

the facts in the light most favorable to the non-moving party,” and take every reasonable inference in that party's favor. Hugh v. Butler County Family YMCA, 418 F.3d 265 (3d Cir. 2005). If, after viewing all reasonable inferences in favor of the non-moving party, the court determines that there is no genuine issue of material fact, summary judgment is appropriate. See Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987). The opposing party must support each essential element with concrete evidence in the record. See Celotex, 477 U.S. at 322-23. This requirement upholds the “underlying purpose of summary judgment [which] is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense.” Walden v. Saint Gobain Corp., 323 F.Supp. 2d 637, 641 (E.D. Pa. 2004) (restating Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir.1976)).

In describing the background of this case, I have set out those record facts that are undisputed, and construed them in the light most favorable to Plaintiff. I have disregarded those allegations that Plaintiff makes without any evidentiary support. See Celotex, 477 U.S. at 322-23; Jones v. UPS, 214 F.3d 402, 407 (3d Cir. 2000) (requiring more than “unsupported allegations” to defeat summary judgment).

BACKGROUND

In 2003, Plaintiff Dianna Solodky was an extremely experienced insurance broker who had been married to Stanley Solodky for twenty-five years. See Exhibit A to Defendant's Memorandum of Law in Support of Motion for Summary Judgment at PB-028; Exhibit B to Defendant's Memorandum at 8-32, 39 (Dep. of D. Solodky). On March 13, 2003, she sold a \$100,000 Peoples Benefit life insurance policy to her husband. See Exhibit A to Defendant's

Memorandum of Law in Support of Motion for Summary Judgment. In completing the policy application, Mr. Solodky was required to answer “Medical Questions.” See id. at PB-030. Two questions are significant here:

2) “Within the past 10 years, has any proposed insured been treated or diagnosed by a health care professional as having any disease or disorder of the . . . [r]espiratory system (such as: emphysema, asthma, shortness of breath, chronic cough or sleep apnea)?”; and 8) “Within the past 10 years, has any proposed insured . . . [h]ad or been advised to have a check-up, consultation, lab test, EKG, X-ray or other diagnostic test?”

Id. Mr. Solodky, who was advised by Plaintiff in completing the application, answered “No” to both questions. Id. Mr. Solodky then signed the application. In the space above the signature line, the application provided: “The statements and answers on this application are true and complete to the best of my knowledge and belief.” Id. at PB-036. The Plaintiff also signed the application as the agent on the policy, representing that “I know of no condition affecting the insurability of the proposed insured not fully set forth herein.” Id. The contract between Mr. Solodky and Peoples Benefit consisted of the policy and the application. See Exhibit D to Pl. Memorandum. The contract provides that “any written statement . . . will not be used to void your policy nor defend against a claim under your policy unless the statement is contained in the application.” Id. at PB-007 (emphasis added).

In March 2003, Peoples Benefit issued a \$100,000 life insurance policy to Mr. Solodky, listing Plaintiff as the primary beneficiary. Id. Mr. Solodky died a little more than a year later as a result of post-polio syndrome – an illness he knew he had in March 2003, but did not disclose on his policy application. See Exhibit H to Def. Memorandum. Plaintiff nonetheless submitted a claim for benefits on May 17, 2004. See Exhibit I to Def. Memorandum.

In the course of investigating Plaintiff's claim, Peoples Benefit obtained Mr. Solodky's medical records for the ten years preceding his March, 2003 purchase of the policy. *Exhibit J to Def. Memorandum*. The investigation revealed that Mr. Solodky had not provided truthful answers to the "Medical Questions": 1) doctors treated Mr. Solodky for respiratory problems, including post-polio syndrome; and 2) on multiple occasions, Mr. Solodky was "advised to have a check-up, consultation, lab test, EKG, X-ray or other diagnostic test." Once again, the facts confirming the falsity of Mr. Solodky's responses are not in dispute.

On October 11, 2001 – less than a year and a half before he applied for the \$100,000 policy – Mr. Solodky visited the Medical Associates of Lancaster where he was examined by Dr. Andrew Myers. *Exhibit F to Def. Memorandum*. In his notes, Dr. Myers wrote that Mr. Solodky:

Over the past three years . . . has pretty much spent most of his time in a wheelchair He reports to me that just walking a short distance such as five feet across a room will make him short of breath. He does not have any chest tightness or chest pain with doing this though he does tell me that he gets short of breath at night when he lays down and sometimes feels kind of a tightness or a pressure in his chest when he is laying at night but this never comes with exertion. He had been attributing his shortness of breath to his post polio syndrome but now finds it to become worsened to the point where he cannot really tolerate it and wonders if this is indeed the cause and what can be done.

