

*2012 U.S. Dist. LEXIS 170518, **

INTEGON NATIONAL INSURANCE COMPANY, Plaintiff vs. MT&R ENTERPRISES, INC., et al.,
Defendants

Case No. 4:10-cv-02021-HGD

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION

2012 U.S. Dist. LEXIS 170518

November 8, 2012, Decided
November 8, 2012, Filed

SUBSEQUENT HISTORY: Adopted by, Accepted by, Summary judgment granted by, Motion granted by, Dismissed by Integon Nat'l Ins. Co. v. MT&R Enters., 2012 U.S. Dist. LEXIS 169196 (N.D. Ala., Nov. 29, 2012)

CORE TERMS: driver, misrepresentation, driving, matter of law, summary judgment, premium, insurer, influence of alcohol, motor vehicle, suspended, insured's, default, license, sheet, insurance policy, good faith, recommendation, filled, pled guilty, driving record, issuing, wanton, insurance application, driver's license, underwriting, coverage, omission, drive, insurance agent, continuing duty

COUNSEL: **[*1]** For Integon National Insurance Company, Plaintiff: Patrick G Montgomery, Ralph D Gaines, III, GAINES GAULT HENDRIX & BISHOP PC, Birmingham, AL.

For MT&R Enterprises, Inc., a corporation, Defendant: James S Lloyd, LLOYD GRAY WHITEHEAD & MONROE, PC, Birmingham, AL.

For Harley James Smith, an individual, Monica Manning Smith, an individual, Defendants: Robert L Gorham, LEAD ATTORNEY, GORHAM & ASSOCIATES LLC, Birmingham, AL; Matthew J Smith, GORHAM & ASSOCIATES, Birmingham, AL.

JUDGES: HARWELL G. DAVIS, III, UNITED STATES MAGISTRATE JUDGE.

OPINION BY: HARWELL G. DAVIS, III

OPINION

REPORT AND RECOMMENDATION

The above-entitled civil action is before the court on the Motion for Summary Judgment (Doc. 52) and the Motion for Default Judgment Against Defendant Mark Gallups (Doc. 41) filed by plaintiff Integon National Insurance Company. This is a declaratory judgment action by Integon National Insurance Company (Integon). Integon issued an Alabama Commercial Insurance policy, Policy Number ALC 3071022, to defendant MT&R Enterprises, Inc. (MT&R), effective January 28, 2009, and reissued January 28, 2010, based on an application for insurance signed by Rita Donahoo, president of MT&R on or about January 28, 2009. Defendants Harley **[*2]** James Smith and Monica Manning Smith were occupants of a vehicle struck by a vehicle owned by MT&R and operated by Mark Gallups. It is alleged that Gallups was intoxicated at the time of the accident

and that he subsequently pled guilty to driving under the influence of alcohol. (Doc. 1, Complaint).

The Smiths filed a lawsuit in the Circuit Court of St. Clair County, Alabama, against Gallups and MT&R, alleging that Gallups was negligent and wanton in the operation of the motor vehicle at the time of the accident and that MT&R negligently entrusted and/or wantonly hired, trained and supervised its employees. The Smiths are seeking compensatory and punitive damages from MT&R and Gallups. (*Id.*)

Integon asserts that it owes no duties or coverage under the insurance policy due to material misrepresentations and omissions on the application that it relied upon in issuing the policy. (*Id.*). Integon filed a motion for summary judgment which included evidentiary submissions. (Doc. 52). Both MT&R (Doc. 55) and the Smiths (Doc. 53) have filed opposition to this motion, along with evidentiary submissions. (Doc. 54). Integon filed a response to the Smiths' reply. (Doc. 58). The matter is ready for **[*3]** disposition.

FACTUAL BACKGROUND

Rita Donahoo is the President of MT&R Enterprises. (Donahoo Depo. at 6). Her brother, Mark Gallups, is the corporate secretary of the company. (*Id.* at 8). They are the only officers of this company. (*Id.*). MT&R is in the commercial construction business, specializing in hanging and finishing drywall. (*Id.* at 10, 29). It shut down operations in July of 2010. (*Id.* at 8).

As president of the company, Donahoo paid the bills and procured the insurance. (*Id.* at 19). All of the insurance which Donahoo purchased for MT&R was purchased through insurance agent Steve Cole. On or about January 28, 2009, Cole faxed to Donahoo an Alabama Commercial Auto Insurance Application. Donahoo does not know who filled out the application, but she signed and dated it in her capacity as president of MT&R. (*Id.* at 34, 40). Donahoo testified that she understood the importance of reviewing documents before signing them in order to make sure the information in them was correct, there was nothing left off, and there was nothing added that was not supposed to be there. (*Id.* at 41-42).

