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Record No. 5086

In the Supreme Court of Appeals of Virginia at Richmond

SOUTHLAND LIFE INSURANCE COMPANY
v.
INEZ A. DONATI

FROM THE CIRCUIT COURT OF PRINCESS ANNE COUNTY

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5086

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 9th day of October, 1959.

SOUTHLAND LIFE INSURANCE COMPANY,
Plaintiff in Error,

against

INEZ A. DONATI, Defendant in Error.

From the Circuit Court of Princess Anne County

Upon the petition of Southland Life Insurance Company a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of Princess Anne County on the 10th day of July, 1959, in a certain motion for judgment then therein depending wherein Inez A. Donati was plaintiff and the petitioner was defendant.

And it appearing that a *supersedeas* bond in the penalty of seventeen thousand dollars, conditioned according to law has heretofore been given in accordance with the provisions of sections 8-465 and 8-477 of the Code, no additional bond is required.

RECORD

* * * * *

MOTION FOR JUDGMENT.

Inez A. Donati hereby moves the Circuit Court of Princess Anne County, Virginia, for judgment against the defendant, Southland Life Insurance Company of Dallas, Texas, in the sum of SEVENTEEN THOUSAND ONE HUNDRED ($17,-100.00) DOLLARS, for this to-wit:

(1) That the Plaintiff is the widow of David C. Donati, deceased, who died September 11th, 1958.

(2) That the deceased at the time of his death was resident and domiciled in the County of Princess Anne, State of Virginia.

(3) That prior to the death of David C. Donati, to-wit: on February 1st, 1957, the defendant, Southland Life Insurance Company of Dallas, Texas, issued its Policy No. 558764 on the life of David C. Donati; and that the plaintiff, Inez A. Donati, wife of the deceased, is the beneficiary under said policy.

(4) That the above referred to policy at the time of the death of the deceased, David C. Donati, was in full force and effect, and that the plaintiff has complied with all of the requirements of the said policy including, but not excluding any other requirements, notice and proof of death. That the defendant, Southland Life Insurance Company of Dallas, Texas, has wrongfully refused to pay to the plaintiff under the terms of said policy the sum of SEVENTEEN THOUSAND ONE HUNDRED ($17,100.00) DOLLARS now due and payable.

page 2 } Hence, plaintiff moves this Court for judgment against the aforesaid Southland Life Insurance Company of Dallas, Texas, under the terms of said policy in the sum of SEVENTEEN THOUSAND ONE HUNDRED ($17,100.00) DOLLARS, with interest from September 11th, 1958 until paid, attorney's fees, and Court costs expended.

INEZ A. DONATI
By J. M. PICKRELL
Of Counsel.

Filed in the Clerk's Office the 5 day of March, 1959.

Teste:

R. H. WEST, D. C.

* * * * *

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GROUNDS OF DEFENSE.

The defendant, as and for its Grounds of Defense, says:

1. That it has no knowledge concerning the allegation of paragraph numbered 1 of the Motion for Judgment.
2. That it denies the allegation contained in paragraph numbered 2 of the Motion for Judgment.
3. That it admits that it issued its policy No. 558764 on February 1, 1957, on the life of David C. Donati and that the beneficiary named therein is Inez A. Donati.
4. That it denies that the said policy was in full force and effect at the time of the death of the said David C. Donati. On the contrary, the defendant says that the said policy of insurance never had any force or effect, in that:

(a) The said David C. Donati obtained issuance of the policy to him by the defendant by making knowingly false and fraudulent answers to certain questions, contained in his written application for the issuance of the said policy, and that if the said questions had been answered truthfully the defendant would not have issued a policy of insurance to the said David C. Donati.

(b) That the said David C. Donati was not in good health at the time of the execution of the application for insurance or at the time of issuance of said insurance policy and its delivery to him, such good health being a condition precedent to the policy becoming in force.

page 5 } 5. That it denies that, if valid, the plaintiff would be entitled to recover Seventeen Thousand One Hundred Dollars ($17,100.00), as the amount which would be payable under the terms of the policy, if valid, is Twelve Thousand Two Hundred and Forty Dollars ($12,240.00).

6. That as the said policy of insurance was never in force or effect, the personal representative of the estate of David C. Donati is entitled to receive from the defendant the sum of One Hundred Thirty-Five and 80/100 Dollars ($135.80), this being the total sum of all premiums paid to the defendant by the said David C. Donati. And the defendant further avers that it stands ready, able and willing to pay said sum of One

Hundred Thirty-Five and 80/100 Dollars ($135.80) to said personal representative upon request so to do.

