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Distinguished by [United of Omaha Life Insurance Company v. Silva](#), D.Mass., September 25, 2012

56 Mass.App.Ct. 244

Appeals Court of Massachusetts,
Middlesex.Ruth **ROBINSON**

v.

PRUDENTIAL INSURANCECOMPANY OF AMERICA & another.¹

No. 00-P-374.

|

Argued March 7, 2002.

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Decided Oct. 11, 2002.

Synopsis

Beneficiary brought action against life insurer and its agent to recover proceeds after the insurer refused to pay based on incorrect answers in application. The Superior Court Department, Middlesex County, [Elizabeth M. Fahey](#), J., entered summary judgment in favor of insurer and agent. Beneficiary appealed. The Appeals Court, Dreben, J., held that: (1) nurse's examination of insured to check blood pressure and collect a urine sample was not a medical examination; (2) the insurer thus needed to show that incorrect answers on application were wilfully false, fraudulent, or misleading; (3) that burden presented a jury question; and (4) any negligence by agent was not actionable.

Affirmed in part, reversed in part, and remanded.

West Headnotes (10)

[1] Insurance 🔑 Knowledge and intent in general**Insurance** 🔑 Effect of medical examination or lack thereof**Insurance** 🔑 Duty to investigate

A "medical examination" is an examination by a physician, not a nurse, within the meaning of statute which makes statements

in the application for a policy issued without previous medical examination binding on the life insurer, but allows a defense that the statements were wilfully false, fraudulent, or misleading. M.G.L.A. c. 175, § 124.

[2] Insurance 🔑 Knowledge and intent in general**Insurance** 🔑 Effect of medical examination or lack thereof

Imposing a higher burden of proof on a life insurer when it contests a policy issued without a medical examination than when it contests a policy issued after a medical examination is the purpose of statute which makes statements in the application for a policy issued without previous medical examination binding on the insurer, but allows a defense that the statements were wilfully false, fraudulent, or misleading. M.G.L.A. c. 175, § 124.

[3] Insurance 🔑 Knowledge and intent in general**Insurance** 🔑 Effect of medical examination or lack thereof**Insurance** 🔑 Duty to investigate

Registered nurse's examination of insured to check blood pressure and collect a urine sample was not a "medical examination" within the meaning of statute which makes statements in the application for a policy issued without previous medical examination binding on the life insurer, but allows a defense that the statements were wilfully false, fraudulent, or misleading. M.G.L.A. c. 175, § 124.

[4] Statutes 🔑 Natural, obvious, or accepted meaning

Courts construing a statute accord to the words their ordinary meaning and approved usage.

[5] Insurance 🔑 Questions of law or fact
Insurance 🔑 Questions of law or fact

The question whether an insured's statements in a life insurance application were wilfully false, fraudulent, or misleading was for the jury under statute which makes statements in the application for a policy issued without previous medical examination binding on the life insurer, but allows a defense that the statements were wilfully false, fraudulent, or misleading; although the insured twice signed the policy and thereby twice certified that the statements were true, he allegedly informed the agent of a stroke, and court could not decide issue of intent to deceive when giving incorrect answers to questions about chest pain, any disorder of the heart or blood vessels, and any disorder of the brain or nervous system. *M.G.L.A. c. 175, § 124*.

1 Cases that cite this headnote

[6] **Judgment** 🔑 Insurance cases

The question whether a life insurer has met its burden of proving that statements in an application were wilfully false, fraudulent, or misleading is not to be determined on summary judgment in applying statute which makes statements in the application for a policy issued without previous medical examination binding on the life insurer, but allows a defense that the statements were wilfully false, fraudulent, or misleading. *M.G.L.A. c. 175, § 124*.

3 Cases that cite this headnote

[7] **Insurance** 🔑 Knowledge and intent in general

An incorrect statement in an application for life insurance does not necessarily indicate actual intent to deceive for purposes of statute which makes statements in the application for a policy issued without previous medical examination binding on the life insurer, but allows a defense that the statements were wilfully false, fraudulent, or misleading. *M.G.L.A. c. 175, § 124*.

1 Cases that cite this headnote

[8] **Insurance** 🔑 Officers or agents; imputed knowledge

Life insurer was bound by the knowledge received by its agent who had at least apparent authority to receive statements about the insured's health.

[9] **Insurance** 🔑 Duties and liabilities to insureds or other third persons

Any negligence by life insurer's agent in failing to inform insurer of the insured's stroke would have no effect on the beneficiary's recovery, would not have caused any damage, and, therefore, was not actionable by the beneficiary; the beneficiary would recover the proceeds if the insured's statements about his health were not wilfully false. *M.G.L.A. c. 175, § 124*.