The application reflects that five employees of MT&R would be driving MT&R vehicles. (*Id.* at 43, 45). **[*4]** The five names listed were Rita Donahoo, Michael Donahoo, Michael Gallups, Bobby Masters and Adam Stewart. (*Id.* at 45-46). Mark Gallups was not listed as a driver. (*Id.* at 48). The application was faxed to Donahoo by her insurance agent, Steve Cole. Although she did not fill out the application (*id.* at 84), Donahoo signed it and sent it back. (*Id.* at 62). Donahoo signed the policy application directly below the following statement:

INSURED-APPLICANT'S SIGNATUREI certify all the answers to all questions in this application are true and correct and I understand, recognize and agree said answers are given and made for the purpose of inducing the Company to issue me a policy for which I have applied. I have fully disclosed on this application the identity of all persons who drive my vehicle(s). I affirm my vehicle(s) is (are) garaged in Alabama. In addition, I understand have a continuing duty to notify the Company of any changes in: (1) my address or the location at which any of the vehicles listed on the policy are principally garaged; (2) the operators of any of the vehicles listed on the policy; or (3) any change in my business or commercial use of any of the vehicles listed on this **[*5]** policy. I understand the Company may declare the policy null and void if said answers on this application are false, misleading, or materially affect the risk which the Company assumes by issuing the policy. I understand the Company may declare the policy null and void if I do not comply with my continuing duty of advising the Company of any changes as noted above which materially affect the risk the Company assumes by issuing this policy. I further understand the representations I have made in the application and my continuing duty to advise the Company of

changes noted above apply to the specific policy issued by the specific Company named above or any affiliate of such company.

* * *

Failure to accurately and completely report all driver information may result in premium differences and service delays.

(Plaintiff's Ex. 3 at 6).

The policy issued to MT&R by Integon was mailed to MT&R's mailing address of 2785 Sprayberry Road, Riverside, Alabama 35135-0279. (Aff. of Sharon Dowell at ¶ 4). Likewise, the renewal offer was sent to that address on November 24, 2009. (*Id.* at ¶ 5). The renewal offer covered the same five drivers listed on the original application. (Plaintiff's Ex. 5 at 3). **[*6]** At no time did Donahoo contact Cole or Integon to request that Mark Gallups be added to the policy as a named driver. (Donahoo Depo. at 61). According to Donahoo, she "never realized" he was not on the policy. (*Id.*).

On the night of the accident, Mark Gallups had a company truck because he was supposed to go to the University of Alabama for a job the following day. While he had the truck for business purposes the next day, he did not have permission to use the truck to go drinking that night. (*Id.* at 56). On the night of April 3, 2010, Gallups was involved in an automobile accident. He is being sued by the occupants of the other motor vehicle who allege that he was negligent and wanton in the operation of the vehicle at the time of the accident, that MT&R negligently and/or wantonly entrusted the vehicle to Gallups and that MT&R negligently and/or wantonly hired, trained and supervised Gallups. (See Plaintiff's Ex. 6 at 3). The Smiths allege that Gallups' conduct was wanton because he was intoxicated at the time of the accident. (*Id.*).

At the time Integon received the application for commercial automobile insurance from MT&R, it was Integon's policy to run motor vehicle record checks **[*7]** on all drivers listed on the policy. (Aff. of Sharon Dowell at ¶ 7). A review of each driver's motor vehicle record is material to Integon's assessment of whether it will accept the risk and the premium to be charged if the risk were accepted. (*Id.*).

Sharon Dowell is a customer relations specialist for Integon. According to Dowell's affidavit, her job duties "include verifying procedures are being followed when issuing policies and insuring they are risks Integon is willing to take." According to Dowell, had Mark Gallups been listed as a driver on the application for insurance, Integon would have checked his driving record which would have disclosed that he had convictions for driving under the influence of alcohol in 1992, twice in 1995, and 1997. In addition, he was arrested for driving under the influence of alcohol and a controlled substance on January 30, 2008, and pled guilty to that charge on April 8, 2008. (Aff. of Sharon Dowell at ¶ 8).

She further stated that the review of Mark Gallups' driving history would have shown that at the time of the application for insurance with Integon, his driver's license was suspended. According to Dowell, as a matter of routine policy, Integon **[*8]** will not issue a policy with a listed driver who is unlicensed. In particular, Integon would not have issued the policy with Gallups listed as a driver because his license was suspended at the time of the application due to the combined DUI he received on January 30, 2008, and to which he pled guilty on April 8, 2008. (*Id.* at ¶ 9).

