co., 189 A.2d 234, 236 (Pa. 1963)). If there are no genuine issues of material fact and the policy is void, then Defendant is entitled to summary judgment on both the breach of contract claim and the counterclaim.

Defendant claims that the contract is void because Decedent made a material misrepresentation with respect to her Lupus condition.² Specifically, the Change Application asked the following question:

11. Has any person EVER received treatment, attention, or advice from any physician, practitioner or health facility for, or been told by any physician, practitioner or health facility that such person had: . . .

(n) Any other impairment of health within the past 5 years?

(Def.'s Ex. E "Change Application" (emphasis added)).

Plaintiffs first argue that none of the questions in the Change Application relate to Lupus. While it is true that none of the questions ask specifically about Lupus, question 11(n) is clearly broad enough to cover Lupus and any other such health impairment. Plaintiffs also contend that the Decedent disclosed in the Change Application an October 15, 1998 appointment with Dr. Jacobs at which Lupus was mentioned, and so she in effect disclosed that she had Lupus. However, it is undisputed that Decedent answered "no" to question 11(n). Based upon Decedent's written

²The parties strongly dispute whether Decedent ever actually had Lupus. In referring to the Decedent's "Lupus condition," the Court makes no determination as to whether Decedent actually suffered from the condition. As will be discussed below, the Court notes that an actual medical determination as to whether Decedent actually had Lupus is irrelevant to the proof of either Plaintiffs' or Defendant's case.

responses in the Change Application, there is no genuine issue of material fact that Decedent did not disclose her Lupus condition.³

Nor does Plaintiffs' contention that Decedent orally disclosed the Lupus condition to Defendant's agent establish a genuine issue of material fact as to whether Decedent informed Defendant of her Lupus condition.⁴ Regardless of whatever verbal disclosures were made, Decedent was bound by the written representations made in the change application. See Monarch Life Ins. Co. v. Donahue, 708 F. Supp. 674, 676 (E.D. Pa. 1989). The change application contained the statement that: "I have read the answers to Items 1 through 18 before signing. They have been correctly written, as given by me, and are true to the best of my knowledge and belief." (Change Application at Bates 1791636.) The application further provided that:

It is agreed that:

C. Any conversion or change is based on this application and the application(s) for the original policy(ies).

D. Only the Company's President, Secretary or a Vice-President may: (1) make or change any

³Furthermore, Plaintiffs cannot argue both that the October 15, 1998 appointment constituted a disclosure of Lupus while also contending that Dr. Jacobs did not provide any diagnosis or treatment at the same appointment.

⁴Plaintiffs contend that Decedent told Debra Stellfox, Defendant's agent, that she believed she had Lupus, but that the Agent told her the Defendant already knew about it and that she did not need to include it in the application. (Pls.' Ex. I "Affidavit of Ivan & Robert Justofin".) Agent Stellfox denies that such an exchange ever took place. (Def.'s Ex. G "Wertz Dep.".)

contract of insurance; or (2) make any binding promises about insurance benefits; or (3) change or waive any of the terms of the application, receipt or policy.

E. No information about any person to be insured will be considered to have been given to the Company unless it is stated in this application or the application(s) for the original policy(ies).

(Id. at Bates 1791635.) Thus, by the terms of the Change Application, Decedent's oral statements cannot be considered as evidence she disclosed her Lupus condition in her Change Application. There is no genuine issue of material fact that Decedent did not disclose the Lupus condition.

Having established that there is no genuine issue of material fact that Decedent did not include any mention of Lupus or Lupus treatment in her change application, the Court must next consider whether there is a genuine issue of material fact as to whether Decedent made a material misrepresentation in her application. Plaintiffs contend that there is a genuine issue of material fact with respect to whether Decedent's failure to disclose her Lupus or Lupus treatment constitutes a misrepresentation. Plaintiffs argue that this failure cannot be a misrepresentation because Decedent did not actually have the disease. In support of this proposition, Plaintiffs provide statements by Decedent's physician, Dr. Jacobs, as well as an expert who never actually examined Decedent, who both indicate that, from review of the medical records, there was insufficient evidence to support a diagnosis of Lupus. (Pls.' Ex.

C.) Defendant argues that these post-mortem medical opinions are irrelevant. Defendant instead posits that because Plaintiff believed she had the disease, and because Plaintiff received "advice" and "treatment" from her physician, her answer of "no" to question 11(n) was a misrepresentation.

