

DATE: 2001/04/12  
DOCKET: C32157

COURT OF APPEAL FOR ONTARIO

CATZMAN and WEILER JJ.A. and SPENCE J. (ad hoc)

B E T W E E N:

PUSATERI'S LIMITED

Barry A. Percival, Q.C., for the appellant Plaintiff (Appellant)

- and -

PRUDENTIAL OF AMERICA LIFE  
INSURANCE COMPANY (CANADA)

Peter H. Griffin and Mark Veneziano, for  
the respondent

Defendant  
(Respondent)

Heard: March 29 and 30, 2001

On appeal from the judgment of Madam Justice Jean L. MacFarland dated  
April 28, 1999.

BY THE COURT:

[1] The trial judge dismissed the action of the appellant Pusateri's Limited ("the company") for payment of the proceeds of a life insurance policy from the respondent in the amount of \$5 million.

[2] Cosimo Pusateri (“Pusateri”) died at forty-three years of age on December 23, 1995. His death was caused by a particularly virulent form of colon cancer with which he had been diagnosed earlier in March of that same year.

[3] Pusateri had made arrangements for himself and his brother-in-law, Salvatore Trozzo, to apply for key-man policies of life insurance to be held by the company on each of their lives. The policies were to pay the sum of \$5 million in the event of the death of either Pusateri or Salvatore Trozzo.

[4] Pusateri spoke to his insurance agent, Richard Gordon, who made the required appointments for physical examinations to be conducted by the respondent’s physician on January 19, 1995. The policies were delivered to Pusateri on the morning of March 23, 1995. The following day, Pusateri was diagnosed with lymphoma and on March 29, 1995 following surgery, with colon cancer. The respondent refused to pay the proceeds of the policy and the appellant brought an action for payment.

[5] **The trial judge dismissed the action on three bases:**

(a) At the date of the application, **Pusateri materially misrepresented the facts regarding his medical treatments in 1994** which, if known, would have led the respondent and any reasonable insurer to refuse to accept the risk;

(b) **There was a change in health and insurability between the date of the application and the date of delivery of the policy** with the result that Pusateri signed a policy delivery receipt which was false and under s. 180 of the Insurance Act rendered the policy voidable at the instance of the insurer.

(c) **Pusateri materially misrepresented the change in his medical condition at the time of delivery** of the policy of insurance.

[6] We are not satisfied that there is any error respecting the first reason for which the trial judge dismissed the action. In her reasons, the trial judge said, at paras. 34 and 35:

On the evidence there can be no doubt that Mr. Pusateri failed to reveal relevant and material information to Dr. Landon in response to his specific questions about rectal bleeding. He did not tell Dr. Landon about his visits to Dr. Rosen in relation to such complaints the previous summer, did not tell him about the sigmoidoscopy examination, did not tell him that Dr. Rosen had found a hemorrhoid which bled on palpation, and did not tell him that he had been referred to a colorectal surgeon but failed to keep the appointment.

Similarly Dr. Rosen's report to the insurer failed to accurately report Mr. Pusateri's symptoms and the duration of them, failed to reveal the sigmoidoscopy examination and the fact that a hemorrhoid had been found which bled on palpation, failed to reveal that Mr. Pusateri had been referred to a colorectal surgeon and that he apparently failed to keep the appointment. The reassuring tone of the report was misleading.

[7] We agree with the trial judge's observations and find them conclusive on the materiality of misrepresentation of facts at the date of Pusateri's application for insurance. By virtue of s. 183 of the Insurance Act,[1] the misrepresentation of these facts rendered the policy voidable by the respondent.

[8] Having regard to our conclusion on the first ground, it is not necessary for us to deal with the second and third bases. It is indisputable that there was a change in the insurability of Pusateri between the time the application was completed and the time the policy was delivered. In essence, the appellant's argument was that the respondent had to establish subjective knowledge on the part of Pusateri of his health and insurability and of changes in his health and insurability between the time the application was completed and the delivery of the policy. The trial judge did not agree that a subjective element was required, and referred to *Wagner Bros. Holdings Inc. v. Laurier Life Insurance Co.* (1992), 8 O.R. (3d) 609 at 615 (Ont. C.A.), which suggests that pursuant to s. 180 of the Insurance Act,[2] a change in insurability may prevent the contract from coming into effect even if it is not known to the insured.

[9] The appellant's further submission is, however, that despite s. 180, the wording of the policy required subjective knowledge on the part of Pusateri. The trial judge made no specific finding with respect Pusateri's subjective knowledge. She did, however, say in paras. 49 and 50 of her reasons:

Lastly, in the event I am in error in respect of my findings in relation to the materiality of the events of the summer of 1994 and the application of s. 180 of the Insurance Act, I consider the relevance of the visits to doctors in March, 1995.

Mr. Pusateri was, in my view, obliged to reveal these visits to Mr. Gordon as I have found he did but also to authorize Mr. Gordon to pass the information on to the company. Signing the Delivery Receipt without qualification as he did was misleading the company in a very material way. His failure to inform the company of these changes entitled the company to void the policy if one ever took effect.

[10] While it is not necessary for us to decide, we lean to the view that these findings, coupled with the evidence to which we refer below, would establish (if it were necessary to do so) the requisite subjective knowledge on the part of Pusateri. The further evidence is that, between the dates of the application and the delivery of the policy, Pusateri visited doctors on four occasions and had seven separate diagnostic tests of his medical condition. He also cut short a trip to Florida with his family during the March school break and on his return to Ontario asserted a claim on a travel insurance policy with respect to recurrent severe and abdominal chest pains. When Gordon attended upon Pusateri to deliver the policy, Pusateri told Gordon about having a pain in his side. Gordon advised Pusateri that he had to tell the respondent about these visits to doctors as it affected his insurability. Pusateri did not do so. The trial judge also accepted the evidence that Pusateri instructed Gordon not to advise the respondent.

[11] Finally, the appellant submitted that Pusateri's disclosure to Gordon concerning his pain at the time of the delivery of the policy bound the respondent. On this subject, Pusateri knew that Gordon was of the view he could not advise the respondent without Pusateri's consent. We agree with the trial judge's conclusion that, in these circumstances, the respondent was not bound by the knowledge of Gordon.

[12] Accordingly the appeal is dismissed with costs.

Released: APR 12, 2001  
MAC

Signed: "M.A. Catzman J.A."  
"K.M. Weiler J.A."  
"Spence J. (ad hoc)"

[1] Section 183 states:

183.-(1) An applicant for insurance and a person whose life is to be insured shall each disclose to the insurer in the application, on a medical examination, if any, and in any written statements or answers furnished as evidence of insurability, **every fact within the person's knowledge** that is material to the insurance and is not so disclosed by the other.

(2) Subject to section 184, a failure to disclose, or a misrepresentation of, such a fact renders the contract voidable by the insurer.

[2] Section 180 states:

180.-(1) Subject to any provision to the contrary in the application or the policy, a contract does not take effect unless,

(a) the policy is delivered to an insured, the insured's assign or agent, or to a beneficiary;

(b) payment of the first premium is made to the insurer or its authorized agent; and

(c) **no change has taken place in the insurability** of the life to be insured between the time the application was completed and the time the policy was delivered.

(2) Where a policy is issued on the terms applied for and is delivered to an agent of the insurer for unconditional delivery to a person referred to in clause (1)(a), it shall be deemed, but not to the prejudice of the insured, to have been delivered to the insured.