

**COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT  
Common Law and Equity Division**

**2018/CLE/gen/01781**

**BETWEEN:**

**GAYE CORILEE HUYLER**

---

**(As Personal Representative in the Estate of  
HILARY HUYLER)**

**Plaintiff**

**AND**

**B.A.F. FINANCIAL & INSURANCE (BAHAMAS) LTD.**

**Defendant**

**Appearances:** Mrs. Janet P. Fountain of Counsel for the Plaintiff  
Mr. Timothy Eneas of Counsel for the Defendant

**Hearing Dates:** May 15<sup>th</sup>, 2019  
June 14<sup>th</sup>, 2019

**Before:** The Hon. Mr. Justice Keith H. Thompson

**RULING**

[1] This is an action by the Plaintiff as Personal Representative of the Estate of her late husband Hilary Huyler to recover the proceeds of a Life Insurance Policy issued by the Defendant on her deceased husband's life.

[2] The Defendant has sought to void the policy on the ground of material non-disclosure.

[3] On the 01<sup>st</sup> October, 2010 Mr. Huyler applied for Life Insurance with the Defendant in the sum of \$75,000.00.

[4] The application for insurance included the usual questions as to the medical history and in particular sections 6 and 7.

[5] **SECTION 6 PROVIDES:**

“When any of the questions 3 to 10 hereunder is answered “yes”: give complete information under “DETAILS”. Specify the condition, item or history, and give dates, duration, treatment and name and address of **EACH DOCTOR CONSULTED**”

“Section 6:

**No. 3 - Do you have any health problems or are you taking treatment or medication of any kind?**

**No. 6 - Have you ever had or been told that you had:**

**(a) dizziness, fainting spells, epilepsy, nervous disorder, depression, severe headaches, stroke or any disease or disorder of the brain or nervous system?**

**(b) -----**

**(c) high blood pressure, chest pain, heart attack, shortness of breath, heart murmur or any disease**

**or disorder of the heart or blood vessels or elevated serum cholesterol or triglyceride?”**

- [6] In my opinion, these appear to be the critical questions as it relates to this case.
- [7] The deceased answered “No” to all of these questions. Mr. Huyler died on July 21<sup>st</sup>, 2011, some eight (8) months after taking out the life insurance policy. There is no disagreement that he died during the contestability period of the insurance.
- [8] The application, at section 7 contained “Declarations and authorizations at No. 3, which provided –

**“It is hereby declared and agreed that:-**

- (1) This application for insurance is hereby made to a member of the BAF Group Companies which is duly authorized to transact insurance business in the territory of issue specified on page 1 (referred to as “the Company”).)**
- (2) The answers in this application are complete and true.**
- (3) The statements made in this application and in any other documentation submitted in connection with this application form the basis of a life policy applied for and shall constitute all representations made as a basis for the said policy.**
- (4) No agent has the authority to waive a question in the application, modify the application or bind the company**

**by making any promise or representation or by giving or receiving any information.**

**We hereby authorize any licensed physician, medical practitioner, hospital clinic or other medical or medically related facility, insurance company or other organization, institution or person that has any records or knowledge of the life proposed to give to the company or its insurers any such information and to testify as to such information all to the extent permitted by law and we agree that a photographic copy of this authorization shall be as valid as the original for this purpose.**

**It is further agreed that unless otherwise provided by a receipt which has been issued in connection with this application, the said policy shall/only take effect if;**

- (1) it is delivered to the applicant and the final premium paid in full to the Company and**
- (2) there has been no material change in the health or insurability of the life or lives proposed subsequent to the completion of this application.”**

[9] The Plaintiff informed the Defendant of the death of Mr. Huyler and shortly thereafter was advised by letter dated 12<sup>th</sup> October, 2011 that the insurance policy was rescinded for non-disclosure of material information.

[10] Ms. Patricia Thompson, a witness for the Defendant and at the relevant time, the manager of claims wrote to Dr. Vincent Forbes as a part of the Defendant's investigation to ascertain the complete medical history of Mr. Huyler and to the

Rand Memorial Hospital by letter dated 12<sup>th</sup> August, 2011 and to Dr. Winston Forbes by letter dated 7<sup>th</sup> September, 2011.

