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Clerk, Supreme Court of Appeals
Richmond, Va.

Record No. 6386

In the

Supreme Court of Appeals of Virginia

at Richmond

MUTUAL OF OMAHA INSURANCE COMPANY

v.

FRANK ECHOLS, ET AL., ADMRS., ETC.

FROM THE CIRCUIT COURT OF THE CITY OF STAUNTON

RULE 5:12 BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 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. 6386

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Monday the 18th day of April, 1966.

MUTUAL OF OMAHA INSURANCE COMPANY,
Plaintiff in error,

against

FRANK ECHOLS AND CHARLES E. ECHOLS, ADMINISTRATORS OF THE ESTATE OF DOROTHY GUY ECHOLS, DECEASED,
Defendants in error.

From the Circuit Court of the City of Staunton
William S. Moffett, Jr., Judge

Upon the petition of Mutual of Omaha Insurance Company a writ of error and *supersedeas* is awarded it to a judgment rendered by the Circuit Court of the City of Staunton on the 2nd day of November, 1965, in a certain motion for judgment then therein depending, wherein Frank Echols and Charles E. Echols, Administrators of the estate of Dorothy Guy Echols, deceased, were plaintiffs and the petitioner was defendant.

And it appearing that a suspending and *supersedeas* bond in the penalty of eighty-five hundred 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

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page 1]

* * * * *

MOTION FOR JUDGMENT

The plaintiff, Dorothy Guy Echols, hereby moves the Corporation Court for the City of Staunton, at Staunton, Virginia, for judgment against the defendant, Mutual of Omaha, Mutual Benefit Health & Accident Association, of Omaha, Nebraska, in the sum of Six Thousand Seven Hundred Seventeen Dollars and Forty-one Cents ($6,717.41), with interest from October 29, 1963 and the costs of this action, for the damages and wrongs hereinafter set out, to-wit:

That on the 27th day of March, 1962, the plaintiff entered into a contract of insurance with the defendant, designated as defendant's policy #13CM3-297121-62M, filed herewith as Exhibit A, by which the defendant agreed that, in the event of sickness on the part of the plaintiff, it would pay plaintiff 75% of her medical, hospital and nursing expenses, in excess of the deductible amount of Five Hundred Dollars ($500.00) and not exceeding Ten Thousand Dollars ($10,000.00); that plaintiff, at the inception of said policy, paid the annual premium of One Hundred Twenty-eight Dollars ($128.00), and thereafter paid the annual renewal premium due April 1, 1963, in like amount; and that on or about May 13, 1963, plaintiff suffered a cerebral accident or stroke which caused her to incur medical, nursing and

page 2] hospital expenses in the treatment and cure of her illness in the sum of Nine Thousand Four Hundred Fifty-six Dollars and Fifty-five Cents ($9,456.55), 75% of such sum in excess of the deductible amount being Six Thousand Seven Hundred Seventeen Dollars and Forty-one Cents ($6,717.41); and,

That due claim was made by plaintiff to defendant for the benefits due her under said policy by virtue of said medical, nursing and hospital expenses but defendant, on October 29, 1963, declined to make payment of said claim on the grounds that Dr. Alex F. Robertson, a physician of

Staunton, Virginia, had seen plaintiff at her home on several occasions in February, 1960, for faintness and weakness, and that said visits by Dr. Robertson were not disclosed in plaintiff's answer to the question in her application for said policy "Have you or any Dependents ever had, or been told you had, or received advice or treatment for (a) any physical conditions or injuries not mentioned above, or (b) any symptoms of ill health?," it being the defendant's position that by virtue of this situation no valid contract existed between the parties; and,

That, as a matter of fact, in February, 1960, plaintiff became nervous with accompanying weakness and faintness, as a result of matters entirely unrelated to her personal health and, as a precaution, she had Dr. Robertson make two or three calls upon her at her home for examination and consultation, his findings as to any abnormal physical conditions being entirely negative; that her discomfort was entirely unrelated to any organic or physical ill health and, shortly thereafter, she accompanied her husband on an extensive European trip, and in 1961 she traveled through South America, and during the entire period until May, 1963, she continued to be free of any indication of sickness or bad health; that her failure to mention her dis-
page 3] comfort in February, 1960, was not prompted by any intent to withhold material information; on the other hand, the answers to the questions in said application were supplied by the defendant's agent from information he elicited from plaintiff; and that her inadvertent failure to mention the aforesaid several visits by Dr. Robertson, as a matter of fact, was not a material factor in the negotiation of the contract between plaintiff and defendant nor was it material to the risk assumed by defendant in issuing said policy to plaintiff.

Wherefore, plaintiff prays judgment against the defendant in the aforesaid sum of Six Thousand Seven Hundred Seventeen Dollars and Forty-one Cents ($6,717.41), with interest from October 29, 1963, and the costs of this proceeding.

Given under my hand this 31st day of December, 1963.

DOROTHY GUY ECHOLS
By Counsel

* * * * *

Filed in the Clerk's Office the 3rd day of January, 1964.

EDITH H. PAXTON, Clerk
By M. W. WHITE, D.C.

* * * * *

page 6]

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DEFENDANT'S ANSWER AND GROUNDS OF DEFENSE

Defendant, Mutual of Omaha Insurance Company, successor to Mutual Benefit Health & Accident Association, for answer and grounds of defense to plaintiff's Motion for Judgment says:

(1) That it admits that on the 27th day of March 1962, it issued its policy of insurance as set forth in plaintiff's Motion for Judgment, and that the plaintiff paid said premiums as therein alleged. Defendant further admits that on or about May 13, 1963, plaintiff became ill and incurred certain medical and hospital expenses, the exact amount of which is not known to this defendant.

(2) Defendant admits that plaintiff duly filed her claim for benefits under said policy, and that defendant, for the reasons hereinafter set out, refused to pay said claim.

(3) Defendant admits and alleges that, prior to the issuance of its policy of insurance in the year 1960, plaintiff became ill and received medical attention. Defendant has no knowledge of travels taken by the defendant or as to her physical condition subsequent to the year 1960 and prior to her illness in the year 1963, but says that the same is immaterial. Defendant denies that the failure of plaintiff to mention in her application for said policy of insurance was immaterial to the risk assumed.

page 7] (4) And further answering defendant says that it issued its said policy of insurance relying upon the truth of all statements made in said application and in belief that the plaintiff had made a full disclosure

of her medical history; that said policy was issued in consideration of the payment of the initial premium and in consideration of the statements made in the application of the plaintiff, a copy of which was attached to said policy of insurance.

