2018 IL App (5th) 160404-U

NO. 5-16-0404

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

FOUNDERS INSURANCE COMPANY, Plaintiff-Appellant, v. MARTIN FLORES, JR.; MARTIN FLORES, SR.; MARIA CARMEN FLORES; BEVERLY TREXLER, Special Administrator of the Estates of Nicole R. Charles, Deceased, and Madison J. Stone, a Minor, Deceased; and AMY CASH, Individually and as Mother and Next of Friend of Taylor Cash, a Minor, Defendants-Appellees.	)	Appeal from the Circuit Court of Union County. No. 12-CH-41 Honorable Mark M. Boie, Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justice Moore concurred in the judgment.
Justice Cates specially concurred.

ORDER

¶ 1 *Held*: The trial court's denial of the plaintiff's complaint for declaratory judgment was proper where the insurance agent was acting as an agent for Founders Insurance, and any lack of due diligence on the part of the agent should be imputed to Founders. The trial court's order is hereby affirmed.

¶ 2 The appellant, Founders Insurance Company (Founders), brought an action for declaratory relief in the circuit court of Union County, which requested a declaration that

it had no duty to indemnify or defend the appellees, Martin Flores, Sr., and Martin Flores, Jr., for injuries and liability arising from an automobile accident that occurred on November 26, 2012. In the complaint, Founders alleged that Martin Sr.'s failure to disclose that his then 17-year-old son was residing in his home was a material misrepresentation in breach and violation of the terms and conditions of the insurance policy. Founders further alleged that the policy was null and void *ab initio* as the result of the material representation. Following a bench trial, the court denied Founders's claim for declaratory judgment as well as its posttrial motion filed pursuant to section 2-1203 of the Code of Civil Procedure (735 ILCS 5/2-1203 (West 2010)).

¶ 3 On appeal, Founders raises three issues: (1) whether the trial court erred in ruling against Founders where all of the evidence showed that Martin Sr.'s failure to disclose his then 17-year-old son, Martin Jr., was residing in the home was a material misrepresentation; (2) whether the court erred in ruling against Founders where all of the evidence showed that Joseph Huffman Sr. and Associates, Inc. (Huffman), was the agent of Martin Sr. and that the actions and conduct of Huffman, could not be imputed to Founders; and (3) whether the trial court erred in ruling against Founders where the insurance application was signed by, or on behalf of, Martin Sr., but then Martin Sr. claimed lack of understanding, in contravention of the holding in *Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716.

¶ 4 I. BACKGROUND

¶ 5 On July 21, 2011, Martin Sr. entered the offices of Huffman for the purpose of obtaining automobile insurance on four vehicles. John Williams, an agent at Huffman,

procured a policy for Martin Sr. based on information he provided on a single sheet of paper that listed the names, social security numbers, and driver's license numbers of he and his wife, as well as the makes, models, and vehicle identification numbers (VIN) of four vehicles, including a 1998 Ford Mustang. Martin Sr. was accompanied by his younger son, not Martin Jr., because he speaks very limited English and cannot read either English or his native language, Spanish. Williams filled in the application on a computer using the information provided on the sheet, and the policy was signed by the son in front of the agent. At the time, the son would have been 15 or 16 years old.

¶ 6 The application included the following language: "[a]pplicant warranties that there are no other residents of insured's household (aged 15 and older) and no regular drivers other than those listed below." Under this provision, Martin Sr. was required to disclose all members of his residence over the age of 15, regardless of whether they were licensed, as well as any non-resident regular drivers of the vehicle. At the time the application was completed, Martin Sr. had at least one child, Martin Jr., who was living at home aged 15 or older that he was required to disclose under the terms of the application.[1] According to the application, the policy would have been effective from July 22, 2011, to January 22, 2012.

¶ 7 On November 26, 2011, Martin Jr., while driving the 1998 Ford Mustang, was involved in a single-vehicle accident when he swerved to avoid hitting a deer in the road and drove into a ditch and hit a utility pole. The accident resulted in the deaths of two

[1]It appears from the record that Martin Sr. may have had at least two children he was required to disclose, as the son who accompanied him to Huffman was 15 or 16.

passengers. The accident was reported to Founders, at which time the company began an investigation as to the identity of Martin Jr. On January 17, 2012, after discovering that Martin Jr. resided in the home of Martin Sr., and was a licensed driver over the age of 15, Founders rescinded the policy.