Id. at PB-372. Dr. Myers also observed that Plaintiff "note[d] . . . his breathing seems quite labored at night [and] she will have to come and check and make sure he is still breathing at times as he will stop breathing for episodes during the night." During the course of the interview, Mr. Solodky described himself as a "diaphragm breather" since his contraction of polio at age 7. Id. Dr. Myers concluded that Mr. Solodky "developed dyspnea on exertion and has had and continues to have a progressive post polio syndrome," and that his shortness of breath was potentially "related to pulmonary problems." Id. at PB-370. Dr. Myers also noted that Mr.

Solodky's "post polio syndrome could be . . . causing weakening and decreased performance of his pulmonary musculature which could also show up on pulmonary function tests of which I have ordered." Id.

After the examination, Dr. Myers advised Mr. Solodky that he should: (1) undergo an ambulatory sleep study; (2) consult a pulmonary specialist; (3) consult a specialist who deals with post polio patients; (4) have x-rays taken of his lumbar spine, right hip and SI joints; (5) follow up with Dr. David Weston concerning Mr. Solodky's polyps; and (6) have lab tests done to rule out anemia and other diseases. See id. at PB-370-74.

Similarly, on October 12, 1998 – less than five years before his March 2003 insurance application – Mr. Solodky visited Dr. Weston, complaining of rectal bleeding. Dr. Weston performed a colonoscopy. *Exhibit E to Def. Memorandum. Id.*

On October 23, 1998, Mr. Solodky visited the Medical Associates of Lancaster, requesting physical therapy because he became weak when walking short distances. *Exhibit F to Def. Memorandum.* The examining doctor noted that Mr. Solodky suffered from post-polio syndrome. Finally, on October 29, 1998, Mr. Solodky was treated at The Heart Group, where he underwent a realtime echocardiogram with doppler and a doppler colorflow velocity study. Id.

Mr. Solodky disclosed none of these diagnoses, procedures, or recommended procedures in his March 2003 Peoples Benefit application.

DISCUSSION

Plaintiff has alleged that, "[b]y refusing to pay the proceeds of the life insurance policy, [Peoples Benefit] is in breach of its life insurance contract." *Complaint* at ¶ 11. Peoples Benefit

argues that because the Solodky policy is *void ab initio*, Plaintiff's breach of contract claim fails as a matter of law.

For the Solodky policy to be void, Peoples Benefit must "establish three elements: (1) that the representation [on the insurance application] was false; (2) that the insured knew that the representation was false when made or made it in bad faith; and (3) that the representation was material to the risk being insured." New York Life Ins. Co. v. Johnson, 923 F.2d 279, 281 (3d Cir. 1991); Lotman v. Security Mut. Life Ins. Co., 478 F.2d 868, 870 (3d Cir. 1973). The undisputed evidence confirms that Peoples Benefit has established these elements and so is entitled to summary judgment. See Lotman at 870; Barbaro v. Old Line Life Ins. Co., 1992 U.S. Dist. LEXIS 6576 at *3 (where policy is *void ab initio*, "the court may enter a verdict in favor of the insurer").

I. Mr. Solodky Gave False Answers to the Questions on the Policy Application.

Mr. Solodky checked the box "No" next to Medical Questions Two and Eight of his insurance application. Question Two asked Mr. Solodky to report whether he had been "treated or diagnosed" for problems of the respiratory system. The application explicitly enumerated "shortness of breath" and "chronic cough" as examples of respiratory problems. Plaintiff does not deny that Mr. Solodky consulted Dr. Myers for shortness of breath and was diagnosed as having a "chronic cough." *Brief of Plaintiff in Opposition to Summary Judgment* at 7. Nor does she deny that Mr. Solodky had "the consequent need to see a pulmonary specialist." *Pl. Brief* at 8. Similarly, Plaintiff also offers no facts disputing Dr. Myers' diagnosis that "on exertion," he "developed dyspnea," or shortness of breath. Mr. Solodky's answer to Question Two is

unquestionably at odds with these undisputed facts.