(5) Defendant further says that in answer to a question in said application as to whether or not the plaintiff had received advice or treatment for any physical conditions or injury not mentioned in questions 1 (a) (b) (c) (d) and (e) of said application, failed to disclose that on or about the month of February 1960, she had fainting attacks at home, complained of weakness for several weeks thereafter, that she was seen a number of times at her home by Dr. Alex F. Robertson, and that Dr. Robertson then urged hospitalization for her for the purpose of study of her condition; defendant alleges that such sickness and treatment and recommendation by said doctor was material to the risk assumed and that it would not have issued the said policy had it been informed fully of the same; that such concealment by the plaintiff was in law fraudulent.

(6) Defendant further says that by reason of the aforesaid concealment and incorrect information, said policy of insurance was void from its inception and was not in legal effect at the time the plaintiff became ill in the year 1963.

(7) Defendant on the 29th day of October 1963, when it learned of the aforesaid sickness in the year 1960, notified plaintiff that said contract of insurance was invalid by reason of said misrepresentation tendered to plaintiff
page 8] a refund of all premiums paid on said policy of insurance; that plaintiff refused said tender and returned the same; that defendant stands ready to refund the amount of the premiums paid by the plaintiff.

(8) Defendant denies that it is indebted to the plaintiff in any sum of money by reason of the aforesaid contract of insurance.

MUTUAL OF OMAHA INSURANCE COMPANY,
Successor to Mutual Benefit Health & Accident Association
By R. R. RUSH
Counsel

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Filed in the Clerk's Office of the Corporation Court City of Staunton January 24, 1964.
Teste:
EDITH H. PAXTON, Clerk.

page 9]

* * * * *

ORDER

This day came the attorneys for the parties and it being represented to the Court that the plaintiff, Dorothy Guy Echols, died intestate on the 11th day of August, 1964 and that Frank Echols and Charles E. Echols qualified before the Clerk of this Court on the 1st day of September, 1964 as Administrators of the Estate of Dorothy Guy Echols, deceased, on motion of Frank Echols and Charles E. Echols, Administrators of the Estate of Dorothy Guy Echols, deceased, it is ORDERED that this action be and the same hereby is revived in the names of Frank Echols and Charles E. Echols, Administrators of the Estate of Dorothy Guy Echols, as plaintiffs, and it is further ORDERED that this case be and the same hereby is set for trial in this Court on Monday, May 10, 1965 at 9:30 A. M.

Enter:

WM S. MOFFETT, JR.
Judge
2/2/65

* * * * *

page 12]

INSTRUCTION 1

The Court instructs the jury that, if they believe from the evidence that Mrs. Dorothy Guy Echols entered into the health and accident insurance policy in question with the defendant, Mutual of Omaha Insurance Company, on March 27, 1962, and in her application answered correctly all of the material questions propounded to her to the best of her knowledge and belief, and thereafter on or about May 13, 1963 became ill and entitled to the benefits as provided in

said policy, the jury shall find for the plaintiffs, Frank Echols and Charles E. Echols, Administrators of the Estate of Dorothy Guy Echols, deceased, in the amount of $6,717.41, with interest from October 29, 1963.

WM. S. M.

page 13] INSTRUCTION 2

The Court instructs the jury that in order to defeat recovery on the insurance policy involved in this action, the burden rests upon the defendant, Mutual of Omaha, to prove by a preponderance of the evidence that Mrs. Dorothy Guy Echols knowingly made a material false statement in answer to Question 1 in the application and unless the defendant, Mutual of Omaha, has proven by a preponderance of the evidence that Mrs. Echols did knowingly make a false statement as to a material fact in Question 1 of the application, you shall find a verdict in favor of the plaintiffs and fix their damages at $6,717.41 with interest from October 29, 1963.

Wm. S. M.

page 14] We, the Jury, upon the issue joined, find for the plaintiff in the amount of $6717.41 with interest from Oct. 29, 63.

PAUL OBAUGH
Foreman

May 10, 1965 EDITH H. PAXTON, Clerk

page 15] IN THE CIRCUIT COURT OF THE CITY OF STAUNTON. MAY 10, 1965.

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MOTION FOR JUDGMENT

This day came the parties by counsel and thereupon came a panel of thirteen (13) jurors, duly summoned by the Sergeant of the City of Staunton according to law, who qualified in all respects to serve as jurors and a list of said qualified

jurors was made up and completed. And the attorney for the plaintiff and the attorney for the defendant having alternately, beginning with the attorney for the plaintiff, each stricken from said panel the names of three of said jurors, the remaining seven, to-wit: Roger Scipione, Joseph K. Alexander, Emory C. Marchant, Berry F. Harvey, H. Paul Obaugh, Milton G. Klotz and Julius Margolis, constituted the jury for the trial of this case, who were sworn to well and truly try the issue joined and a true verdict give according to the evidence. And the jurors aforesaid having heard the evidence and arguments of counsel and having received the instructions of the Court, retired to their room to consider their verdict and after some time returned into Court with the following verdict, to-wit: "We, the Jury, upon the issue joined, find for the plaintiff in the amount of $6,717.41 with interest from Oct. 29, 1963. Paul Obaugh, Foreman." Thereupon the said defendant, by counsel moved the court to set aside the verdict of the jury on the grounds that the court left with the jury the materiality of misrepresentation in giving instruction No. 1 and further, that the evidence showed the answer was material. The grounds for the motion are more fully set forth in the record in this case. The Court doth take time to consider the motion of the defendant. And this case is continued.

WM. S. MOFFETT, JR., Judge

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page 16]

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ORDER

This day came the parties, by their attorneys, and the Court having maturely considered the defendant's motion to set aside the jury's verdict as contrary to the law and the evidence and without evidence to support it, and the briefs filed in support of and opposition to said motion, and being of the opinion that the jury's verdict should not be disturbed, it is accordingly ORDERED that the said motion to set aside the verdict of the jury be and the same hereby is overruled, to which action of the Court the defendant excepts.

And it is further ORDERED that the plaintiffs do recover of the defendant, in accordance with the said verdict, the sum of Six Thousand Seven Hundred Seventeen Dollars and Forty-one Cents ($6,717.41), with interest thereon from the 29th day of October, 1963, and the costs of this proceeding, to which action of the Court the defendant excepts.

Enter:

WM. S. MOFFETT, JR., Judge
11/2/65

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page 18]

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR

TO: MISS EDITH H. PAXTON,
Clerk of the Circuit Court for the City of Staunton
Clerk's Office
Staunton, Virginia

Notice is hereby given that Mutual of Omaha Insurance Company appeals from a final judgment rendered by this Court on November 2nd, 1965, and announced its intention of applying to the Supreme Court of Appeals of Virginia for a Writ of Error and *Supersedeas.*

ASSIGNMENTS OF ERROR

1. The Trial Court erred in submitting the case to the jury since the only question at issue was whether or not an admitted misrepresentation in the application for the insurance policy in question was a material misrepresentation.