- [11] As a result of the information obtained the Defendant discovered that Mr. Huyler had failed to disclose that he had been admitted to hospital in 2006, and did not refer to his abnormal electrocardiogram and his referral for further treatment. Mr. Huyler also failed to disclose what was contained in a letter to Atlantic Medical Insurance Ltd. dated 7<sup>th</sup> April, 2010, some seven (7) months prior to the insurance of the life insurance policy. He also failed to disclose at question 8 of section 6 that he had recently undergone an ECG and EKG. The EKG was on or about 17<sup>th</sup> May, 2006 at the Cleveland Clinic in Florida and at Dr. Forbes' practice on or about 01<sup>st</sup> February, 2007. It is of very special note that Dr. Forbes referred Mr. Huyler to the Cleveland Clinic in 2006 for a TEE. In the report from the Cleveland Clinic inclusive of the amended report, of special note in particular is paragraph 3, thereof which provides.

**Cleveland Clinic Florida**

3350 Cleveland Clinic Blvd  
 Weston, FL 33331-3609  
 WESTON (Card Fla Wes)  
 Office Visit FLA 5/17/2006 2:15 PM

**MR # 4629011**

ENC # 73487541  
 Huyler, Hilary  
 Male 12/11/1952  
 Provider: Kenneth R. Fromkin,  
 MD

**Vitals - Last Recorded as of 5/17/2006 2:15 PM**

Temp	Pulse	HT	WT	BSA	BMI
36.9°C	80	180.3 cm (5' 11")	78.9 kg (174 lb)	1.99 m <sup>2</sup>	24.27 kg/m <sup>2</sup>

 **Allied Health Notes**

No notes of this type exist for this encounter.

**Progress Notes**

Author	Status	Last Editor	Updated
Kenneth R. Fromkin, MD	Addendum	Kenneth R. Fromkin, MD	1/26/2018 1:57 PM

Source of Referral: Dr. Forbes

Reason for referral: Evaluation of a suspected left atrial mass

History of Present Illness: Mr. Hilary Huyler is a 53 year old year old man who is referred for definitive evaluation of a suspected left atrial mass.

He was in his usual state of good health until he began to experience chest pain earlier this month. He was admitted to Rand Memorial in the Bahamas about 2 weeks ago complaining of atypical chest pain radiating to his back, worse with inspiration. He was diagnosed with pericarditis and was treated accordingly. An echocardiogram was performed at that time and showed a possible left atrial mass.

He notes that he had an upper respiratory infection prior to the recent chest pain episode. On the night before admission, he had a fever and chills. His chest pain was very sharp and was associated with dyspnea, diaphoresis, and radiated to the back. There was no associated nausea or vomiting. Lying down worsened the pain, sitting up relieved it. An EKG obtained at the time suggested pericarditis and he was treated with NSAIDs. The chest pain has since resolved.

He was then referred to our center for a TEE. This study was performed yesterday, 5/16/6, and showed no evidence of left atrial thrombus or mass; normal LV/RV function; no significant valvular abnormalities; no pericardial effusion; upper normal aorta size, no dissection or aneurysm.

**Cardiac Risk Factors:**

No diabetes, no hypertension, no dyslipidemia, no family history of premature CAD, no smoking.

**Past Medical History**

None significant

00169

Huyler, Hilary (MR# 4629011)

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[12] The Plaintiff's proof of death was submitted on or about 4<sup>th</sup> August, 2011 and on the same date, Ms. Thompson wrote to the Plaintiff advising that the claim would not be processed within the usual 48 hour turnaround time as a result of the cause of death and the age of Mr. Huyler. She also advised in that very same letter that it was the Defendant's policy to obtain a complete medical history of the deceased.

[13] Subsequent to the Defendant's investigation and the information contained in the medical history the Defendant discovered among other things that Mr. Huyler was treated for pericarditis by Dr. Forbes. In particular the information revealed complaints of severe chest pains on at least two occasions and shortness of breath.

#### **THE LAW:**

[14] On 12 October, 2011, Ms. Thompson on behalf of the Defendant sent a letter to the Plaintiff in her capacity as Representative in the Estate of Hilary Huyler rescinding the life insurance policy for non-disclosure of material information.

[15] In the case of **DAVID ZELLGR V BRITISH-CANADIAN INSURANCE COMPANY LIMITED (2008) UKPC 4** the court had to consider whether an insurance company was entitled to void a policy on the ground of material misrepresentation. The Privy Council held that the Test was whether **"THE APPLICANT HONESTLY BELIEVED THAT HE WAS ANSWERING THE QUESTIONS TRUTHFULLY"**.

In that case the Board was satisfied that the applicant answered the questions completely and correctly, to the best of his knowledge and belief, and that **IN THOSE CIRCUMSTANCES** the insurer was not entitled to avoid liability under the policy.