7. That by reason of the foregoing the defendant denies that the plaintiff is entitled to recover Seventeen Thousand One Hundred Dollars ($17,100.00) or any other sum of money from the defendant.

SOUTHLAND LIFE INSURANCE COMPANY
By LAWSON WORRELL, JR.
Counsel.

Filed Mar. 19, 1959.

JOHN V. FENTRESS, Clerk
By M. WHITE, D. C.

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PLEA OF ESTOPPEL.

Inez A. Donati in response to the grounds of defense filed in this action on March 18th, 1959 by the defendant herein, while specifically denying the allegations contained in the grounds of defense, alleges further that the defendant is estopped to deny that the policy was in full force and effect inasmuch as a copy of the application for the insurance policy in question was not attached thereto and made a part thereof.

INEZ A. DONATI
By J. M. PICKRELL
Counsel.

Filed Apr. 3, 1959.

JOHN V. FENTRESS, Clerk
By R. H. WEST, D. C.

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MOTION FOR SUMMARY JUDGMENT.

Inez A. Donati, by counsel, hereby moves the Honorable Court in the above styled lawsuit on Motion for Summary Judgment for judgment in this cause.

INEZ A. DONATI
By JAMES M. PICKRELL
Counsel.

Filed Apr. 3, 1959.

JOHN V. FENTRESS, Clerk
By R. H. WEST, D. C.

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May 19, 1959.

OPINION.

The plaintiff's motion for judgment in this case, upon a policy of insurance on the life of David C. Donati is met by the contention in the grounds of defense that David C. Donati obtained the insurance by false and fraudently answers to certain questions in the application for insurance, and that David C. Donati, was not in good health at the time of the execution of the application for insurance which is a condition precedent to the policy becoming in force. Plaintiff pleads an estoppel and moves for summary judgment, introducing the original policy of insurance.

The policy does not have the application attached and the application has not been filed, but both parties concede that the mis-representations if any were contained in the application signed by David C. Donati.

The question therefore is whether the defense is pleaded by the defendant are available to do it under Section 38.1-393 of the Code of Va. This section provides: "In each such policy there shall be a provision that the policy, or the policy and the application therefore if a copy of the application is endorsed upon or attached to the policy when issued, shall constitute the entire contract between the parties, and that all statements made by the insured shall in the absence of fraud, be deemed representations and not warranties, and

that no such statement or statements shall be used
page 10 } in defense of a claim under the policy, unless contained in a written application and unless a copy of such statement or such statements be endorsed upon or attached to the policy when issued."

It is in order at this point to analyze in more detail the latter part of the above quoted code section. It states that all statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties. This simply means that unless the insured had a deliberate intent to deceive any statements made by him are representations as distinguished from warranties which made a vast difference in defense by the insurer under the common law, but which are not material to the issue at hand. The statute then goes on to say that no such statement shall be used in defense, unless contained in a written application. This has the effect of limiting the defense of mis-representation by the insured to statements reduced to writing in a written application. The final clause of the sentence requires a copy of such statement or statements to be endorsed upon or attached to the policy. Thus all representations made by the insured to the company must be contained in a written application and in addition thereto a copy of such statements must be attached to the policy. It is admitted here that the statements of the assured alleged in defense have not been endorsed upon or attached to the policy.

The defendant contends first that all requirements in the above quoted portion of section 38.1-393 are qualified by the phrase "In the absence of fraud." The Court cannot agree with this construction. In the first place the natural reading of the phraseology makes it clear that this clause applies only
to that portion of the statute which declares that
page 11 } all statements of the insured shall be deemed representations and not warranties. If it were intended that the effect of the entire statute should be vitiated by fraud, the statute could and would have been drafted to make such intention perfectly clear. That such was not the intention of the legislature is further evident from the fact that the whole purpose of the statute is to eliminate a body of defenses available to the insurer at common law, unless the statements are made in the manner and incorporated into the policy in the mode while the statute requires.

The Code section in this respect does not seem to have been construed in Virginia, but under a Michigan statute of substantially identical phraseology it has been held that the phrase "shall, in the absence of fraud" did not apply to or qualify the requirement that no statement was admissible

unless contained in an application which had been endorsed upon or attached to the policy when issued, and therefore did not permit a defense of fraud although the application was not attached to the policy. *New York Life Insurance Co.* v. *Hamburger,* 174 Mich. 254, 140 N. W. 510.

