IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

ROBERT REDMOND and wife, RUBY REDMOND,	)	McMINN CHANCERY
Plaintiffs/Appellees	)	NO. 3A01-9801-CH-00034
v.	)	HON. EARL HENLEY CHANCELLOR
GREAT AMERICAN INSURANCE COMPANIES and ATHENS INSURANCE COMPANY,	)	
Defendants/Appellants	)	REVERSED and DISMISSED

Jeffrey L. Cunningham, Athens, for Appellant, Great American Ins. Co.

Charles E. Ridenour, Sweetwater, for Appellees.

O P I N I O N

INMAN, Senior Judge

This is an action to recover on a policy of fire insurance issued on August 9, 1994 by Great American Insurance Company through its local agency, Athens Insurance Company.[1] The insured property was destroyed by fire on July 2, 1995. Coverage was denied because the claimants made a material misrepresentation in their application for the policy. The Chancellor found that the plaintiffs misrepresented their loss history, but held that the unrevealed loss was not material and allowed a recovery. The defendant appeals and presents for review the issue of whether the concealment of a prior loss from wind

[1] Which was dismissed from the case. Counsel for the appellant stated during argument that while the Notice of Appeal was "from the Judgment," it was not his intent to appeal the dismissal of Athens Insurance Co. In any event, the appellant has stated no issues with respect to the dismissal of Athens Insurance Co.

damage was a material misrepresentation which increased the risk of loss, and thus voided the policy. Our review of the findings of fact made by the trial Court is *de novo* upon the record of the trial Court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. TENN. R. APP. P., RULE 13(d); *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26 (Tenn. 1996).

The plaintiffs' property was initially insured by State Farm Fire and Casualty Company. In 1993 an outbuilding was damaged by a windstorm and the loss was paid. State Farm declined to renew the policy.[2] The plaintiffs then inquired of the Athens Insurance Company, an independent agency, if coverage could be arranged on their residence.

Mrs. Redmond and her daughter, Barbara Wattenbarger, provided the requisite information to the agency by telephone. The application to Great American was processed and mailed to the plaintiffs who timely received it. One of the questions on the application was whether the plaintiffs had "any losses within the last three years," which they answered, no; another question was whether any coverage had been declined, canceled, or non-renewed during the last three years, which they answered, no; another inquiry was directed to the number of rooms (6), and the square footage of the house, (2,236).

These responses were false, because (1) a prior loss had occurred, (2) State Farm, for whatever reason, had declined to renew its policy, and (3) the residence was larger than as represented.[3] The plaintiffs offered testimony,

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[2]Mr. Redmond denied that State Farm declined to renew the policy, stating that "she [the agent for State Farm] said she didn't have a policy to cover a wood heater."

[3]In this connection, the plaintiffs believed that the premium would be lower for a 'smaller' house. This fact, while interesting, is not crucial to a resolution of the case. Perhaps of equal interest is the fact that the plaintiffs were in Townsend, in Blount County, as the time of the fire. Mrs. Redmond was notified by telephone at seven o'clock A.M. of the fire; she did not tell her husband. They had breakfast, took their grandchildren swimming, packed, and began the two-hour journey home. They stopped for lunch, after which Mr. Redmond was told of the fire.

obfuscating to an extent, that when they reviewed the prepared application and became aware of the incorrect answers, they called an employee of the insurance agency to set the matter right. This was denied by the employee; other circumstances redounded against the plaintiffs' testimony. In any event, the plaintiffs did not correct the admittedly false answers, as they might easily have done. Suffice to say that the Chancellor found against the plaintiffs on this point, stating that " . . . the Court does not believe they carry the burden of proof to show they had revealed the previous loss to the agency." This conclusion is supported by the preponderance of the evidence.

But the Chancellor declined to void the policy, finding that the "omission" [to reveal the prior loss] was not intentional, and that the "wind loss was so trivial and in no way connected to a fire loss that the policy should not be voided."

T.C.A. § 56-7-103 provides:

> **Misrepresentation or warranty will not avoid policy - Exceptions.** No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the insured or in the insured's behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increases the risk of loss.

[Acts 1895, ch. 160]

The appellant contends that as a matter of law the failure of the appellees to disclose the prior loss voids the policy, and there is abundant authority to support this argument. For a misrepresentation to increase the risk of loss within the meaning of the statute, the fact misrepresented need not necessarily be one that causes or contributes to the actual loss; if the matter misrepresented increases the risk involved in the issuance of the policy the company may avoid

the contract. *Independent Life Ins. Co. v. Russell,* 80 S.W.2d 846 (Tenn. App. 1934). The courts of this State have long held that a misrepresentation increases the loss if it influences the judgment of the insurer in making the contract. *Seaton v. National Grange,* 732 S.W.2d 288 (Tenn. App. 1987); *Medley v. Cimmaron Ins. Co.,* 514 S.W.2d 426 (Tenn. 1974); *Broyles v. Ford Life Ins. Co.,* 594 S.W.2d 691 (Tenn. 1980). *See*, *Overton v. Auto Owners Ins. Co.,* Tenn. Ct. App. No. 01A01-9308-CV-00342, March 18, 1994. The case of *Milligan v. MFA Mutual Ins. Co.,* 497 S.W.2d 736 (Tenn. App. 1973) is instructive. There, the applicant falsely represented that no other insurance company had refused to renew a policy. We found that such a misrepresentation would "naturally and materially influence the judgment and decision of the company to which application is made, and does increase the risk of loss."

In this connection, Rosemary Harris, an officer of the Great American Ins. Company, testified, in considerable detail, that a prior loss generates a substantial loss ratio because, statistically, the risk of future loss is increased, and that Great American "would not have written this if we had known the outbuilding had blown away." The Chancellor thought that the prior loss ["a trivial thing"] of an outbuilding in a windstorm had no connection with the later fire loss, and thus held that the misrepresentation was not material. But as held in a long line of cases, if the concealment of the loss was such as to influence the judgment of Great American, the policy was subject to avoidance. The monetary amount of the prior loss is not controlling. As stated in *Clingan v. Vulcan Life Ins. Co.,* 694 S.W.2d 327 (Tenn. App. 1985), "the undisclosed information was necessary to an honest appraisal of insurability." The fact that

the prior loss was relatively small [circa $1,500.00] or that it had no connection with the later fire loss, is irrelevant. The defendant was entitled to the information in order to make an informed judgment about whether to contract with the plaintiffs, since the "facts misrepresented need not be with reference to a hazard which actually produced the loss in question." *Loyd v. Farmers Mutual Fire Ins. Co.*, 838 S.W.2d at 542 (Tenn. App. 1992).

The judgment is reversed and the case is dismissed at the costs of the appellees.

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William H. Inman, Senior Judge

CONCUR:

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Herschel P. Franks, Judge

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Charles D. Susano, Jr., Judge