MT&R objects to Sharon Dowell's statement regarding Gallup's driving record, asserting that she lacked personal knowledge of this fact. However, Ms. Dowell's affidavit states that her statements are based on her personal knowledge. Likewise, as a representative of Integon whose job duties included verifying that the risks insured were ones that Integon was willing to write, Dowell has sufficiently identified herself as qualified to testify regarding Integon's underwriting policies. In addition, Gallups' driving record would be a matter of public record. It is noted also that MT&R does not dispute the accuracy of Dowell's statement regarding Gallups' driving record

and would be hard pressed to do so given that Mark Gallups has testified under oath that he had five convictions for DUI prior to his arrest and conviction for DUI that resulted from the accident **[*9]** that is the basis for this litigation. (See Doc. 54 at Ex. C, Mark Gallups Depo. at 16, 19-20).

MT&R does not dispute that Gallups' license was actually suspended at the time the initial application was made or that, as a matter of policy, Integon reviewed a driver's motor vehicle record to assess whether it would accept the risk of insuring him or her and the premium to be charged if the risk were accepted. (See Doc. 52 at ¶ 21, Plaintiff's Motion for and Brief In Support of Summary Judgment, and Doc. 55 at ¶ 21, MT&R's Opposition to Summary Judgment). MT&R asserts that Dowell failed to provide empirical evidence or studies supporting her statement that drivers with violations are more likely to be involved in an accident and increase the risk taken by Integon. However, her testimony is premised on the fact that her job duties involve risk assessment for Integon, and MT&R has provided no testimony that her assessment is invalid. Simply because her job title does not include the word "underwriter" does not automatically make her unqualified to provide testimony regarding risk assessment. Because it disagrees with her conclusions, MT&R argues that her testimony is unsupported by empirical **[*10]** evidence. MT&R could have taken her deposition to delve into her basis for her conclusion, but it failed to do so. Likewise, it could have offered affidavits disputing this conclusion. It did not do so. Despite the lack of citation to empirical studies by Dowell, nothing requires a court to suspend reality or shelve common sense in reaching a decision. A common sense view to the realities of life easily leads to the conclusion that a person who drives an automobile under the influence of alcohol is at a higher risk for accidents than one who does not. The fact remains that, as a matter of policy, Integon did not issue policies for unlicensed drivers for any reason other than financial responsibility ¹ and, based on this policy, would not have issued one with Gallups listed as a driver because his license was suspended due to the DUI he received on January 30, 2008, and pled guilty to on April 8, 2008.

FOOTNOTES

¹ The Alabama Motor Vehicle Safety-Responsibility Act, *Ala Code* § 32-7-1, *et seq.*, requires drivers to have liability insurance and mandates the suspension of driver's licenses in certain circumstances when a driver is not in compliance with the provisions of the Act.

Integon asserts that **[*11]** MT&R's failure to list Gallups as a driver on the application was a material misrepresentation as a matter of law with regard to Integon's acceptance of this risk and that, but for this misrepresentation, it would not have issued the policy to MT&R.

Misrepresentation by an insured in an application for an insurance contract is addressed in *Ala.Code* § 27-14-7. That section states, in pertinent part:

(a) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by, or in behalf of, the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:

(1) Fraudulent;

(2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or

(3) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in **[*12]** the loss if the true facts had been made known to the insurer as required either by the application for

the policy or contract or otherwise.

This case came before the district court on diversity jurisdiction, and under Alabama law, materiality of a misrepresentation on a policy application is generally triable by a jury. *Mega Life and Health Ins. Co. v. Pieniozek*, 585 F.3d 1399, 1404 (11th Cir. 2009); *Bennett v. Mutual of Omaha Ins. Co.*, 976 F.2d 659, 661 (11th Cir. 1992) (citing *Federal Kemper Life Assurance Co. v. First Nat'l Bank*, 712 F.2d 459, 462 (11th Cir. 1983); *State Farm Ins. Co. v. Whiddon*, 515 So.2d 1266 (Ala.Civ.App. 1987)); *Alfa Life Ins. Corp. v. Lewis*, 910 So.2d 757, 762 (Ala. 2005) (citing *Bennett*, 976 F.2d at 661; *Clark v. Ala. Farm Bureau Mut. Cas. Ins. Co.*, 465 So.2d 1135 (Ala.Civ.App. 1984)).