2. The Trial Court erred in refusing to set aside the verdict of the jury and in refusing to enter judgment for the defendant.

3. The Court erred in permitting the witnesses, Dr. Alex F. Robertson, Jr., and Thomas A. Teagle, a practicing phy-

sician and a retired insurance salesman, respectively, to give opinion evidence on insurance underwriting practices.

GIVEN under our hand this 16 day of December, 1965.

MUTUAL OF OMAHA INSURANCE COMPANY
By R. R. RUSH
Its Counsel

* * * * *

page 3] A panel of seven jurors, all duly qualified and sworn, was seated in the box.

Judge Moffett: Members of the Jury, Counsel has indicated several matters they would like to take up in Chambers, so we will take a short recess.

IN CHAMBERS:

Mr. Timberlake: Your Honor, I thought maybe we had better discuss several procedural aspects of this case and then the matter of a deposition here that has been taken. Mr. Rush has agreed to stipulate that the amount of the claim is correct, waive proof of that. Of course, the policy is filed with the Motion for Judgment, and I assume that the same stipulation would apply —

Mr. Rush: Oh, yes.

Mr. Timberlake: As far as proof of the existence of the policy. I take it that the existence of the policy being stipulated and the amount of the claim, that the plaintiff has carried the labor of proof, and actually I go into the matter of defense on the introduction of any evidence from the standpoint of the Defendant. I haven't discussed it with Mr. Rush. I don't know what his thinking is.

page 4] Mr. Rush: I don't see much for a jury to decide. In other words, the policy has the application attached, and there has been introduced in evidence of the Underwriter of the Company a report from Dr. Robertson. The Notice of Motion sets forth three visits of Dr. Robertson to the Insured back in February of 1960 were not disclosed in the application, and that is the grounds on which the Company contends that the policy is not valid. The report of Dr. Robertson indicated that he attended her

three times in February of 1960, February 6, February 12, and February 25, for fainting spells, and at that time urged her to go to the hospital, and that was not disclosed.

Judge Moffett: The patient did or did not go to the hospital?

Mr. Rush: Did not, and as I see the case, we have no dispute of any facts except the materiality of the failure to disclose the visits of a doctor in answer to the questions, and, of course, we would depend upon our deposition of the Chief Underwriter of the Company which indicates that they would not have issued the policy had those facts been known at the time they took the application.

Judge Moffett: Then, do I understand, Mr. Rush, that you are thinking the only jury question in this case is the materiality of the failure to disclose —

Mr. Rush: I don't think that is a jury question. That is a Court question.

page 5] Judge Moffett: Then why have a jury?

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page 22]

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Judge Moffett: I take it, Gentlemen, we have only one jury question, whether or not the omission of Mrs. Echols to advise the Company that she had had these three visits from Dr. Robertson because of the circumstances, which will be made the subject of evidence, whether that omission is of such nature that it would void the policy.

Mr. Timberlake: That and the question whether she knowingly omitted it. The application has been signed by her as correct to the best of her knowledge and belief.

Mr. Rush: As I take the cited cases in Virginia, the question of whether a representation was made is a question for the jury, but whether it is material is a question for the court. That is the *Harkrade* case, and it is confirmed in the *Bankers* case.

Mr. Timberlake: That is the reason I made my objection so *strenously* to the admissibility of these hearsay writings of Dr. Robertson. I agree with Mr. Rush that the question of the materiality, once the condition has been proven, the

condition of the patient or the condition of the applicant has been proven, properly proven, the question of materiality becomes a question of law for the court, and that is the reason I urge so *strenously* that condition be proven by competent evidence.

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page 24]

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Judge Moffett: You gentlemen take the position that the matter of these representations is a matter of law, not a matter of fact?

Mr. Rush: Material.

Judge Moffett: As to whether they are material?

Mr. Timberlake: To the risk.

Judge Moffett: You are, in effect, eliminating the jury question.

Mr. Timberlake: In light of the evidence. If Dr. Robertson's testimony is that she had no malady of a material nature and no evidence or symptom of any organic trouble or disease or anything that required medical treatment in 1960, then I think that would go to the very heart of the materiality of the thing, and I think probably the Court would have to rule as a matter of law that it was material, but I think it is essential for the Company to prove its defense by competent evidence if we are to have a proper record in this case.

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page 27]

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Mr. Timberlake: Yes, Sir. It is stipulated between Counsel for the Plaintiff and Counsel for the Defendant that Policy No. 13CM3-297121-62M was issued on March 27, 1962 by the Mutual of Omaha, Mutual Benefit Health and Accident Association, of Omaha, Nebraska, to Mrs. Dorothy Guy Echols and is the policy that is filed with the Motion for Judgment in this case, and that said policy, subject to the defense asserted in this action, remained outstanding from the time

of its issuance until this action was instituted in
page 28] this Court on January 3, 1964, and that all premiums were paid thereon; and it is further stipulated that the amount sued for, $6,717.41, is the correct statement of the amount that would be due the plaintiff at the time of the institution of this action if the policy was in force and effect at that time. Is that correct?

Mr. Rush: Yes. Will you add one further thing, that the Company tendered a return of all premiums paid and the tender was refused?

Mr. Timberlake: That's all right.

Judge Moffett: The stipulations outlined by Mr. Timberlake as agreed to by Mr. Rush.

Mr. Rush: Yes, Sir.

Mr. Timberlake: With the tender added.

Judge Moffett: Yes, Sir.

Mr. Rush: Yes.

DR. ALEX F. ROBERTSON, JR.,
being duly sworn, testified:

Mr. Timberlake: Your Honor, Dr. Robertson's qualifications are mutually admitted by the parties.

Judge Moffett: All right, sir.

page 29] DIRECT EXAMINATION

By Mr. Rush:

Q. Please state your name and occupation.

A. Alex F. Robertson, Jr., physician.

Q. You practice medicine in the City of Staunton?

A. Yes, Sir.

Q. For how long, Doctor?

A. Since 1919.

Q. Doctor, did you or were you the family physician of Mrs. Dorothy Echols?

A. I would say yes. I would qualify that because she was never ill. I only saw her when she came in to get a vaccination or something of that sort in 1960.

Dr. Alex F. Robertson, Jr.

Q. I believe in the year, 1963, she suffered what the layman calls a stroke.

A. That's right.

Q. Were you requested to file a statement with the Mutual of Omaha Insurance Company in support of her claim for benefits under an insurance policy?

A. I don't recall.

Q. I show you here what is headed, "Physician's Statement, 8/21/63, Patient, Dorothy G. Echols, Address, Staunton, Post Office Box 869." Is that report in your writing?