[16] The facts in the case of **WONG V COLINA INSURANCE LIMITED [2014] 1 BHS J. No. 17** are virtually identical as those in the instant case. The brief facts of the **WONG** case are;

**“The Plaintiff as executrix of the estate of her brother sought to recover the proceeds of a life insurance policy in the amount of \$100,000.00. The application included the usual questions as to the applicant’s medical history. In particular:**

- (1) Have you ever had symptoms of, been treated for or had any indication of high blood pressure, stroke, rheumatic fever, heart murmur, chest pain, palpitations, heart attack, cancer, tumour, lupus or multiple sclerosis?**
- (2) Have you ever had symptoms of, been treated for or had any indications of nervous or emotional disorders such as seizures, including epilepsy, paralysis and fainting, depression, cerebral vascular disorders (stroke)?**

**5. The applicant, Mr. Spence, answered “no” to both of those questions.**

**6. In the declaration made by him in the application Mr. Spence said:**

**“The policy owner and each insured declare that all the answers to questions in this application are true and correct to the best of their knowledge and that all material information has been disclosed.”**

**7. The application also included an authorization in the following terms:**

**“I understand that in order to issue a contract of insurance on my life or health and to assess any claim**



arising from the policy, the company must have access to confidential information about me. Therefore, I authorize any person or organization having medical information or other confidential information about me and, in particular, any doctor, hospital, medical information bureau or any other organization, institution or person that has any records or knowledge to disclose information about me to Colinalmperial Insurance, Limited or to its re-insurers. I also consent to any requests by Colinalmperial Insurance, Limited for a report on any inquest on my death. A photographic copy of this authorization is as valid as the original.”

8. A policy of insurance was in fact issued by the Defendant on the 4<sup>th</sup> of July, 2008. The policy contained the following term.

“Within two years following the in-force date of any coverage, the company can void the insurance provided by that coverage because of a misrepresentation of or failure to disclose any fact material to that insurance. After the two years, the company cannot void the insurance provided by that coverage unless such misrepresentation or failure is made fraudulently. This does not apply to information given about age or date of birth.

9. On the 1<sup>st</sup> of October, 2008, less than three months after the insurance policy was issued, Andrew Spence died. The death certificate listed his cause of death as, “hypertensive and

**atherosclerotic coronary artery disease with cardiomegaly and history of seizure disorder”.**

- 10. The Plaintiff made a claim to the Defendant for the proceeds of the life insurance policy.**
- 11. Upon receipt of the claim, the Defendant drew to the attention of the Plaintiff the provision of the term giving it the right to void the policy within two years in the event that there was a material misrepresentation in the application for insurance and said that it would cause a further investigation before honouring the Plaintiff's request.**
- 12. Pursuant to that, the Plaintiff wrote to Mr. Spence's physician and sought further information.**
- 13. As a result of that, it received from the Medi-Centre Medical Clinic a report that Mr. Spence attended the medical clinic on the 10<sup>th</sup> of April, 2005, complaining of fatigue and that he had bit his tongue during his sleep.**
- 14. The report indicated that Mr. Spence was concerned about seizures and that this was *“not the first occurrence of the same”* and that he had unusual headaches.**
- 15. Mr. Spence's record also indicated that he had brain surgery in 1982 for a benign brain tumour.**
- 16. The records reflect that he was assessed as having, “uns. Epilepsy w/o intract epilepsy”.**
- 17. A referral letter was written to Dr. Charles Rahming, a neurologist and neuro-physicist, in following terms.**  
**“Dear Dr. Rahming,**

**Can you kindly see this gentleman who was presented to our clinic with a history of 'waking up from sleep just to discover that he had bitten his tongue.' He woke up in a pool of blood which signified that the trauma was significant.**

**He has a history of having a brain surgery in 1982 for a benign brain tumour. He has also had an episode like this before and is quite concerned that he may be having seizures.**

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**Can you kindly see and work up for epilepsy.**

**Thank you”**

**Signed,**

**Dr. R.S. Abraham, Staff Physician.**

- 18. The Defendant also wrote to Dr. Rahming for further information but Dr. Rahming's records do not reflect that Mr. Spence ever attended him in 2005 or at all for consultation and/or treatment.**
- 19. As a result of that, the Defendant wrote a letter to the Plaintiff's attorney voiding the policy and denying coverage. The letter was in the following terms.**