[10] **Insurance** 🔑 Duty to settle or pay

Life insurer's action in contesting the policy was not unreasonable in light of the insured's incorrect answers to application questions about chest pain, any disorder of the heart or blood vessels, and any disorder of the brain or nervous system, and, thus, the insurer did not engage in unfair methods of competition and unfair or deceptive acts or practices. *M.G.L.A. c. 93A, § 1 et seq.*

Attorneys and Law Firms

****459 *245** David W. Krumsiek, Newtonville, for the plaintiff.

Edward P. O'Leary, Boston, for the defendants.

Present: BROWN, DREBEN, & DOERFER, JJ.

Opinion

DREBEN, J.

[1] This is an action by a widow against an insurer and its sales agent to recover death benefits under a life insurance

policy issued to the widow's husband, Russell **Robinson** (Russell). The insurer, **Prudential** Insurance Company of America (**Prudential**), declined to pay the benefits, claiming that Russell had misrepresented the state of his health in applying for the policy. A judge of the Superior Court granted summary judgment for the defendants. Whether that grant was proper depends in large part on which of two sections of G.L. c. 175 applies, § 124 or § 186, and that, in turn, depends on whether the policy issued “without previous medical examination.” The two sections **460 are set forth in the margin.² We hold that the term “medical examination” contained in § 124 refers to an examination by a physician and does not include an examination by a nurse, and that the question whether the insured's statements were “wilfully false, fraudulent or misleading,” as required by § 124, presents a jury issue. Accordingly, we reverse the judgment for the insurer.

We first set forth the legal significance of a medical examination and then describe the facts, viewed in the light most favorable to the nonmoving party. *Sullivan v. Brookline*, 435 **Mass.** 353, 356, 758 N.E.2d 110 (2001).

[2] *246 1. *Significance of “medical examination.”* The importance of determining whether the examination of Russell by a nurse was a “medical” one within the meaning of G.L. c. 175, § 124, is explained in *Protective Life Ins. Co. v. Sullivan*, 425 **Mass.** 615, 623, 682 N.E.2d 624 (1997), and in *Torres v. Fidelity & Guar. Life Ins. Co.*, 34 **Mass.App.Ct.** 376, 377–380, 611 N.E.2d 733 (1993). As seen from its legislative history, the purpose of § 124 is to impose a higher burden of proof on an insurer when it contests a life insurance policy issued without a medical examination than when it contests a life insurance policy issued after a medical examination. *Protective Life Ins. Co. v. Sullivan*, 425 **Mass.** at 623, 682 N.E.2d 624. If there is an examination, § 186 applies, and an insurer need only show that the misrepresentation was made with an “actual intent to deceive” or that the misrepresentation “increased the risk of loss.” If a policy is issued without a medical examination, the insurer must show that the “statements were wilfully false, fraudulent or misleading.” G.L. c. 175, § 124.

2. *Factual material submitted by the parties.* According to the plaintiff's affidavit, Louis Pumphrey, an insurance agent employed by the defendant, met with the plaintiff and Russell in November, 1997, in order to sell them a life insurance policy. Pumphrey asked Russell a series of questions about his health and medical history. In response, Russell told

Pumphrey that he had **high blood pressure** and that he had suffered a **stroke** that had led to his hospitalization ten years earlier. Pumphrey returned several days later, met again with the plaintiff and Russell, and informed them that Russell need not submit to a medical examination but would have to give a urine sample and have his blood pressure tested.

Subsequently, in early December, a registered nurse, Elaine Whitman, came to their house, took Russell's blood pressure and collected a urine sample. A week later, they received a letter from Pumphrey confirming life insurance coverage in the amount of \$60,000. Pumphrey again met with the couple on January 8, **461 1998, handed Russell a typewritten application, and advised him that it had been completed in accordance with the information Russell had provided during the first meeting. Pumphrey instructed Russell to sign his name where indicated on the final page of the application, and Russell did so without *247 fully reading the application. Russell died due to massive heart failure on April 3, 1998.

The insurance company supported its motion for summary judgment with affidavits stating that the responsibility for interviewing clients concerning their medical history lies with **Prudential** underwriters, rather than with agents. It is the underwriters who call clients on the telephone, ask medical questions, and determine whether medical examinations are necessary. On December 3, 1997, **Prudential** underwriter Vicky Fesmire spoke to Russell by telephone, asked him questions, and entered his answers on the application part of the insurance policy.

Since Russell had died during the two-year period before the policy had become incontestable, see G.L. c. 175, § 132, the insurer conducted an investigation after Russell's death. Several answers on the application turned out to be incorrect and, had the insurer had the correct information, a higher premium would have been charged. The most important errors were negative answers to the following questions:

“(4) Has anyone proposed for coverage had:

“a. chest pain, or any **disorder of the heart** or **blood vessels**? ...