A. Signature only.

page 30] Q. Signature?

A. Yes.

Q. Will you read that and see if that is from the records of your office?

A. That is correct.

Q. Is the information contained in that statement correct?

A. Yes.

Q. And that is your signature?

A. Yes.

Q. Will you read what appears after the letters, "2-6-60, 2-12-60, and 2-25-60?"

A. "2-6-60, fainting attack at home. 2-12-60, not determined, urged to come to hospital for further study and declined," and that also applies to the date of 2-25-60.

Q. What is this figure here before, "Not determined?"

A. I think it is a bracket to couple the dates together.

Q. Together. It doesn't mean anything, is that —

A. That's right.

Q. This statement was mailed under your signature to the Insurance Company, was it not?

A. I assume it was. It is my signature. I don't recall it.

page 31] Q. What was Mrs. Echols' age at that time, do you recall?

A. I don't recall it, the answer to your question, I am looking it up in the record. She was sixty — Is that '60 or '63?

Q. 1960.

A. In 1960, she was sixty-five.

Q. You called on her the three times at her home in Febru-

ary, 1960; did she come to your office at any time during February, 1960?

A. No.

Q. Do you have a record of her blood pressure at that time?

A. No, I do not. My records *says* physical examination was normal — negative I have — no record of the actual pressure.

Q. Whatever examination you gave her was in her home at the time?

A. That's right.

Q. When — let's see, those dates were February 6, 12, and 25 you visited her.

A. I don't have the record of the dates, but that is substantially correct so far as I can remember.

Q. She did she refuse to go to the hospital?

A. She didn't want to.

page 32] Q. She didn't want to. You urged her to go?

A. She didn't want to be bothered.

Q. I say you urged her to go?

A. (The witness nodded his head indicating, "yes.")

Q. I assume you wanted to give her some further examination at the hospital.

A. That's right.

Q. When there are fainting spells, there are possibilities of many disabilities are there not?

A. Yes.

Q. Would you name some of them?

A. Well, I would think the commonest cause of it would be a psychic effect of some sort. It also may occur in depleted, rundown conditions, anemia, various types of malignancy, *lukemia,* cancer, and low blood pressure.

Q. And high blood pressure?

A. Not commonly, certainly.

Q. If Mrs. Echols had gone to the hospital, you would have given her a thorough examination, would you not?

A. I would have — I think she had a thorough examination — I would have, additional examination not possible at home such as X-rays, certain lab work and any necessary consultations with other specialists if they were interested.

Dr. Alex F. Robertson, Jr.

Q. Did you make a report to the University Hospital concerning Mrs. Echols' prior treatment when she went there?

page 33] A. Dr. Miller from the University Hospital was over here in consultation — you mean at the time she had her stroke?

Q. Yes.

A. Dr. Miller from the University Hospital was over here and went over Mrs. Echols exhaustively, and he was also back another time, and she was not doing well, and we decided to send her over to the University Hospital. He was throughly familiar with the case.

Q. You did not make a written report to the University Hospital concerning those prior times?

A. No. No.

Q. Did you ever communicate to the Mutual of Omaha Insurance Company anything further than your signed statement which I showed you a few minutes ago?

A. I have no record or recollection of doing so.

A. Yes, *Sir.* That's all.

CROSS EXAMAMINATION

By Mr. Timberlake:

Q. Doctor, do you recall the circumstances under which you made these three visits out to Mrs. Echols in February, 1960?

A. Yes.

Q. Did you find any complaint on her part other

page 34] than weakness and disinterest in things in general?

A. Well, she said she had lost consciousness, felt faint.

Q. On one occasion?

A. The first time only.

Q. And aside from that, did you find any evidence of anything other than a feeling of weakness and disinterest?

A. No.

Q. I believe that you told the jury in response to Mr. Rush's question a few moments ago that some psychic cause or some shock or emotional disturbance for a person in otherwise

normal health is a common explanation or cause of a feeling of faintness.

A. Yes.

Q. I believe, Doctor, that you also testified that you made what you considered a thorough examination of Mrs. Echols on the occasion of one or more of these visits that you made to her at her home in February, 1960, and found no evidence of organic disorder or disease.

A. That's right.

Q. Isn't it true that it was simply to further reassure her as to the absence —

Mr. Rush: I think the question is very leading.

Mr. Timberlake: I can lead on cross examina-
page 35] tion. I think that is correct.

Judge Moffett: Yes.

By Mr. Timberlake:

Q. Isn't it true it was simply to reassure her as to the apparent absence of any organic disorder or malady that you urged her to go to the hospital?

A. Partly that, but largely to reassure her family.

Q. And you had in mind that a further examination at the hospital would rule out entirely or show the presence of *lukemia* or cancer; isn't that correct?

A. Not exactly. I would say a Pap smear for instance, which was one thing I wanted to have, would rule out to a fairly competent degree, cancer of the cervix. It wouldn't rule out cancer anywhere else. You have to have X-rays and other studies, and then you can't be sure. You can rule it in, but you can't rule it out.

Q. Is there evidence you know of that Mrs. Echols suffered from any of the maladies there — that Mrs. Echols would have suffered from at the hospital if —

Mr. Rush: I don't think that's material.

A. I am not sure I understand the question.

By Mr. Timberlake:

Q. To your knowledge, was there any subsequent evidence

of cancer or *lukemia*?

A. No.

page 36] Mr. Timberlake: Your Honor, I realize the question that I desire to ask Dr. Robertson would be in effect making Dr. Robertson my own witness, rather than cross examination, but for the sake of expediency, I would like to expound several questions to Dr. Robertson as a witness for the Plaintiff.

Judge Moffett: Yes, Sir.

Mr. Rush: Yes.

By Mr. Timberlake:

Q. I believe you testified that you had been practicing your profession here in the City of Staunton since 1919.

A. Yes.

Q. Will you state whether or not through that period you have served as medical examiner for various insurance companies?

A. I have.

Q. And that has been throughout the entire span of your practice?

A. Yes.

Q. Doctor, based upon your experience as a medical examiner for the various insurance companies that write business in this area, either health and accident or life or both, will you state whether or not in the absence of any subsequent evidence of ill health or organic disease or malady between February, 1960, and March 27, 1962, in your pro-
page 37] fessional opinion what you found or what you did not find on the occasion of your three visits in February, 1960, would that have rendered Mrs. Echols an uninsurable or bad risk for insurance on March 27, 1962?

Mr. Rush: I don't think he qualifies as an expert underwriter. This was made without medical examination. The policy was issued without medical examination.