**Dear Ms. Forbes:**

**Re: Andrew Spence – policy number 200019410**

**“We have reviewed the death claim submitted on the above referenced policy and regret to advise that the claim has been denied due to nondisclosure of medical information and material misrepresentation of the application for life insurance.” Mr. Spence applied for and was issued the above mentioned life insurance policy July 4, 2008. Among the questions he answered were:**

**"Section E, medical history, Part 1.**

**One: Have you ever had symptoms of, been treated for, or had any indication of high blood pressure, stroke, rheumatic fever, heart murmur, chest pain, palpitations, heart attack, cancer, tumour, lupus or multiple sclerosis?**

**"Section E, medical history, Part two:**

**Five: Have you ever had symptoms of, been treated for, or had any indication of A, nervous or emotional disorders such as; Seizures, including epilepsy, paralysis, fainting, depression, cerebro-vascular disorders (stroke). "Mr. Spence answered, no, to these questions". We received medical information, which revealed that in April 2005 he gave a history of brain surgery for benign brain tumour in 1982. He also gave a history of biting his tongue during sleep. He was assessed as 'unstable epilepsy without intract epilepsy.'**

**"We therefore enclose our cheque No. 624194 in the amount of two hundred seventy-six dollars and twenty-one cents (\$276.21, which represents refund of the premiums made July 2008 through October 2008.**

**"Please confirm that this payment releases Colinalmperial Insurance, Limited from any and all further payments regarding the life benefit in the death of Andrew Spence, under policy No. 2000019410 by signing the enclosed copy of this correspondence.**

**Yours sincerely,**

**Sandra Patton, Senior**

**Claims Adjudicator,  
Life Claims and Disability and  
Wendy Butler, Financial Controller.”**

[17] I take special note that one of the several issues of the non-disclosure claim by the Defendant in the instant matter; **“CHEST PAINS”** is included in the **WONG** case. Additionally, Dr. Forbes’ letter dated April 7<sup>th</sup>, 2010 states that Mr. Huyler was being monitored **“DUE TO THE PRESENCE OF THE FOLLOWING DISEASE ENTITIES: PERICARDITIS and ACUTE SINUSITIS”**.

[18] On September 7<sup>th</sup>, 2011 Ms. Thompson wrote to Dr. Forbes requesting a complete medical history. She, in the second paragraph said:

**“We would be grateful if you would provide us with a complete medical history. Your report should include details for the dates Mr. Huyler attended your practice and any hospital or clinic visits as well as the nature of illness and treatment together with results of all lab reports. Please state the name and address of any referring physician.”**

[19] On October 04<sup>th</sup>, 2011 Dr. Forbes replied to the Defendant and provided visit date reports for 04/29/11, 06/02/2011, 07/13/2011, 07/19/2011, 07/21/2011. Consistent throughout these reports under the rubric **“CURRENT MEDICATIONS:”** is Viagra as a prescription. The lab results for this particular policy was 2/16/2010. The policy date is November 10<sup>th</sup>, 2010, some eight months before the policy start date. This particular medication is consistent throughout all of Dr. Forbes’ reports set out above.

[20] Section 6 No. 3 of the application form states:

**“Do you have any health problems OR are you taking treatment OR medication OF ANY KIND?”**

**Mr. Huyler answered “NO” to this question.**

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[21] Counsel for the Plaintiff placed much emphasis on her understanding that the questions were based on body systems. However I cannot agree with that position, in light of the fact that as an example section 6, 6(c) is worded;

**“Have you ever had OR been told that you had:**

**(c) high blood pressure, chest pain, heart attack, shortness of breath, heart murmur OR any disease or disorder of the heart or blood vessels or elevated serum cholesterol or triglyceride?”**

[22] The question in the instant case is whether there is a basis in the instant matter to find that the applicant Mr. Huyler honestly believed that he was answering the questions truthfully.

[23] The evidence is patently clear and cannot be disputed that Mr. Huyler, prior to completing the application for the \$75,000.00 life insurance coverage was well aware that he had complained of shortness of breath, chest pains, was referred to the Cleveland Clinic, had an ECG and an EKG, was seen by Dr. Frankin at the Cleveland Clinic and neglected saying so in section 6 where it provided:

**“When any of the questions 3 to 10 is answered “YES”, give complete information under “DETAILS” specify the condition, and give dates, duration, treatment and name and address of each doctor consulted.”**

[24] In my judgment, having had the medical issues set out above, having been referred and having been prescribed certain medication in addition to the pericarditis and related illness, Mr. Huyler could not have been honest, when completing the application for insurance coverage.