However, Alabama courts do take judicial notice that the existence of certain conditions is material as a matter of law. See e.g., *New York Life Ins. Co. v. Zivitz*, 243 Ala. 379, 10 So.2d 276, 283 (Ala. 1942) (tuberculosis, cancer and Hodgkin's disease increase risk to insurance company as a matter of law); *Fard v. Omaha Indem. Co.*, 510 So.2d 220 (Ala. 1987) (failure to identify eight or [*13] nine insurable losses in business prior to submitting application, where insurer would not have issued policy if facts concerning prior losses were known, was material omission as a matter of law); *Nationwide Mut. Fire Ins. Co. v. Pabon*, 903 So.2d 759 (Ala. 2004) (insured's misrepresentation in application that neither she nor any family member had filed for bankruptcy or been sued within previous seven years was material to homeowners' insurer's acceptance of the risk as a matter of law); *Clark v. Alabama Farm Bureau Mut. Ins. Co.*, 465 So.2d 1135 (Ala.Civ.App. 1984) (failure to reveal prior convictions for crimes of moral turpitude was material as a matter of law); *Liberty Nat'l Life Ins. Co. v. Trammell*, 33 Ala. App. 275, 33 So. 2d 479 (Ala.Civ.App. 1947) (cancer); *Ginsberg v. Union Cent. Life Ins. Co.*, 240 Ala. 299, 198 So. 855 (Ala. 1940) (misstatement of age); *Camden Fire Ins. Assoc'n v. Landrum*, 229 Ala. 300, 156 So. 832 (Ala. 1934) (possession of property by tenant other than the one insured under a fire insurance policy); *Gunn v. Palatine Ins. Co.*, 217 Ala. 89, 114 So. 690 (Ala. 1927) (misrepresentation of extent of ownership interest); *Crumpton v. Pilgrim Health & Life Ins. Co.*, 35 Ala. App. 363, 46 So.2d 848 (Ala.Civ.App. 1950) (Hodgkin's disease).

In [*14] the case at bar, MT&R obtained an insurance policy which left out the name of the co-owner of the company as a listed driver of the company vehicles. The fact that the application was filled out by Donahoo's agent and sent to Donahoo for her signature does not excuse her failure to see that Gallups was not listed in the application. Absent misrepresentations, fraud, or other deceit by the agent, a person able to read and write is bound by an insurance application signed by him or her, whether or not he or she reads it. *Nationwide Mut. Fire Ins. Co. v. Pabon*, 903 So.2d at 767 (citing *First Nat'l Life Ins. Co. of America v. Maxey*, 25 Ala.App. 289, 145 So. 589 (1932)). It is difficult to imagine a more material fact for an automobile insurer to have than that a driver of the insured's vehicles has five prior convictions for driving under the influence of alcohol and, at the time of the application, had a suspended driver's license based on one such conviction. Thus, the policy is voidable under *Ala.Code* § 27-14-7(a)(2).

Integon also seeks to avoid paying for any damages under the MT&R policy on the basis of *Ala. Code* § 27-14-7(a)(3), on the ground that, in good faith, it would not have [*15] issued the policy or would have required a greater premium had it received accurate answers on the application. Under subsection (a)(3), the misrepresentation does not have to be material nor does the insurer have to have a rational basis for the underwriting practice at issue. *Mega Life and Health Ins. Co. v. Pieniozek*, 516 F.3d 985, 989-90 (11th Cir. 2008). In order for an underwriting policy to be in "good faith" under (a)(3), the policy need only be universally applied. *Id.*

The affidavit of Sharon Dowell reflects, and it is otherwise undisputed, that Integon, as a matter of policy (*i.e.* "universally"), does not issue automobile insurance for a driver whose license is suspended for any reason other than financial responsibility. She also testified that, had Gallups been a listed driver on MT&R's application, Integon would not have issued the policy. It goes almost without saying that it is rational to refuse to insure drivers who do not have a license to

drive, especially when the suspension is based on driving under the influence of alcohol and drugs. Thus, the policy is voidable under *Ala. Code* § 27-14-7(a)(3) as well.

Defendants Harley and Monica Smith take a different approach **[*16]** to the Integon policy by claiming that insurance agent Steve Cole made material misrepresentations and false statements to Donahoo when procuring her insurance. However, this conclusion is based on a misrepresentation of the testimony given by Donahoo. There is no testimony that Donahoo specifically advised Cole that she wanted Gallups listed as a driver on the MT&R policy. She states that she "believes" she would have tried to have the insurance documents "corrected" if she had known he was not a listed driver. (*Id.* at 81). However, when asked if she told Cole that Gallups would be driving a company vehicle, she responded, "I don't know." (Donahoo Depo. at 78-79). The following exchange also occurred between counsel for Integon and Donahoo:

Q. Someone from MT&R had to provide the information to Steve, would that be fair to say?

A. I assume, yes.

Q. Steve didn't have any special knowledge about MT&R prior to y'all entering and getting this insurance through his insurance agency?