Both parties misconstrue, to a certain degree, the primary issue in determining whether there was a false representation. In this case, Decedent, by answering "no" to Question 11(n), represented that she did not "ever receive[] treatment, attention, or advice from any physician, practitioner or health facility for, or [was not] told by any physician, practitioner or health facility that [she] had . . . [a]ny other impairment of health [Lupus] within the past 5 years." Therefore, the key inquiry for determining whether Decedent made a misrepresentation is whether she received any treatment, attention or advice from a physician, practitioner or health facility for Lupus, or was ever diagnosed or otherwise told that she had Lupus, within the five years prior to her Change Application. If so, then she made a misrepresentation on her application. The issue is not whether she actually had the disease⁵, or whether doctors may have misdiagnosed or mistreated Decedent, or whether Decedent believed that she actually suffered from the disease.

⁵Decedent did not, for example, certify that she did not have the disease.

Based on the actual representation made in the application, and examining the evidence presented and construing it in the light most favorable to the Plaintiffs, the Court concludes that there is a genuine issue of material fact as to whether the Decedent made a misrepresentation. Specifically, there is a genuine issue of material fact as to whether Decedent was diagnosed or otherwise told by a health professional that she had Lupus, or whether she received treatment, attention, or advice from a health professional for Lupus, during the five-year time period prior to the date of the Change Application. Defendant points to several references in Decedent's medical history that indicate a diagnosis for Lupus, (Def.'s Ex. J-A), as well as to a reference to the drug Prednisone which Plaintiff was taking to treat Lupus. (Id.) This evidence tends to suggest that Decedent was diagnosed and/or being treated or given attention by a health professional for Lupus. However, none of these statements explicitly indicate whether the doctor making the notes actually diagnosed the Decedent or told her that she had the disease. Although Plaintiffs' expert medical reports are not relevant with respect to whether or not there was a medical basis for a diagnosis of Lupus (Pls.' Ex. A "Dr. Jacobs Letter, June 3, 2002⁶; Pls.' Ex. B "Dr. Valente's Letter", June 4, 2002⁷;

⁶Dr. Jacobs provides an affidavit certifying that he authored the letters dated October 18, 2001, and June 3, 2002, and that "[t]he facts in those reports are known by me to be true, of my own knowledge. I am competent to testify to such facts and would so testify if I appeared in court as a witness as the trial of the

Pls.' Ex. C "Dr. Joan Marie Von Feldt Letter"), Plaintiffs do present evidence suggesting that the Decedent was never actually diagnosed or treated by a doctor for Lupus. Specifically, Dr. Jacobs clarifies that he did not actually diagnose Decedent. In his June 3 letter, Dr. Jacobs says that, during her initial interview on October 15, 1998, Decedent claimed that "she considered herself to have systemic lupus erthematosus," which information the doctor entered into her past medical history on her chart. (Jacobs Letter June 3, 2002.) Dr. Jacobs indicates that upon her death, he "inadvertently concluded that a secondary contributing factor to her death might have been previously stated SLE." (Id.) Dr. Jacobs further indicates that "[t]he diagnosis of SLE was never clinically made by a physician . . ." (Id.) Dr. Jacobs notes that he never performed any laboratory or other tests to confirm or eliminate a diagnosis of Lupus. (Pls.' Ex. B "Jacobs' Letter Oct. 18, 2001.) Plaintiffs' expert, Dr. Joan Marie Von Feldt, upon examining the medical records, concludes that there was never a diagnosis of Lupus by a physician, and that the Decedent must have diagnosed herself. (Pls.' Ex. C (" . . . it appears the diagnosis of Lupus was not made by a physician, but by

matter." (Pls.' Surreply Ex. A.)

⁷Dr. Valente provides an affidavit certifying that he authored the letter dated June 4, 2002, and that "[t]he facts in that report are known by me to be true, of my own knowledge. I am competent to testify to such facts and would so testify if I appeared in court as a witness at the trial of the matter." (Pls.' Surreply Ex. B.)

the patient.”)) And while it is true that Decedent was evidently taking Prednisone, according to Dr. Jacobs’ treatment notes, Dr. Jacobs never indicates that he or another health professional actually prescribed the medication. In fact, Dr. Von Feldt opines from her review of the medical records that, “. . . it appears that [the decedent] was self-medicating with prednisone for an arthritic condition of her hands.” (Id.) Viewing this evidence in the light most favorable to Plaintiffs, the Court concludes that there is a genuine issue of material fact as to whether Decedent made a misrepresentation on her application.

Furthermore, there is a genuine issue of material fact as to whether the misrepresentation was intentional. The material misstatements made in the application must be made knowingly or in bad faith. Innocent mistakes, even when involving material misrepresentations, are insufficient to void the contract. The American Franklin Life Ins. Co. v. Galati, 776 F. Supp. 1054, 1060 (E.D. Pa. 1991). In determining that the insured made a misrepresentation intentionally or in bad faith, it is not necessary that the insured intended to deceive the insurance company for the purpose of obtaining insurance. Rather, it is sufficient that the insured knew that the statement or representation she made was false. See Evans v. Penn Mutual Life Ins. Co. of Phila., 186 A. 133, 138 (1936) (“It is sufficient to show that [the representations] were false in fact and that [the]

insured knew they were false when [s]he made them since an answer known by [the] insured to be false when made is presumptively fraudulent." (citations omitted).