¶ 8 After notifying Martin Sr. of the cancellation, Founders filed a complaint in Cook County for declaratory judgment alleging the contract null and void *ab initio*. The case was transferred to Union County pursuant to a motion for *forum non conveniens*. On February 4, 2015, Founders filed a motion for summary judgment, which was later denied, and a bench trial was held on April 18, 2016.

¶ 9 During the trial, evidence was presented as to Martin Sr.'s ability to read and understand both English and Spanish. Martin Sr. testified, through an interpreter, that he cannot read either English or Spanish and speaks very limited English. Martin Jr. testified that he or his brother often accompanied their father in order to translate for him. Martin Jr. also testified that the signature that appeared on the application was that of his younger brother, who would have been 15 or 16 years old at the time.

¶ 10 Williams testified that he did not recall whether anyone had accompanied Martin Sr. to the agency, and he did not recall whether he asked any questions of Martin Sr. Williams also testified that he could not recall whether he obtained quotes from several insurance companies or only Founders, though he testified that he normally checked several companies. Nancy Rochwick, the then director of personal lines underwriting at Founders, testified that had Martin Jr. been disclosed, the premiums on the policy would have increased by $1109. She also testified that Williams is and was an independent

agent who is free to contract with several insurance companies, as opposed to a captive agent, which is an employee of the insurance company. Founders does not employ any of its own agents and relies entirely on independent agents for its business.

¶ 11 On June 10, 2016, the trial court issued a written order. In its order, the court distinguished this case from that of *Ratliff v. Safeway Insurance Co.*, 257 Ill. App. 3d 281 (1993). The court found that:

> "The general factual circumstances in *Ratliff* are similar to this matter, including the fact that the policy holder attempted to add the young driver onto the policy after an accident. However, it is the Court's opinion that there are facts involved in this case that distinguish it from *Ratliff*.
>
> Based upon the testimony and evidence, the Court's opinion is that when [Martin] Sr. went to the Huffman Insurance Agency on July 21, 2011, he was accompanied by his younger son, not [Martin] Jr. [Martin] Sr. and [Martin] Jr. both testified that the signature on the original application, Plaintiff's Exhibit #1, is not that of [Martin] Sr. Further, the signatures on Plaintiff's Exhibit #1 and #8 are strikingly similar, and [Martin] Jr. testified that those were the signature of his younger brother who was either fifteen or sixteen at the time. This is further shown when compared with the signature of [Martin] Sr. in Plaintiff's Exhibit #7. This evidence supports the contention that [Martin] Sr. did not fully understand the apparent limited conversation with Williams due to his language barrier. ***
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> *** Williams did not testify that the questions he asked specifically included young drivers in the household. This fact, along with the following facts,

should have put Williams on notice to inquire about other drivers in the household: that [Martin] Sr.'s young son was present; the son may have answered questions during the interview; the son signed the application; and, [Martin] Sr. demonstrated an apparent problem with the English language.

*** [I]t was incumbent upon Williams, the insurance agent, to specifically inquire about such drivers when completing the application for insurance, but he failed to do so."

¶ 12 In denying Founders relief, the court went on to find that "[a]s stated above, Plaintiff's Exhibit #1 directs the applicant to list all persons over the age of fifteen and/or any other driver in the household. However, there should be a duty for due diligence on Williams' part as the insurance agent completing an application to specifically ask the applicant about any and all drivers in the household."

¶ 13 Based on the evidence, the trial court denied the complaint for declaratory judgment and later also denied Founders's posttrial motion.

¶ 14 II. ARGUMENT

¶ 15 A trial court's order following a bench trial will not be reversed unless the court's findings are against the manifest weight of the evidence. *Stilwell v. Continental Illinois National Bank & Trust Co. of Chicago*, 31 Ill. 2d 546, 549 (1964). Founders raises three issues for this court to consider. Based on the following analyses, we affirm the court's denial of Founders's complaint for declaratory relief.

¶ 16 A. Material Misrepresentation

¶ 17 First, Founders argues that the court erred in ruling against it where it met its burden in proving a material misrepresentation through evidence that Martin Sr.'s disclosure of his then 17-year-old son residing at his residence would have increased the premium by $1109. The appellees argue that Founders did not meet its burden in proving that the misrepresentation was by direct misrepresentation, omission, concealment of material fact, or inconsistent statement.