Judge Moffett: There is nothing in the record to show Dr. Robertson has over that period of time made decisions as to the insurability or uninsurability of people. He has examined these people, no doubt many, many of them, and has sub-

mitted his findings to the company for their examination.

Mr. Timberlake: I will implement my question then.

Q. Dr. Robertson, throughout the period of some forty-five years that you have been serving as medical examiner for various insurance companies and performing the medical examinations and reporting the results of those examinations to the insurance companies, have you been able to determine the normal and usual bases and tests of insurability or insurable risks of the people that have throughout this period of time been examined by you?

Mr. Rush: The same objection.

A. I think so.

page 38] By Mr. Timberlake:

Q. Based upon that knowledge of general insurance practice acquired by you over a span of forty-five years as an insurance examiner for many and various companies, would you answer the question I propounded a few moments ago, assuming there was no evidence of organic trouble, malady, or ill health on the part of Mrs. Echols in February, 1960, to March 27, 1962, would, in your opinion, the conditions observed by you in the course of your three visits in February, 1960, to Mrs. Echols have rendered her an uninsurable risk?

Mr. Rush: The same objection.

Judge Moffett: State the grounds.

Mr. Rush: The objection is it still does not show Dr. Robertson is an underwriter or able to determine what steps or what action an insurance company would take. There are many kinds of insurance, health and accident. I think the age has something to do with it, and the type of policy, itself, and I just don't think he, as a medical doctor he may may know when policies were issued, but I don't think he is able to determine what the policies of underwriting in insurance is. I don't think he is qualified and expert in that field.

Mr. Timberlake: In reply, I would say Dr. Robertson answered in reply to my express question, over forty-five years

he has served as a medical examiner for various
page 39] insurance companies and life companies, he has been able to familiarize himself with the various parctices of the different questions and that is the basis for his trying to answer.

Judge Moffett: I would like for you to point out this particular type of policy, a major medical, a health and accident policy. I will get you to explore his familiarity with that type of policy.

Mr. Timberlake: Yes, Sir.

Q. In the course of forty-five years you have served as a medical examiner, has your experience dealt with hospital, health and accident policies as well as life insurance company policies?

A. Yes.

Mr. Timberlake: I think he is qualified.

Judge Moffett: All right, but I would like for you to direct your questions to the type policy we are dealing with in this case.

By Mr. Timberlake:

Q. Does that include so-called major hospitalization policies as well as others?

A. I would say not necessarily because that is a most recent development. You are going back over a forty-five year span.

Q. Over a portion of that span, have you had
page 40] experience with that type policy as well as other types?

A. Not as much as some, but not a great deal.

Q. Based upon the experience that you have had with that type of policy, can you answer the question I propounded to you?

A. Yes, I think she was insurable.

Mr. Rush: I object to the answer and move it be stricken. He just stated he never had any experience with this type policy.

Dr. Alex F. Robertson, Jr.

Mr. Timberlake: That is not what he stated.

Judge Moffett: Save your point, Mr. Rush.

Mr. Rush: Yes, Sir.

CROSS EXAMINATION

By Mr. Rush:

Q. Dr. Robertson, you have never had any experience with policies issued without medical examination, have you?

A. No.

Q. And other policies that you have had experience with, there has been a medical examination?

A. Yes.

Q. And wherever it is revealed to an insurance company that there have been some medical visits and
page 41] treatment of a certain thing to the insured, you are requested to make a current examination to determine if that trouble is still present, are you not?

A. I am not sure I understand that question.

Q. Well, assume that an application for a policy of insurance would indicate that the applicant had been visited by a doctor three times in one month say for fainting spells, when you examine that applicant, you would make the examination to determine what you thought were indicated by fainting spells, would you not?

A. I think that would be somewhat modified by the time. If it had been a long interval, I don't think you would have gone into any exhaustive tests to establish the cause of it if there had been no repetition of it.

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page 42]

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Judge Moffett: The depositions that have been taken in this case were taken of a witness out in Nebraska, and because of the distance involved, he is not here today, and I will ask

you to treat the answers Mr. Rush will read as if they came from the gentleman in question. His name is what?

Mr. Rush: Mr. Warner Moss.

* * * * *

page 43]

* * * * *

WARNER M. MOSS

Mr. Rush assumed the stand, to read the following answers to the following questions read by Mr. Timberlake:

"Please state your name and address." I suppose that should be you.

"Warner M. Moss, 8623 North Ridge Drive, Omaha, Nebraska.

By whom are you employed?

Mutual of Omaha Insurance Company.

Would you please give a brief resume of your employment, including dates, titles and companies?

I have been employed by Mutual of Omaha since May of 1947, all of which time has been spent in the underwriting area as an underwriter, as a supervisor, as Assistant Chief Underwriter, and as Chief Underwriter. I have been Chief Underwriter since 1959.

During the month of March, 1962, what was your position with Mutual of Omaha?

Chief Underwriter.

page 44] What were your duties as Chief Underwriter?

To oversee the underwriting of all the individual business written by Mutual of Omaha Insurance Company, to establish the company's underwriting practices, to see that the underwriters maintained consistency in administering those practices, and to keep in touch with the industry generally to make sure that we were consistent with the practices throughout the insurance industry.

Were you as Chief Underwriter familiar with Mutual of Omaha's practice in the underwriting of major medical policies?

Yes.

I now hand you a piece of paper. Do you know what this is?

Yes.

Please tell us what this is.

This is an application for insurance policy No. 13 CM 3 297121-62MC, dated March 27, 1962, for Dorothy Guy Echols.

I now hand you said piece of paper which has now been introduced in evidence and marked as Defendant's Exhibit 'A.' Would you please tell us when this policy was applied for?

It was applied for on March 27, 1962.

How do you know when this policy was applied for and when it was issued?

It is indicated on the application.

page 45] What type policy is this?

An individual major medical expense policy.

Was this policy issued to Dorothy Guy Echols?

It was.

Would you please tell us what selection is?

Selection is the review and consideration by the underwriters on behalf of the insurance company to determine the applicant's eligibility for the policy of insurance applied for.

Was this type policy issued on a selective basis?

It was.

Was this particular policy issued on a selective basis?

It was.

Is this type policy issued today on a selective basis?

It is.

Are there any questions on the application introduced as Defendant's Exhibit 'A' pertaining to the past and present health history of the applicant?

There are.

Would you please read such questions and answers as are given on the application marked as Defendant's Exhibit 'A?'