Plaintiff argues that Mr. Solodky's "no" answer was not false because Question Two did not "require disclosure of post-polio syndrome." *Pl. Br.* at 6. Plaintiff ignores the law and the undisputed evidence. Dr. Myers observed in his December 18, 2001 report that Mr. Solodky "attribut[ed] his shortness of breath to his post polio syndrome but now. . . wonders if this is indeed the cause." *Exhibit F to Def. Memorandum* at PB-372; *Def. Memorandum* at 4; *Pl. Brief* at 6. Thus, it is undisputed that Mr. Solodky knew that either post-polio syndrome or a separate respiratory disorder was causing breathing difficulty. Plaintiff's contrived semantic distinctions are especially inappropriate because she and Mr. Solodky were in "exclusive possession of material knowledge concerning the health history of the proposed insured." Kearns v. Philadelphia Life Ins. Co., 585 A.2d 53, 56 (Pa. Super. 1991) (holding that "semantic evasiveness" does not excuse false statements on an application). See also McCloskey v. New York Life Ins. Co., 292 Pa. Super. 1, 7 (1981) (that insured was not *told* he suffered a heart attack irrelevant to the obligation properly to describe medical condition). In these circumstances, Mr. Solodky's denial that he had "been treated or diagnosed . . . as having a disease or disorder of the . . . [r]espiratory system" was certainly false.

In response to Question Eight, Mr. Solodky was obligated to disclose whether or not he had "been advised to have a check-up, consultation, lab test, EKG, X-ray, or other diagnostic test." Plaintiff does not dispute that Dr. Myers advised a consultation with a pulmonary specialist, recommended X-rays, and suggested that lab tests be conducted. Nor does Plaintiff contest that Dr. Weston performed a colonoscopy on Mr. Solodky in October, 1998 to determine the cause of his rectal bleeding, or that later the same month Mr. Solodky had an

echocardiogram. Each of these incidents – whose occurrence Plaintiff does not dispute – renders false Mr. Solodky’s “No” answer to Question Eight.

In these circumstances, I conclude that the undisputed evidence confirms that Mr. Solodky gave false answers to both Question Two and Question Eight in the Medical Questions section of his insurance application.

II. As a Matter of Law, Mr. Solodky Answered the Questionnaire Fraudulently or in Bad Faith.

When an insured makes false statements on his policy application, bad faith or fraud “is presumed... from knowledge of the falsity.” Burkert v. Equitable Life Assur. Soc’y of Am., 287 F.3d 293, 298 (3d Cir. 2002). This “inference . . . is irresistible [if an] unreported illness or disability of the insured was so serious and so recent that he could not have forgotten.” Id. The presumption of bad faith enforces the requirement that the insured “impart [his] knowledge to the company in his answer to the question.” Derr v. Mutual Life Ins. Co., 351 Pa. 554, 558 (1945). Courts have frequently applied this rule to facts similar to those presented here. See, e.g., Coolspring Stone Supply, Inc. v. Am. States Life Ins. Co., 10 F.3d 144, 148 (3d Cir. 1993); Northwestern Mutual Life Ins. Co. v. Babayan, 2004 U.S. Dist. LEXIS 17155, *21 (E.D. Pa. Aug. 25, 2004) at *30-*31; Grimes v. Prudential Ins. Co., 401 Pa. Super. 245 (1991).

The Third Circuit has recently addressed when I may employ Pennsylvania’s bad faith presumption while also taking care that “by applying Pennsylvania’s substantive law, [I] do not impress a different procedural requirement on Rule 56.” Justofin v. Metro Life Ins. Co., 372 F.3d 517, 523 (3d Cir. 2004). In that case, the insured, Loretta Justofin, had initially applied for a

life insurance policy from MetLife in 1994. Id. at 519. As the Third Circuit described:

In the application, she listed her son, Dr. Christopher Justofin, as her personal physician, mentioning that Dr. Justofin had treated her for occasional arthritis of her hands and feet. MetLife issued the life insurance policy to Loretta in the amount of \$100,000.