[25] The Plaintiff asserts that the Defendant ought not to be allowed to avoid the policy because as counsel had suggested, the Defendant could have requested further information or carry out further investigations before issuing the policy. In this regard, I disagree. Contracts of insurance are based on the utmost good faith. Thus utmost good faith is a fundamental principle of insurance law and must be observed by both parties.

[26] This rule was clearly stated by **LORD MANSFIELD** as far back as 1776 in the case of **CARTER V BOEHM (1776), 3 BURR 1905** at page 1909 where he stated:

**“Insurance is a contract upon speculation. The special facts, upon which the contingent chance is to be computed, lie more commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such a circumstance is a fraud, and therefore the policy is void.”** Although the suppression should happen through mistake, without any

**fraudulent intention; yet still the underwriter is deceived, and the policy is void; because the risqué run is really different from the risqué understood and intended to be run at the time of the agreement.... The governing principle is applicable to all contracts and dealings. Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact, and his believing the contrary..."**

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[27] In the book **GENERAL PRINCIPLES OF INSURANCE LAW** Chapter 12 by E.R. Hardy Ivamy 1979 it states at pages 129 – 130:

**"Further examples can be found in other judgments, "In policies of insurance, whether marine insurance or life insurance, there is an understanding that the contract is *uberrima fides*, that, if you know any circumstance at all that may influence the underwriter's opinion as to the risk he is incurring, and consequently as to whether he will take it, or what premium he will charge, if he does take it, you will state what you know. There is an obligation there to disclose what you know, and the concealment of a material circumstance known to you, whether you thought it material or not, avoids the policy."**

**"It has been for centuries in England the law in connection with insurance of all sorts, marine, fire, life, guarantee and every kind of policy, that, as the underwriter knows nothing and the man who comes to him to ask him to insure knows everything, it is the duty of the assured, the man who desires to have a policy, to make a full disclosure to the underwriter without being asked of all the material circumstance, because the underwriter knows nothing and the assured knows everything. That is expressed by saying that it is a**



**contract of the utmost good faith – *uberrima fides*. Now, insurance is a contract of the utmost good faith, and it is of the gravest importance to commerce that that position should be observed. The underwriter knows nothing of the particular circumstances of the voyage to be insured. The assured knows a great deal, and it is the duty of the assured to inform the underwriter of everything that he has not taken as knowing, so that the contract may be entered into on an equal footing.”**

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As far as marine insurance is concerned, the Marine Insurance Act 1906, s. 17, provides:

**“A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party.”**

It is the duty of the parties to help each other to come to a right conclusion, and not to hold each other at arm's length in defence of their conflicting interest.

It is the duty of the assured not only to be honest and straightforward, but also to make a full disclosure of all material facts. Further, all statements made by him during the negotiations must be accurate.”

[28] Further in the case of **AIKEN V STEWART WRIGHTSON MEMBERS AGENCY LTD & OTHERS [1995] 1 WLR 1281** at pages 1315 (H) – 1316 (F) Potter J said:

**“An insurer is entitled to assume that a particular summary or description supplied to him in connection with a risk is fair and accurate so far as it goes, and, if he takes the proposer at his word, no question of waiver arises.**

**suspicion that there were other circumstances which would or might vitiate the presentation made to him,” can waiver by implication from non-inquiry be established. In this case, the nature of the representation made was such that, at least in relation to categorization of business for the purposes of assessing premium, Mr. Emney was put off inquiry rather than put on inquiry.”**

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[29] As was stated by Barnett C.J. in the **WONG** case (supra) I likewise opine that; there was nothing in the answers which if true warranted any further investigation and an applicant cannot be relieved of his obligation to answer the questions honestly and truthfully by saying, **“YOU COULD INVESTIGATE TO FIND OUT WHETHER OR NOT I AM TELLING THE TRUTH.”** I am of the view that the questions were plain and unambiguous and by the use of words, used not only by the deceased’s physician and the deceased himself he should have been prompted right away to furnish honest and truthful answers.

[30] In the circumstances therefore, I am more than satisfied, based on the evidence that the Defendant was entitled to avoid the policy. The Plaintiff’s action is therefore dismissed and the Plaintiff will pay the Defendant’s costs, to be taxed if not agreed.

I so Order.

Dated the *22<sup>nd</sup>* day of *December* A.D., 2020.

  
Keith H. Thompson

Justice