'1. Have you or any Dependents ever had, or been told you had, or received advice or treatment for: (circle

page 46] conditions answered 'yes' and give details below) (a) High blood pressure, heart, vein or ar-

tery trouble, rheumatic fever?' The answer given is 'No.' '(b) Lung or other respiratory trouble; stomach, gall bladder, intestinal or rectal trouble; rupture; diabetes?' The answer given is 'No.' '(c) Any form of tuberculosis; kidney or bladder trouble, prostate trouble, female trouble, venereal disease?' The answer given is 'No.' '(d) Mental or nervous trouble, epilepsy, brain disorder, arthritis, rheumatism, back or spinal trouble? The answer given is 'No.' '(e) Cancer, tumor or any form of growth; any deformity; loss of hearing; loss of, or loss of use of, eye or limb?' The answer given is 'No.' 'Have you or any Dependents ever had, or been told you had, or received advice or treatment for: (a) any physical conditions or injuries not mentioned above, or (b) any symptoms of ill health? (Give details below)' The answer given is 'Yes.' 'Self Tonsillectomy as a child Self Carbuncle 1961 Complete Recovery' 'Are your and your Dependents' morals and habits correct and temperate?' The answer given is 'Yes.' '2. What issued or pending individual or group accident or sickness insurance do you now have?' The answer given is 'Mutual of Omaha.' '3. Has any insurance applied for by or covering you or any Dependents been declined, rated up or terminated?' The answer given is 'No.' '4. What insurance benefits or Government Compensation has been claimed or paid because of injuries or sickness sustained

page 47] by you or any Dependents? (State who, sources, dates, and nature of injuries or sickness)' The answer given is 'None.'

In your position as Chief Underwriter do you think, in line with Mutual of Omaha underwriting practices, that the answers given to the questions which you just read from Defendant's Exhibit 'A' in the application were material to the issuance of this policy?

Yes.

If the application for this policy had shown that the applicant was seen at her home on several occasions in February of 1960 for faintness and weakness by a doctor, would you have issued this policy?

No.

I hand you a light green colored piece of paper. Do you know what this is?

Yes.

Would you please tell us what this is?

It is a Physician's Statement prepared by Dr. Alex F. Robertson, 211 West Frederick Street, Staunton, Virginia, on August 21, 1963, and appears to pertain to his patient, Dorothy Guy Echols.

Does this Defendant's Exhibit 'B,' Dr. Robertson's statement, indicate that he had given any medical treatment or advice to Dorothy Guy Echols prior to March 27, 1962?

Yes.

page 48] Would you please indicate such medical treatment as is shown on Defendant's Exhibit 'B?'

The statement indicates that Dr. Robertson saw Dorothy Guy Echols on February 6, 1960, February 12, 1960, and February 25, 1960, for fainting attacks at home, cause not determined, urged to come to the hospital for further study, and declined.

If the application for this policy had shown that the applicant was seen at her home by a doctor on February 6, February 12, and February 25, of 1960, for fainting attacks, and was urged by said doctor to go to the hospital for further study but the applicant declined to do so, would you have issued this policy?

No.

If the application for this policy had shown that the applicant was seen by a doctor in 1960 for a fainting attack and complained of weakness for several weeks after that, and hospitalization for study was urged but declined, would you have issued this policy?

No."

"Mr. Moss, are you still under oath as to the matters testified to in chief on March 6, 1964, and this cross examination in respect thereto?

Yes.

page 49] Do you suggest that the answers given by Mrs. Echols in her application relative to the policy in question, or any of them, were false?

Yes.

If so, in just what respect do you contend that she gave a false answer or answers?

Warner M. Moss

We contend that the answer given to the question on the application for insurance which reads, 'Have you or any Dependents ever had, or been told you had, or received advice or treatment for: (a) any physical conditions or injuries not mentioned above, or (b) any symptoms of ill health? (Give details below)' was false.

Is your testimony that the policy in question would have been refused based entirely upon the 'physician's statement' of Dr. Alex F. Robertson dated August 21, 1963, referred to in your prior testimony?

Yes.

If so, please state whether you have any information from Dr. Robertson, by virtue of personal interview or discussion or supplemental report, dealing with his having seen Mrs. Echols in February, 1960, other than the abovementioned 'physician's statement?'

Yes.

If so, just what is such information?

We have what purports to be a hospital history
page 50] from Kings Daughters Hospital.

Counsel for the Defendant: Mr. Moss, I hand you what has been identified as Defendant's Exhibit 'C.' Now would you please tell us what this is?

This appears to be a photo copy of a hospital history from the Kings Daughters Hospital.

Tell the patient and the date of confinement.

On Mrs. Dorothy Guy Echols on May 13, 1963.

I would like to introduce in evidence Defendant's Exhibit 'C.'

In conjunction with the question: 'If so, just what is such information?' would you please give us the information shown in Defendant's Exhibit 'C?'

This history indicates that 'In 1960 she had a fainting attack at home and complained of weakness for several weeks after that. She was seen by me a number of times and hospitalization for study was urged but declined.' The report is signed by Dr. A. F. Robertson.

Do you tell the Court that, based upon such 'physician's statement' alone, assuming that the answers given by Mrs. Echols in her application were otherwise correct, and without

further inquiry or amplification, your company would have refused to issue the policy in question?

Yes.

Please answer this question: Assuming that page 51] Mrs. Echols, on or about February 1, 1960, was suffering from no known organic malady or ill health, that she was suddenly confronted with an emotional shock because of a family problem and that as a result, she experienced a normal reaction of nervousness and concern, causing her to feel symptoms of faintness and fatigue, that to reassure herself and her family she had Dr. Robertson visit her at her home on those occasions to check her physical condition and satisfy her and himself that she was suffering from no organic malady or illness, that Dr. Robertson's examinations of her on those three occasions failed to reveal any organic trouble or abnormality and that he so advised her and told her that he could find nothing wrong but that if she had any further apprehension on this score she should go to the hospital for further examinations, that she thereupon accepted his conclusion that there was no evidence of organic illness or abnormality and, thereafter, the emotional shock which she had suffered having diminished or disappeared, she enjoyed her normal good health, up to and including the date of March 27, 1962, would you state under oath that she, in your opinion, would not have been an acceptable risk for the policy she applied for on March 27, 1962?"

Mr. Timberlake: I have objected to the foregoing answer on the grounds it is unresponsive to my question, and subject to my objection. I am perfectly willing for it to be read.

page 52] Mr. Rush: I think it is more or less immaterial, but since the question has been read, the answer should be. I understood that Mr. Timberlake was not going to read questions he didn't want answered.

Judge Moffett: May I refresh my recollection as to the answer? I think, Gentlemen, I will let that answer go into the record. Save your point, Mr. Timberlake.

Mr. Timberlake: All right, I except to the Court's ruling. That is on Page 5, the answer.