The defendant next contends that under the recent decision in *Gilley* v. *Union Life Insurance Co.*, 194 Va. 966, fraud can be shown in Virginia not-withstanding section 38.1-393 and it can also be shown that the insured was not in good health at the time the policy was issued. The opinion in the Gilley case discloses that the application was made by the beneficiary and not by the insured, and therefore section 38.1-393 would, on its face have no application, for that section applies only to representations made by the insured. Because the statute was not discussed, nor a provision in the policy page 12 } containing the statutory language gone into, it must be assumed that the reason just given is the basis for it.

Statutes providing either that no representations or warranties made by the insured shall be used as a defense unless contained in a written application, or that no statements contained in an application shall be used in defense against the policy unless attached to the policy are very prevalent in other states. The Virginia statute however goes further and requires not only that the statements be contained in a written application, but that the statement shall not be used in defense unless endorsed upon or attached to the policy when issued. It is therefore evident that the Virginia policy is to construct the insurance companies' defense in matters of this kind to a very rigid sequence of requirements.

At least four other states have strikingly similar statutes to that of Virginia, and in each instance they have held that the defense of fraud is not available to the company and that statements in the application cannot be used against the insured, unless the application is endorsed upon or attached to the policy. *Fisette* v. *Mutual Life Insurance Co.*, 162 La. 620, 110 Sou 880; *New York Life Insurance Co.*, v. *Hamburger,* 174 Mich. 254, 140 N. W. 510; *Wheelock* v. *Home Life Insurance Co.*, 115 Minn. 177, 131 N. W. 1081; *Arnold* v. *New York Life Insurance Co.,* 131 Tenn. 720, 177 S. W. 78.

This question is thoroughly annotated in 93 A. L. R. 374.

It is the conclusion of the Court therefore that the defendant is estopped in this case to assert that the insured made fraudent answers to questions in his application and fraudently misrepresented himself to be in good health therein.

H. W. MacKENZIE, JR.

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SUPPLEMENTAL OPINION.

June 23, 1959.

The defendant calls attention to the fact that in the memorandum opinion of this court dated May 19, 1959, the ruling is not clear on the point advanced that the insured was not in good health at the time the policy was issued, as distinquished from any positive representations which may have been made by him, and that this fact of itself would preclude recovery upon the policy.

The defendant relies heavily upon the case of *Combs* v. *Equitable Life Insurance Co. of Iowa,* 120 Fed. 2nd 432, in which the Circuit Court of Appeals for the fourth circuit in determining the Virginia law came to the conclusion that where the parties had agreed that the good health of the insured was a condition precedent of the effectiveness of the contract that the absence of such good health would vitiate the policy. In the Combs case the application embodying this condition was attached to and made a part of the policy as provided by Virginia law. The defendant has exhibited a copy of the application in this case which it asserts makes a similar provision that the good health of the insured shall be a condition precedent to the effectiveness of the insurance. But as pointed out in the original memorandum section 38.1-393 of the code provides "No such statement or statements shall be used in defense of a claim under the
page 15 } policy unless contained in a written application and unless a copy of such statement or statements be endorsed upon or attached to the policy when issued." The statements and application not being attached to the policy in the case at bar the clear wording of the statute would exclude such statements as matters of defense upon the policy itself. In this respect the case at bar is distinquishable from the Combs case.

It being now decided that any representations of the character brought out in the case at bar contained in an application not made a part of the policy itself cannot be used as defense against liability by the insurance *compnay,* examination of the conditions of the policy itself must be made. The only matter in the original policy bearing on the

subject is contained under provisions "Modifications" and reads as follows; "This policy shall not be effective unless manually delivered to the insured while in good health and in insurable conditions; provided, however, if the first premium was paid to the agent at the time of making application therefor, and if the conditional receipt of the company was completed by the agent detached from the application, and given to the applicant, then the insurance under this policy shall be effective from the date of the company's approval of the application at the home office * * *"

To this court, the proper construction of the proviso above quoted serves to eliminate the condition that the policy shall not be effective until manually delivered to the insured while in good health. In other words, that the first part of the section quoted applies only where the premium is not paid with the application and is designed to protect the company in the event of the change of the insured's health page 16 } between the time the application is filed and the policy delivered and premium paid. The policy must be most strongly construed against the company and I find nothing in this language which compels the construction that the policy is not regarded as being in force unless the insured were in fact in good health at the time the coverage became effective.

H. W. MacKENZIE, JR.

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* * * * *

The above styled law action came again on this day to be heard on the plaintiff's motion for Summary Judgment, and the Opinion of the Court rendered in this action dated May 19th, 1959, and the Supplemental Opinion dated June 23rd, 1959, and was argued by counsel.