Generally, it is for a jury to decide whether the representations made by the insured in the application were false and whether the insured knew that the representations were false, because such issues of knowledge and intent must often be resolved on the basis of inferences drawn from the conduct of the parties. Riehl v. Travelers Ins. Co., 772 F.2d 19, 24 (3d Cir. 1985). Nevertheless, where "such falsity and the requisite bad faith affirmatively appear from (a) competent and uncontradicted documentary evidence, such as hospital records, admissions in the pleadings or proofs of death or (b) the uncontradicted testimony of plaintiff's own witnesses, a verdict may be directed for the insurer." Shafer v. John Hancock Mutual Life Ins. Co., 189 A.2d 234, 236 (1963). Bad faith may be inferred as a matter of law when the uncontradicted documentary evidence is such "that the insured has consulted physicians so frequently, or 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." Flick v. Union Sec. Life Ins. Co., Civil Action No. 95-6848, 1996 U.S. Dist. LEXIS 6341, at *13-14 (E.D. Pa. May 7, 1996). Here, while it is undisputed that the

Decedent believed she had Lupus and was taking a drug to treat Lupus, it is not clear from the documentary evidence how she came to that conclusion or how she came to be taking the drug Prednisone. Accordingly, it is similarly unclear whether Decedent knew or believed that she had been diagnosed by a doctor, received treatment from a doctor, or received advice or attention from a doctor, for her Lupus.

As noted above, Decedent's alleged statement to Agent Debra Stellfox cannot be considered with respect to whether Decedent disclosed Lupus to the Defendant. (Affidavit of Ivan & Robert Justofin.) It may be relevant, however, to the issue of Decedent's intent. See Wolfson v. Mutual Life Ins. Co. of New York, 455 F. Supp. 82, 85 (M.D. Pa. 1978).⁸ Agent Stellfox's statement, if it occurred, may be relevant to the issue of how the Decedent understood question 11(n), and whether she understood the question

⁸In Wolfson, the Plaintiffs offered testimony of the decedent's business partner, who overheard the agent assure the decedent that it was unnecessary for him to disclose that he had diabetes, because he was being treated with dietary treatment rather than insulin. The application asked if decedent had diabetes. The agent flatly denied that this exchange ever occurred. In that case, the court observed that if plaintiffs' version of the conversations were believed, jury questions remained on the issue of whether decedent had acted fraudulently so as to permit defendant to avoid policy payments, because even if the jury believed that the assurances had been made, the jury could still conclude that the answers to the medical question were in a technical sense "knowingly false"? However, the court also observed that if "diabetes" as it was explained to him did not include decedent's condition because he was not being treated with insulin, then the jury could conclude that there was no "knowing falsity"?

to require her to disclose her belief that she had Lupus and was taking Prednisone in order to answer the question truthfully. It would be possible, for example, for a jury to conclude that Decedent's failure to disclose her Lupus stemmed from a belief that the question was asking her about new illnesses or diagnoses (within the last 5 years), and that she therefore did not know that she was answering the question falsely. Or, if it is true that no doctor actually diagnosed or treated Decedent for Lupus and in fact she self-diagnosed and self-treated, then a jury could conclude that she thought she was answering the question truthfully when she did not disclose her Lupus. Conversely, if Plaintiff did get a diagnosis, treatment, advice or attention for Lupus during her 1998 visit to Dr. Jacob,⁹ and if she knew she got treatment or advice for her Lupus during that visit, then the representation was intentional for purposes of voiding the change application.

The final element is materiality of the statement. There can be no serious argument here that a misrepresentation based on question 11(n) with respect to a disease like Lupus would be material. Plaintiffs contend that the statement cannot be material if Decedent did not actually have Lupus; however, this argument cannot be correct. A misrepresentation as to diagnosis, treatment, advice, or attention for Lupus within the last five years, if

⁹Or, of course, at any other time during the five-year period prior to the change application.

required, would be material to the validity of the change application, because it would be a key factor considered by the insurer in approving or disapproving the application. The materiality of the misrepresentation must be viewed at the time of the application, and not in hindsight.

The Court denies the Motion for Summary Judgment with respect to the breach of contract and the counterclaims. There are genuine issues of material fact as to whether the Decedent made an intentional and material misrepresentations in her change application.