Warner M. Moss

Mr. Rush resumed the reading of the answers:

"The question assumes certain things were known to us at the time we considered the applicant for insurance. The only knowledge the underwriters have as to the presence or absence of organic malady or ill health is that of disease or symptoms thereof furnished by the applicant in answer to questions on the application for insurance. We had no knowledge of an emotional shock caused by a family problem at the time this policy was applied for. As underwriters, we would not accept fainting attacks followed by several weeks of weakness as a normal reaction of nervousness and concern. Such an episode could indicate the existence of one or more conditions such as hypertension, cardiac disease, hypotension, neurological or emotional problems, cerebral accidents, hypoglycemia or anemia. The true significance would have
page 53] to be determined by examination, tests and studies as ordered by her physician. Our underwriting decision would then be made on the basis of his findings and diagnosis.

If under those conditions, Mrs. Echols would not have been an acceptable risk, just what does your company require from the standpoint of good health, in issuing this type of policy?

From a health standpoint, this type of policy is issued to persons who meet the Company's standards of insurability which are generally consistent with sound underwriting practices throughout the insurance industry.

Were you aware of the fact that Mrs. Echols had a valid policy of health insurance at the time of her application to your company and that she simply, in response to your company's solicitation and advertising that its insurance was more desirable, undertook to substitute the coverage afforded by your company for that which she had previously carried?

We were aware that Mrs. Echols was at that time insured as a dependent on a hospitalization policy issued by Mutual of Omaha to her husband. We were not aware of coverage with any other insurer.

Do the answers which you have given to the foregoing questions modify the position stated by you in the answers which

you gave to the questions propounded to you in this case on March 6, 1964?

No."

page 54]

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THOMAS A. TEAGLE,

being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Timberlake:

Q. Will you please state your full name, age, residence and occupation?

A. Thomas A. Teagle, 214 East Beverley Street, Staunton, Virginia. I will be 68 on August 4th of this year.

Q. Your occupation.

A. Retired insurance man.

Q. Mr. Teagle, over how long a period of time were you actively engaged in the insurance business?

A. About 38 years.

Q. During that time did your work involve the sale and issuance of health and accident insurance, life insurance, and hospitalization insurance?

A. Yes, it involved the sale of hospitalization.

Q. And over that period of time were you able to familiarize yourself with the general underwriting practices of the major companies in the insurance industry

page 55] throughout the country?

A. Yes, to some extent. We have enough correspondence with the underwriters, you kind of feel you accumulate a lot of experience over that many years, exactly how the underwriters feel in issuing the policies.

Q. Do I understand, based on that contact over the years with the underwriters' aspect of the industry as well as the sales, you have familiarized yourself with the general policies of the trade?

A. Oh, yes.

Thomas A. Teagle

Q. From the underwriting standpoint?

A. Oh, yes.

Q. Now, Mr. Teagle, directing your attention to the underwriting practices and policies with reference to major hospitalization insurance, I want to ask you this question: assume that Mrs. Dorothy Guy Echols on or about February 1, 1960, was suffering from no known organic malady or ill health, that she was suddenly confronted with an emotional shock because of a family problem, and that as a result, she experienced a normal reaction of nervousness and concern, causing her to feel symptoms of faintness and fatigue, that to reassure herself and her family she had Dr. Alex F. Robertson, Jr., visit her at her home on three occasions to check her physical condition and satisfy her and himself that she was suffering from no organic malady or illness, that page 56] Dr. Robertson's examination of her failed to reveal any organic trouble or abnormality and that he so advised her and told her that he could find nothing wrong but that if she had any further apprehension on this score she should go to the hospital for further examinations, that she thereupon accepted his conclusion that there was no evidence of organic illness or abnormality and, thereafter, the emotional shock which she had suffered having diminished or disappeared, she enjoyed her normal good health for the ensuing two years and one month up to March 27, 1962, during which period of two years and one month she travelled extensively in Europe and South America, would you state whether in your opinion and in accordance with the general underwriting policies of the major insurance companies of the insurance industry, she would have been an acceptable risk for a policy of major hospitalization insurance on March 27, 1962?

Mr. Rush: The question is objected to. I don't think he is qualified as an expert underwriting insurance. He was a salesman, his only experience was in seeing what happened in applications he took. I think it takes an expert to be an underwriter and know the policies of insurance companies. He hasn't shown he knows the policies of any company except the one he worked for and it was never shown he had had anything to do with major medical policies; and besides, there are some

facts in the hypothetical question not proven by Dr. Robertson. He stated he urged her to go to the hospital,
page 57] to satisfy the family, not her.

Mr. Timberlake: In response to Mr. Rush's objection, I submit the hypothetical question is proper from the Plaintiff's standpoint. Mr. Teagle has qualified himself as the Court heard from the witness stand, and his answer goes to the weight rather than admissibility of his evidence. He testifies that he has been engaged in the insurance company for some 38 years, during which time he has had intimate contact with the underwriting aspect, not only of health and accident insurance but life insurance and major hospitalization insurance, and I submit to Your Honor that his testimony is admissible, and the weight of it is for the jury to determine, particularly in light of this witness, Moss, out in Omaha, and his deposition that the underwriting policies of Mutual of Omaha were geared to the major companies of the industry. That was in his deposition.

By Judge Moffett:

Q. Has it ever been, down through the years, your responsibility to determine the insurability or non-insurability of applicants for insurance by reason of their physical record?

A. Well, you see, all companies can underwrite non-medical insurance up to a certain amount, also hospitalization and major medical, also, and when we asked the questions to the applicant, if the applicant's answer — we feel that's all right according to the application, we sent them in non-medical. If they answer the questions so that the
page 58] agent feels it should go to a medical examiner for his opinion, we send them to the medical examiner, but the major hospitalization and major medical is non-medical.

Q. Is your experience limited largely to the selling aspect of it, Mr. Teagle?

A. In my capacity, you see I have been manager for a good many years, I make inspections for agents on applications and for the company in a lot of cases. Now, I don't make the medical determinations, I don't do that for them, but in handling as many applications as I have handled, I feel I have

some idea as to whether the company will issue the application or whether it won't. /A

Mr. Timberlake: Could I ask a further question?

Judge Moffett: Yes.

By Mr. Timberlake:

Q. In handling the many and sundry applications you have had, have you not, through that, been able to determine the underwriting policy of the company in light of those applications of the companies?

A. Well, to some extent, yes. I can pretty well tell if I send an application in whether they are going to send it back for examination, if there is any question in it, so I always advise them occasionally before I send it in that there is more than likely going to be examination or they will probably write to the doctor for additional information.

page 59] Q. In sending in the application, if there is any question, do you thereupon come in contact with the underwriting department and ascertain their policy?