Id. In 1999, Mrs. Justofin sought to “increase the policy amount from \$100,000 to \$300,000, completing an ‘Application for Change of Placed Personal Life Insurance’ form.” Id. On that form, she failed to note that her son had occasionally treated her in the past five years. Id. In addition, although she noted in the form that she had “self-medicated Prednisone in 1969,” she failed to note that prescribed Prednisone for her in the past five years. Id. at 520. In May 1999, “MetLife issued the increase in death benefit coverage.” Id.

After Mrs. Justofin died in December, 1999, MetLife “paid the Justofins \$100,000 based on the original 1994 policy but informed that it was voiding the amended policy’s \$200,000 increase.” Id. Litigation ensued, and MetLife ultimately sought “a declaration that the policy increase was void based on Loretta’s failure to disclose [on the 1999 form] that her son had treated her and prescribed Prednisone for her.” Id. at 521.

The Third Circuit reversed the district court’s grant of summary judgment in MetLife’s favor, holding that a reasonable jury might conclude that Loretta “did not think that her son’s casual visits [from 1994 through 1999] were so important to report in her new application in great detail, especially when she had already disclosed that he was her personal physician . . . in her initial application.” Id. at 524. Similarly, having disclosed in her 1999 form that she had once self-medicated with Prednisone, Mrs. Justofin did not necessarily act fraudulently when she failed to mention the drug a second time on the form or that her son had prescribed it for her. Id.

In these circumstances, the Third Circuit held that under Rule 56, the record did not “incontrovertibly establish[] her bad faith.” Id.

In reaching its decision, the Justofin Court distinguished the Pennsylvania Supreme Court’s holding in Freedman that an insured’s failure to provide accurate medical information on a policy application voided the policy as a matter of law:

There, the insured flatly denied having consulted any physician or having had any kind of treatment for any ailment in his insurance application form. . . . We believe Freedman’s finding of bad faith as a matter of law must be confined to the cases where “the insured [falsely] denies in his answer that any physician has been consulted, or any medical or surgical treatment has been received during the period of inquiry.”

Id. at 523, n.10 (quoting Freedman v. Mutual Life Ins. Co. of New York, 21 A.2d 81 (Pa. 1941)).

Applying this reasoning here, it is apparent under Rule 56 that no reasonable jury could find that Mr. Solodky – advised by his insurance broker wife (the Plaintiff here) – gave his false answers in good faith. The questionnaire posed to the Solodkys unambiguous, “yes” or “no” questions. Despite his breathing difficulties, Mr. Solodky falsely answered “no” when asked whether he had problems with his respiratory system or shortness of breath. Despite his colonoscopy, echocardiogram, and referral for X-rays, pulmonary consultation, and lab tests, Mr. Solodky falsely answered “no” when asked whether he had been advised to have any medical procedure or laboratory test. Ultimately, Mr. Solodky died from conditions related to his post-polio syndrome – a disease whose existence should have been disclosed on his policy application.

These are not “comparatively minor illnesses” such as “headaches, grippe, acute colds, [or] indigestion,” but rather, medical problems “of such a serious nature, that a person of

ordinary intelligence could not have forgotten.” Compare Adams v. Metropolitan Life Ins. Co., 322 Pa. 564, 567 (1936) (refusing to find bad faith as a matter of law where insured omitted “minor illnesses”) with Freedman at 409 and Piccinini v. Teachers Protective Mut. Life Ins. Co., 316 Pa. Super. 519, 526, 531 (1983) (finding bad faith as a matter of law where insured failed to report arthritis and hand tremors). All these incidents, tests, and diagnoses took place within the 10-year period covered by the questionnaire, and the serious respiratory problems occurred just eighteen months before the policy application. See Shafer v. John Hancock Mut. Life Ins. Co., 410 Pa. 394, 399 (1963) (asking “[h]ow could [the insured] have innocently overlooked... the taking of numerous x-rays” which occurred 18 months before the application date).

In these circumstances, I am obligated to apply the substantive law of Pennsylvania and conclude as a matter of law that Mr. Solodky gave answers to the “Medical Questions” in bad faith. See Hanna v. Plumer, 380 U.S. 460, 468 (1965). To use the language of the Justofin Court, this is a case in which “the insured falsely denie[d] in his answer that any physician ha[d] been consulted,” and falsely denied that “medical or surgical treatment ha[d] been received during the period of inquiry.” Justofin at 523, n.10. Contrary to Plaintiff’s invitation, Pennsylvania law does not allow me to speculate that Mr. Solodky simply “forgot” every one of his diagnoses, referrals, and tests. See Pl. Brief at 8; Freedman, 342 Pa. at 410 (“The credulity of the court cannot be taxed too far by pleas of forgetfulness”). Cf. Liberty Lobby, 477 U.S. at 256 (non-moving party may not rely on mere speculation about what state of mind a jury might find).