A. He knew us.

Q. He knew the company. Did he know all the employees' names?

A. He knew me. He knew Mark. He knew my husband.

Q. Someone had to provide him the names of the people who would be driving the vehicles, **[*17]** the name of the employees that would be driving the vehicles?

A. I guess. I don't know. It looks like they filled out the sheet. I didn't.

Q. They filled out the sheet, they faxed you the sheet?

A. Yes. The best I can remember.

Q. You had an opportunity to review the sheet; correct?

A. I guess.

* * *

Q. You reviewed the sheets, and you had said earlier you know the importance of reviewing contracts and reviewing applications and everything like that to make sure everything is correct; correct?

A. I assume.

(*Id.* at 93-94).

There is no testimony of any fraud, false statement or deliberate misrepresentation by Cole to Donahoo regarding the listing of drivers. Furthermore, as noted above, absent fraud or misrepresentation, a person able to read and write is bound by an insurance application signed by him or her, whether or not he or she reads it. *Pabon*, 903 So.2d at 767. Consequently, regardless of whether Mrs. Donahoo believed that Gallups was a listed driver, the application does not list him as a driver and she is, therefore, bound by the application which she signed. Because that application contained a misrepresentation material as a matter of law, and because Integon has

established that, **[*18]** in good faith, it would not have issued this policy or would have required a greater premium had it received accurate answers on the application, Integon is entitled to summary judgment in its favor and for the relief requested in its complaint for declaratory judgment.

In addition to plaintiff's Motion for Summary Judgment, also pending is its Motion for Default Judgment against Mark Gallups. This action was filed on July 26, 2010. After numerous unsuccessful attempts to perfect service of the summons and complaint on Gallups, Integon sought an order permitting service by publication. (Doc. 33, Motion for Service by Publication). The motion was granted on November 22, 2010. (Doc. 34). Integon complied with Rule 4(e)(1), Fed.R.Civ.P., and Rule 4.3(d), Ala.R.Civ.P., in having Gallups served by publication. On January 21, 2011, the court entered an order deeming service perfected on Gallups. (Doc. 36). As of February 25, 2011, Gallups had not entered an appearance or filed an answer to the complaint allegations. The Clerk entered default against Gallups on February 25, 2011, on plaintiff's motion. (Docs. 39 & 40). To date, Gallups has not entered an appearance nor sought to have the entry **[*19]** of default set aside.

Therefore, it is RECOMMENDED that plaintiff's motion for summary judgment be GRANTED ² and that plaintiff's Motion for Default Judgment Against Mark Gallups be GRANTED and that judgment be ENTERED for plaintiff declaring that:

1. Alabama Commercial Auto Insurance Policy Number 3071022 is null and void;
2. All money paid to MT&R under the Auto Damage Coverage of the policy shall be refunded by MT&R to Integon;
3. The premium payments on the policy received by Integon from MT&R shall be refunded to MT&R;
4. Integon is not required to indemnify and defend MT&R and Mark Gallups from the allegations or claims brought against them in the underlying lawsuit by Harley James Smith and Monica Manning Smith, and Integon has no obligation to pay any judgment which may be rendered in favor of the Smiths and against MT&R or Mark Gallups;
5. Integon has no obligation to pay any punitive damages awarded to the Smiths and against MT&R or Mark Gallups; and
6. Integon has no obligation to pay any damages awarded to the Smiths and against MT&R for negligent and/or wanton hiring, training and supervision.

FOOTNOTES

² Defendant MT&R's Motion to Strike (Doc. 56) is due to be denied. A separate order denying **[*20]** the motion to strike will be entered contemporaneously herewith.

NOTICE OF RIGHT TO OBJECT

The parties are DIRECTED to file any objections to this Report and Recommendation within a period of fourteen (14) days from the date of entry. Any objections filed must specifically identify the findings in the magistrate judge's recommendation objected to. Frivolous, conclusive, or general objections will not be considered by the district court.

Failure to file written objections to the proposed findings and recommendations of the magistrate

judge's report shall bar the party from a *de novo* determination by the district court of issues covered in the report and shall bar the party from attacking on appeal factual findings in the report accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982). See *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir. 1982). See also *Bonner v. Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), adopting as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

DONE this 8th day of November, **[*21]** 2012.

/s/ Harwell G. Davis, III

HARWELL G. DAVIS, III

UNITED STATES MAGISTRATE JUDGE

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