¶ 18 Founders cites to section 154 of the Illinois Insurance Code (Code), which establishes a two-prong test for whether an insurance company may rescind a policy due a material misrepresentation. 215 ILCS 5/154 (West 2008). First, under the Code, the statement must be false. *Id*. Second, the false statement must have been made with the intent to deceive or must materially affect the acceptance of the risk or hazard assumed by the insurer. *Id*. "Under the statute, therefore, a misrepresentation, even if innocently made, can serve as the basis to void a policy." *Golden Rule Insurance Co. v. Schwartz*, 203 Ill. 2d 456, 464 (2003). However, the existence of the statute does not preclude parties to the contract from entering into an agreement which is more favorable to the insured. *Id*. "Terms and conditions of a contract, if unambiguous, are enforced as they appear [citations] and will control the rights of the parties [citations]." *Id*. at 465.

¶ 19 Here, Founders's argument relies entirely on the language of the Code. However, as the appellees point out, the Founders policy contains additional language not found in the Code. The Founders policy states that "[i]f any representation contained in the application is false, misleading, or materially affects the acceptance or rating of this risk

by the Company, by direct misrepresentation, omission, concealment of material fact or inconsistent statement, then the Company may *** rescind the policy."

¶ 20 In *Golden Rule Insurance Co. v. Schwartz*, the Illinois Supreme Court determined that the inclusion of the additional language of "knowledge and belief" included above the signature line in the insurance contract established a lesser standard of accuracy than that imposed under the statute. 203 Ill. 2d at 465. The court reasoned that freedom of contract must allow contracting parties to enter into agreements that are more favorable to the insured, so long as the provision complies with standard form and does not conflict with the statute. *Id*.

¶ 21 This case involves an insurance contract that contains additional language to that of the statute. Though this additional language changes the inquiry as to whether there was a material misrepresentation, this court need not conduct that inquiry because it is clear from the record, and Founders's briefs, that no evidence was presented by Founders as to how the misrepresentation was by direct misrepresentation, omission, concealment of material fact, or inconsistent statement. Rather, Founders addressed only the standard of a material misrepresentation under the statute. Therefore, this court finds that the trial court's ruling against Founders was not against the manifest weight of the evidence.

¶ 22 B. Agency

¶ 23 Founders argues that the trial court's denial of Founders's claim was against the manifest weight of the evidence where all the evidence showed that Williams was an agent of Martin Sr., and the court committed reversible error in imputing Williams's lack of due diligence to Founders. The appellees argue that Williams was an agent of

Founders and the trial court's ruling against Founders should be affirmed. This court disagrees with the assertion that the trial court made a specific finding that Williams was the agent of Martin Sr. In its briefs, Founders states that the trial court "ruled that Williams and Huffman were at all times ***independent agents***, and that ***Williams*** did not exercise due diligence ***as the agent of Martin, Sr.*** in questioning him about all drivers in the household." (Emphases in original.) However, the phrase "as the agent of Martin Sr." does not appear anywhere in the trial court's order. This phrase was inserted by counsel.[2] Even assuming *arguendo* that the trial court did find Williams to be an agent of Martin Sr., that finding would be against the manifest weight of the evidence. Therefore, it is the finding of this court that based on the following analysis, Williams was an agent of Founders, he had notice that due diligence required further inquiry into the members of the household, and the trial court's denial of declaratory relief is not against the manifest weight of the evidence.

¶ 24 An agent owes a duty to the insurance company; a broker owes a duty to the insured. *Farmers Automobile Insurance Ass'n v. Gitelson*, 344 Ill. App. 3d 888, 892 (2003). Whether a person is acting as an agent or a broker is a question of fact. Conduct and not title will determine to whom a duty was owed. *Id*. In making such a determination, courts consider four factors: (1) who first set the agent in motion; (2) who controlled the agent's actions; (3) who paid the agent; and (4) whose interest the agent was attempting to protect. *Id*.

[2]The court recognizes that this oversight may be the result of multiple changes in Founders's counsel throughout the life of this case.

¶ 25 In *Gitelson*, the court determined that the agent was acting on behalf of the insured because the family had a long-existing relationship with the agent, had procured several policies through the agent, and the agent paid premiums and signed applications on the family's behalf. *Id*. at 893. None of the factors that were present in that case appear in this case.