A. Oh, yes, you come into contact with the underwriting department.

Q. Has that contact existed throughout your experience?

A. Oh, yes, I have been in contact many a time.

Judge Moffett: I think I am going to let Mr. Teagle answer. *They* jury has heard his experience, and they will evaluate and weigh it in light of his experience. Save your point, Mr. Rush.

Mr. Rush: Yes.

By Mr. Timberlake:

Q. You remember the question?

A. Do I think the company would have issued the policy?

Q. With the background question—with the background I gave you and coupled with the fact from 1960 up to February, 1962, there was no evidence of ill health on the part of this applicant who was leading an active life including extensive travel abroad, will you state whether or not in your opinion she would have been a major risk?

A. For the companies I have represented, I

page 60] would say yes. I have represented several companies in the brokerage field and also I have

represented two companies I would say — I told you for 38 years, but come to think of it, it has been 40 years, a little longer than I thought.

Q. Do those companies with which you have had your contact conform to the general underwriting policies of the underwriting trade?

A. Yes. In fact, all companies have similar underwriting.

Q. That's all.

Mr. Rush: Without waiving my objection, I would like to ask him several questions.

CROSS EXAMINATION

Q. Have you ever sent off for a policy you thought would be issued and the application was declined?

A. Oh, yes.

Q. That's all.

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page 67]

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FRANK ECHOLS,

being duly sworn, testified:

DIRECT EXAMINATION

By Mr. Timberlake:

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Q. Mr. Echols, are you the husband of the late Mrs. Dorothy Guy Echols?

A. That's true.

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page 70]

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Q. On March 27, 1962, Mr. Echols, were you aware of any ill health on the part of your wife?

Frank Echols

A. None whatever. What date?

Q. The time of this application, March 27, 1962.

A. None whatever.

Q. To your knowledge, what was the first indication of ill health on the part of Mrs. Echols?

A. Well, I don't know of any particular occasion. She had this stroke in May of '63.

Q. That is the first indication to your knowledge, *S*ir?

A. Except back in '60, three — Dr. Robertson's visits.

Q. Were you aware of the fact she had had a carbuncle removed in 1961?

page 71] A. I remember that, yes.

Q. Now, aside from these instances, do you know of any indication of ill health on the part of your wife?

A. No, *S*ir, I do not.

Q. Directing your attention to the occasion of Dr. Robertson's three visits in February of 1960, will you state whether or not that was in the same period of your son's, Charles', decision to get married?

A. It was the same month, yes.

Q. Were you aware during the month of February, 1960, of any problems, or emotional upset as far as that goes, on the part of Mrs. Echols?

A. Not beyond the last visit of Dr. Robertson which was on February 25.

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page 75]

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IN CHAMBERS

Judge Moffett: Mr. Timberlake, do you have any identity on your instructions?

Mr. Timberlake: I don't have. I will put it right on. Number them one and two?

Judge Moffett: Yes, *S*ir. Mr. Rush, you letter yours, please.

Mr. Rush: No, *S*ir, I have no instructions. I want to make a motion to strike the Plaintiff's evidence on the grounds that

there can be no question that Mrs. Echols had knowledge of the visits of the doctor which were left off the
page 76] application, which, I think, leaves the one question as to whether or not the failure to answer those questions is material, which is, of course, a question for the court of law.

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page 79]

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Mr. Rush: If Your Honor please, I think Counsel for the Plaintiffs is trying to prove that actually what happened to her had no significance, was not connected in any way with her later disability, but that is not the question, as I see it. As I said, as in the *Harkrader* case, the Company is entitled to a full and frank disclosure of prior medical tests so it may estimate the risk they assume. When the fact of three visits to a home in one month and the further fact that she was urged to go to the hospital — and Dr. Robertson doesn't deny that — that is indication that it was a material thing in connection with the health of a sixty-six year-old woman. Now, Dr. Robertson stated there might be several indications or physical defects that might cause fainting spells. While he said he took the blood pressure, he said he had no office record of it. We don't doubt he took it. He also stated if she had gone to the hospital other tests would have been made and, if necessary, consultations with other physicians. And I think that certainly the evidence of the underwriter is entitled to considerable weight, his opinion, as to what fainting spells might mean, and he indicated some several things including hypertension; and without that knowledge, they
page 80] certainly could not have a fair idea of the risk which they were asked to assume. Now, Mr. Echols repeatedly stated that at no other time except when Dr. Robertson visited her in February, 1960 — and he seemed to recall it very clearly — was there any indication of anything being wrong with her health; and I certainly think in view of all of the testimony, including Mr. Moss' and Dr. Robertson's, that there was sufficient indication that some-

thing might be wrong that a company in issuing a policy of that type had a right to know of it.

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page 82]

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Mr. Rush: Instruction 1, as I see it, completely ignores the duty of the Court to determine whether or not the failure to answer the question was material, and as I see it, the only possible question that the jury could have presented to it is whether or not according to Mrs. Echols' knowledge and belief the application was true, and certainly there has been no evidence that she had forgotten. Mr. Echols certainly remembered it, and I think it is certainly — the answer to include those visits is certainly included in the question there. Any kind of treatment or illness, unless something had removed that entirely from her mind; she is bound to have had knowledge of it, and that is certainly contemplated by the question which was asked.

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page 88]

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Mr. Rush: The Defendant moves that the verdict of the Jury be set aside for the following reasons: first, the Court has left with the Jury the question of the materiality of the misrepresentation; the instruction concerning whether or not the Plaintiff — that is Instruction No. 1 —

page 89] whether or not the misrepresentation also adds in there the question of whether it is material. In your correction of that instruction, the question is left with the Jury to determine whether or not she correctly answered all material questions which has the same effect of taking and leaving with the jury whether or not that was a material question and in each instance directs the verdict if they believe that the insured failed to answer material questions. It is our contention as to whether or not it is

material is entirely up to the Court, and that the only question that could possibly have been submitted to the jury was whether or not she answered the questions correctly, that particular question, without the material part in it. And on the further ground that the evidence clearly shows that the answer to the question which was erroneous was material to the issuance of this policy, and that the Court should so find and direct a verdict for the Defendant.

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A Copy — Teste:

H. G. TURNER, Clerk.

INDEX TO RECORD

	page
Writ of Error and *Supersedeas* Awarded	1
Record	2
Motion for Judgment	2
Defendant's Answer and Grounds of Defense	4
Order — February 2, 1965	6
Instructions	6
Verdict of Jury	7
Order — May 10, 1965	7
Judgment — November 2, 1965	8
Notice of Appeal and Assignments of Error	9
Proceedings	10, 21, 34
Witnesses:	
Dr. Alex F. Robertson, Jr.	13
Warner M. Moss	22
Thomas A. Teagle	29
Frank Echols	33