WHEREUPON, it is hereby ORDERED that judgment be and is hereby entered in favor of the plaintiff, Inez A. Donati, against the said defendant, Southland Life Insurance Company, in the sum of TWELVE THOUSAND ONE HUNDRED ($12,100.00) DOLLARS, with interest thereon from September 11, 1958, until paid and cost expended. To which action of the Court the defendant, by counsel, duly excepted.

Enter 7/10/59.

H. W. M.

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NOTICE OF APPEAL AND ASSIGNMENT OF ERROR.

NOTICE OF APPEAL.

The defendant, Southland Life Insurance Company, gives notice of its intention to apply to the Supreme Court of Appeals of Virginia for a writ of error with *supersedeas* from the judgment heretofore entered against it on July 10, 1959.

ASSIGNMENT OF ERROR.

The defendant, as and for its Assignment of Error, says:

1. That the Court erred in sustaining plaintiff's Motion for Summary Judgment and in entering Summary Judgment in favor of the plaintiff against the defendant.

SOUTHLAND LIFE INSURANCE COMPANY,
By LAWSON WORRELL, JR.
Counsel.

Filed Jul. 24, 1959.

JOHN V. FENTRESS, Clerk
By R. H. WEST, D. C.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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RULE 5:12—BRIEFS

§1. Form and Contents of Appellant's Brief. The opening brief of appellant shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. The citation of Virginia cases shall be to the official Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A brief statement of the material proceedings in the lower court, the errors assigned and the questions involved in the appeal.

(c) A clear and concise statement of the facts, with references to the pages of the printed record when there is any possibility that the other side may question the statement. When the facts are in dispute the brief shall so state.

(d) With respect to each assignment of error relied on, the principles of law, the argument and the authorities shall be stated in one place and not scattered through the brief.

(e) The signature of at least one attorney practicing in this Court, and his address.

§2. Form and Contents of Appellee's Brief. The brief for the appellee shall contain:

(a) A subject index and table of citations with cases alphabetically arranged. Citations of Virginia cases must refer to the Virginia Reports and, in addition, may refer to other reports containing such cases.

(b) A statement of the case and of the points involved, if the appellee disagrees with the statement of appellant.

(c) A statement of the facts which are necessary to correct or amplify the statement in appellant's brief in so far as it is deemed erroneous or inadequate, with appropriate references to the pages of the record.

(d) Argument in support of the position of appellee.

The brief shall be signed by at least one attorney practicing in this Court, giving his address.

§3. Reply Brief. The reply brief (if any) of the appellant shall contain all the authorities relied on by him not referred to in his opening brief. In other respects it shall conform to the requirements for appellee's brief.

§4. Time of Filing. As soon as the estimated cost of printing the record is paid by the appellant, the clerk shall forthwith proceed to have printed a sufficient number of copies of record or the designated parts. Upon receipt of the printed copies or of the substituted copies allowed in lieu of printed copies under Rule 5:2, the clerk shall forthwith mark the filing date on each copy and transmit three copies of the printed record to each counsel of record, or notify each counsel of record of the filing date of the substituted copies.

(a) If the petition for appeal is adopted as the opening brief, the brief of the appellee shall be filed in the clerk's office within thirty-five days after the date the printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office. If the petition for appeal is not so adopted, the opening brief of the appellant shall be filed in the clerk's office within thirty-five days after the date printed copies of the record, or the substituted copies allowed under Rule 5:2, are filed in the clerk's office, and the brief of the appellee shall be filed in the clerk's office within thirty-five days after the opening brief of the appellant is filed in the clerk's office.

(b) Within fourteen days after the brief of the appellee is filed in the clerk's office, the appellant may file a reply brief in the clerk's office. The case will be called at a session of the Court commencing after the expiration of the fourteen days unless counsel agree that it be called at a session of the Court commencing at an earlier time; provided, however, that a criminal case may be called at the next session if the Commonwealth's brief is filed at least fourteen days prior to the calling of the case, in which event the reply brief for the appellant shall be filed not later than the day before the case is called. This paragraph does not extend the time allowed by paragraph (a) above for the filing of the appellant's brief.

(c) With the consent of the Chief Justice or the Court, counsel for opposing parties may file with the clerk a written stipulation changing the time for filing briefs in any case; provided, however, that all briefs must be filed not later than the day before such case is to be heard.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of the Court, and at least three copies mailed or delivered to opposing counsel on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

§7. Effect of Noncompliance. If neither party has filed a brief in compliance with the requirements of this rule, the Court will not hear oral argument. If one party has but the other has not filed such a brief, the party in default will not be heard orally.

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