¶ 26 In *Ratliff v. Safeway Insurance Co.*, the court determined that a parent's failure to disclose an adult child residing in the residence was a material misrepresentation under section 154 of the Code and that the broker was acting on behalf of the insured and therefore his knowledge could not be imputed to the company. 257 Ill. App. 3d 281. *Ratliff* is distinguishable from the case at bar because in *Ratliff*, the insurance broker signed the application as the mother's agent, and the mother never signed the application. *Id*. at 285. Also, *Ratliff* involved a misrepresentation in a renewal application, which indicates an ongoing relationship between the mother and the broker. *Id*. Additionally, the request for renewal that was submitted contained a power of attorney clause enabling the agent to execute a premium financing agreement. *Id*. None of the factors upon which the *Ratliff* court relied are present in this case.

¶ 27 In this case, though Martin Sr. first set the agent in motion by walking into the Huffman agency, none of the other factors indicate that Williams was acting as his agent. As to the second factor, who controlled the actions of the agent, the Huffman agency is under a Producer's Agreement with Founders. The Producer's Agreement creates a contractual relationship between Founders and Huffman; however, the terms of the contract are unknown as the agreement was not included in the record. Additionally, the

application gave instructions to the agent as to when an application should or should not be submitted. Though it was the testimony of Williams that it was his custom to look up several companies, there is no evidence that he did that for Martin Sr. There is also no evidence that Martin Sr. made any kind of choice as to the company through which he preferred the insurance be procured. As to the third factor, Williams was paid through commission from Founders, and Founders does not employ any of its own agents and relies entirely on independent agents for its business.

¶ 28 As to the fourth factor, whose interest Williams was protecting, there is no evidence that Williams actions were for Martin Sr.'s benefit. Williams could not recall his conversation with Martin Sr. and could not recall whether he asked any questions of Martin Sr., including inquiring about other members of the household, despite the fact that a 15-year-old family member was present at the office. In fact, Williams did not remember the son being present and signing the application and testified that he could not recall whether anyone had accompanied Martin Sr. to Huffman that day. Also, it is unquestioned that a language barrier existed. Martin Sr. was not questioned by Williams directly, did not sign the application himself, did not have the ability to read it, and was not allowed to take the application out of the office. Martin Sr. had only a single interaction with Williams and did not have an ongoing relationship.

¶ 29 Therefore, the trial court's denial of Founders's complaint was not against the manifest weight of the evidence.

¶ 30 C. Effect of Signing

¶ 31 The last argument made by Founders is that the trial court erred in ruling against Founders where the application was signed by Martin Sr., or on his behalf, where he now claims lack of understanding in contravention to *Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716, a First District case.

¶ 32 The dispute in *Hawkins* revolved around an exculpatory clause contained in a fitness club agreement. *Id*. ¶ 1. In *Hawkins*, a member of the fitness club sued for negligence after being struck by a mirror that fell off a wall during a workout. *Id*. ¶ 5. The member argued that the sales associates failed to adequately explain the clause to him, but he conceded that he did not read the contract himself. *Id.* ¶ 13. The appellate court found that an individual who has the opportunity to read a contract before signing, but fails to do so, cannot later plead lack of understanding in an attempt to escape its enforcement. *Id.* ¶ 14.

¶ 33 First, this court notes that the precedent cited by counsel is not binding on this court. Second, the arguments made by Founders are inconsequential to the outcome of this case. This is not a case where a party to a contract is trying to avoid a provision based on lack of understanding. This case turns on whether a material misrepresentation occurred, thereby allowing Founders to rescind the contact, and if so, whether such misrepresentation was due to a lack of due diligence that can be imputed to Founders. Martin Sr.'s claims that he did not understand the terms of the contract because they were not explained to him and he was not given an opportunity to fully understand goes to the argument that Williams was not his agent and that Martin Sr. had no intent to withhold or

provide false information. It is undisputed that Williams completed the contract and that Martin Sr.'s younger son signed it in front of the agent. Therefore, the trial court's ruling against Founders was not against the manifest weight of the evidence.

¶ 34 III. CONCLUSION

¶ 35 Therefore, the order of the court of Union County is hereby affirmed.

¶ 36 Affirmed.

¶ 37 JUSTICE CATES, specially concurring:

¶ 38 I concur in the result reached by the majority in this case, although I do not necessarily agree with some of the reasoning in the majority's order. I agree that the trial court properly entered a judgment against Founders Insurance Company on its claim for declaratory judgment, and that the trial court's judgment should be affirmed.