In sum, I cannot accept Plaintiff’s argument – that Mr. Solodky might have acted in good faith when he answered “no” to Questions Two and Eight – without overruling Freedman, a step that Erie does not allow me to take. See Erie Railroad Co. v. Tompkins, 304 U.S. 64, 77 (1938).

III. Mr. Solodky's False Answers Were Material to Defendant's Decision to Issue the Policy.

Plaintiff cannot (and does not) seriously dispute that Mr. Solodky's denial of any respiratory problems – that is, the failure to disclose his post-polio syndrome and related conditions – was material to Peoples Benefit. Mr. Solodky died from the condition whose existence he denied. In these circumstances, the omission was certainly material. See Kizirian v. United Ben. Life Ins. Co., 383 Pa. 515 (Pa. 1956) (finding misstatements related to the cause of death to be material).

Rather, Plaintiff argues that Mr. Solodky's other false answers – such as the omission of his colonoscopy in responding to Question Eight – are immaterial to the issuance of the policy. In support, she points to the letter from Defendant denying coverage, which states in pertinent part: “We now know of Mr. Solodky's past medical history including progressive and advanced post polio syndrome, shortness of breath on exertion and referral to a pulmonary specialist.” From this language, she concludes that any other false statements by Mr. Solodky are “by [Defendant's] own admission... not material.” I disagree.

Under Pennsylvania law, almost any false statement resembling those made by Mr. Solodky is material. “Inquiries as to attendance by a physician and treatment in a hospital are material to the risk to be assumed by an insurer, unless it be for some trivial ailment.” Anastasio v. Metropolitan Life Ins. Co., 149 Pa. Super. 414, 421 (Pa. Super. 1942) (holding that undisclosed X-rays were material to the policy). “[E]very fact is material which . . . would naturally influence the judgment of an insurer.” New York Life Ins. Co. v. Johnson, 923 F.2d

279, 282 (3d Cir. 1991). Indeed, a false statement is material even if “the death ensued from a cause unconnected with the false representations.” Shafer at 400. In these circumstances, knowledge of Mr. Solodky’s rectal bleeding, colonoscopy, X-rays, and echocardiogram certainly would have been material to Peoples Benefit. See, e.g., Darling v. Savers Life Ins. Co., 1997 U.S. App. LEXIS 35094 (4th Cir. 1997) (omission of colonoscopy is material to policy issuance).

CONCLUSION

In sum, this case presents the situation the Third Circuit contemplated in Justofin: an insured denying to the insurer the existence of significant medical treatments and consultations, knowing those denials to be false. Unlike the questions in Justofin, the questions Mr. Solodky answered falsely were simple, calling for “yes” or “no” answers. That the insured was advised by his insurance broker wife – the policy beneficiary and Plaintiff here – underscores that under Rule 56 no reasonable jury could find that Mr. Solodky provided his false answers in good faith. Accordingly, I conclude that the insurance policy is void *ab initio* under Pennsylvania law and grant summary judgment to Peoples Benefit.

The Motion for Summary Judgment by Peoples Benefit is **GRANTED**.

An appropriate **ORDER** follows.

Paul S. Diamond, J.

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

DIANNA SUE SOLODKY	:	CIVIL ACTION
Plaintiff,	:	
	:	
	:	
v.	:	
	:	NO. 05-2555
PEOPLES BENEFIT LIFE	:	
INSURANCE COMPANY	:	
Defendant.	:	
	:	

Diamond, J.

December 6, 2005

ORDER

AND NOW, this 6th day of December, 2005, upon consideration of Defendant's Motion for Summary Judgment, Plaintiff's Response, and Defendant's Reply, and for the reasons set forth in the accompanying memorandum, it is ORDERED that Defendant's Motion for Summary Judgment is GRANTED. Judgment is entered in favor of Defendant, Peoples Benefit Life Insurance Company, and against Plaintiff, Dianna Sue Solodky.

Paul S. Diamond, J.