B. Negligence (Count II)

Defendant next seeks summary judgment on the negligence claim. In the claim, Plaintiffs claim that Defendant owed a legal duty to Decedent and the Plaintiffs, and breached that duty by:

- a) failing to investigate the claim thoroughly;
- b) failing to properly investigate Agent Stellfox with respect to the application;
- c) failing to properly review the medical records which showed Decedent never underwent tests to determine if she had Lupus;
- d) failing to review the medical records;
- e) failing to investigate properly because the investigation would show Decedent had properly

disclosed and did properly disclose that she believed she might have Lupus;

- f) failing to investigate properly by failing to contact doctors to determine that Lupus was neither a complication nor contributing factor in her death;¹⁰
- g) basing findings on documents which had no medical credibility;
- h) failing to question Agent Stellfox under oath to determine if Decedent had properly disclosed her belief that she had Lupus;
- i) failing to have an independent medical practitioner review the medical records;
- j) failing to speak with Robert and Christopher Justofin regarding facts and circumstances of Plaintiff's disclosure;
- k) failing to pay on claim of insurance;
- l) willfully delaying on paying a rightful claim for life insurance;
- m) deliberately obfuscating facts and surrounding circumstances of claim;

¹⁰The death certificate indicates a secondary cause of death as Lupus. The certificate was signed by Dr. Jacobs. Dr. Jacobs now recants and says that this was an error, although the certificate has not been amended.

- n) failing to follow insurance guidelines and industry custom;
- o) violating the standard of care in the industry;
- p) finding any reason to deny the claim;
- q) failing to refer the case to an independent insurance expert;
- r) denying claims irrespective of the merits of the claim.

Plaintiffs offer no evidence establishing the parameters of Defendant's duty, and adduce no evidence demonstrating that the Defendant failed to investigate the claim properly, failed to follow applicable guidelines or industry custom, or otherwise violated any standard of care in the industry. Even assuming that Plaintiffs were to prevail on their breach of contract claim, there would be no basis, on the evidence presented here, for Plaintiffs to prevail on a negligence claim. Judgment is entered for Defendant and against Plaintiffs on the negligence claim.

C. Bad Faith Claim (Count III)

In Count III, Plaintiffs seek recovery for bad faith. To establish a claim for bad faith denial of insurance coverage under Pennsylvania law, a Plaintiff must prove by clear and convincing evidence that: the insurer (1) lacked a reasonable basis for denying coverage, and (2) knew or recklessly disregarded its lack of a reasonable basis. Adamski v. Allstate Ins. Co., 738 A.2d

1033, 1036 (Pa. Super. Ct. 1999), appeal denied, Goodman v. Durham, 759 A.2d 387 (Pa. 2000).

Defendant's denial of insurance coverage is based on the alleged material misrepresentation in the Change Application with respect to Decedent's Lupus condition. Defendant points to the Change Application, which contained no mention of Lupus diagnosis or treatment, the records of the medical visit with Dr. Jacobs, which indicates "primary diagnosis" of Lupus, the treatment notes of Dr. Jacobs, which indicate Decedent was taking Prednisone to treat Lupus, and the death certificate, signed by Dr. Jacobs, which indicates a secondary or contributing cause of death to be Lupus.

There can be no serious dispute that Defendant had a reasonable basis for making the initial denial. However, Plaintiffs' bad faith claim is also based on the subsequent refusal of Defendant, after receiving additional information from the Plaintiffs, of the full benefits owing under the Change Application. The question is whether, in light of the additional evidence presented by the Plaintiffs with respect to Plaintiffs' Lupus, Defendant still had a reasonable basis to deny payment.

In light of the Court's conclusion that there are genuine issues of material fact as to whether Decedent made intentional and material misrepresentations in her Change Application, the Court cannot say at this time, based solely on the summary judgment record before it, that there is no genuine issue of material fact

with respect to Plaintiffs' bad faith claim. Accordingly, summary judgment on Count III is denied.

IV. Conclusion

For all of the reasons stated above, Defendant's Motion for Summary Judgment is **DENIED** in part and **GRANTED** in part. The Motion is denied with respect to Count I, Count III, and Defendant's Counterclaim. The Motion is granted with respect to Count II. Judgment is entered in favor of Defendant and against Plaintiffs on Count II.

An appropriate Order follows.

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

JEFFREY JUSTOFIN, ET AL.)
) Civil Action
)
) No. 01-6266
METROPOLITAN LIFE INS. CO.)

ORDER

AND NOW, this day of July, 2002, upon consideration of Defendant's Motion for Summary Judgment (Doc. No. 15), and all supporting and opposing briefing thereto, **IT IS HEREBY ORDERED** that said Motion is **DENIED** in part and **GRANTED** in part. Specifically, it is **ORDERED** that:

1. Defendant's Motion is **DENIED** with respect to Counts I (breach of contract) and III (bad faith).
2. Defendant's Motion is **GRANTED** with respect to Count II (negligence). **JUDGMENT** is entered in favor of Defendant and against Plaintiffs on Count II.
3. Defendant's Motion is **DENIED** with respect to the Counterclaim.

BY THE COURT:

John R. Padova, J.