“h. any **disorder of the brain** or nervous system?”³

The application prepared by Fesmire reflected Russell's disclosure to her of his **high blood pressure** and contained details as to when it had been diagnosed and what had been prescribed.

Fesmire's affidavit states that because of Russell's age and the amount of the policy a medical examination was required. The policy, however, states that no medical examination is required. Fesmire claims this was a "typographical error," and that Elaine Whitman, a registered nurse, performed the medical examination at the request of **Prudential**.

***248** 3. *Examination by Nurse Whitman.* The form filled out by Whitman, entitled "Modified Examination Form,"⁴ consists of two pages: the first page contains (1) the name and social security number of the insured; (2) the name and date of birth of the person to be examined; (3) the name, social security number, address, and tax number of the examiner; (4) the date of the examination, amount of insurance, and name of the agent; and (5) a fee section to be completed by the examining physician relating to the services provided.⁵ The first page was filled out, except for the fee section.

Whitman completed a portion of the second page of the modified examination form: where and when the examination was done (at home at 6:00 p.m.); the current ****462** age or age at death; and year and cause of death of the insured's family members (father, mother, brothers, sisters). The only physical examination performed by Whitman was measuring the insured's weight and height, taking two readings of the insured's blood pressure, and taking a single reading of the insured's pulse rate per minute. She wrote that she had mailed a urine sample and that there was no albumin or sugar in the insured's urine. With a checkmark, she noted that Russell was not her patient and that she had no information regarding any physical or **mental impairment** that Russell might have. She left blank the parts of the form that asked whether there were any **abnormalities of the eyes**, blood vessels, respiratory organs, abdominal organs, or nervous system. Also left blank was a section instructing the examiner to "[e]xamine heart in upright, recumbent and [illegible] lateral recumbent positions" and asking whether there were "murmurs." Whitman signed the second page of the form.

[3] [4] 4. "*Medical examination*" within meaning of § 124. The motion judge concluded, we think correctly, that the examination ***249** performed by Whitman was not a medical examination within the meaning of § 124. "[I]n construing a statute, words are to be accorded their ordinary meaning and approved usage." *Commonwealth v. Anderson*, 38 Mass.App.Ct. 707, 711, 651 N.E.2d 1237 (1995). Ballantine's Law Dictionary 787–788 (3d ed.1969), defines "medical examination" in relevant part as follows:⁶

"An examination of a person by a physician for the purpose of giving medical treatment or medical advice. An examination by a physician to determine the state of health of the person examined, apropos the need for medical or surgical treatment or his acceptability as a life insurance risk. An examination by a physician to determine whether or not a person has a communicable disease. An examination to determine the existence of **venereal disease**" (citations omitted).

In *St. Cloud Natl. Bank & Trust Co. v. Woodmen of the World Life Ins. Soc.*, 451 N.W.2d 75, 79 (Minn.App.1990), the court construed a similar statute,⁷ and held that a referral of the insured by the insurer to a nurse for a "paramedical examination" was not a "medical examination." In that case, the procedure consisted of the nurse checking the applicant's pulse and blood pressure, performing a limited urinalysis and asking him or her a list of medical history questions provided by the insurer. There was no supervision by a medical doctor, nor was the nurse's report evaluated by a physician.

While the insurer in *St. Cloud* characterized the examination as a "paramedical" one, we do not consider that fact dispositive. In the present case, **Prudential** also did not call the examination a "medical" one on its forms, and the only reference in the form to the qualification of the examiner is to a physician. The fee portion states, "To be completed by examining physician." See note 5, *supra*. As in *St. Cloud*, the examination was a ***250** limited one, covered only part of the physical component of the examination requested by ****463** the form, and was not supervised or evaluated by a physician. Cf. *Braxton v. Unity Industrial Life Ins. Co.*, 14 La.App. 435, 437, 131 So. 629 (1930). But see *Parchman v. United Liberty Life Ins. Co.*, 640 S.W.2d, 694, 695, 698 (Tex.App.1982) (indicating, in another context, that examination by a nurse was a medical examination).

Our conclusion that the term "medical examination" in the statute means examination by a physician is also buttressed by other statutes, set forth in the margin,⁸ which were passed shortly before or after c. 175, § 124, was first enacted by St. 1892, c. 372. These statutes invariably refer to physicians or registered medical practitioners (who were then considered qualified physicians, see note 8, *supra*) in the context of medical examinations and strongly suggest that the Legislature considered medical examinations to be examinations conducted ***251** by physicians. While we recognize that nurses and nurse practitioners now assume

many of the duties of physicians, and at less cost, if the term “medical examination” in § 124 is to be interpreted contrary to both its original meaning and its ordinary lexical definition, the change should be made by the Legislature. Accordingly, we construe “medical examination” as used in § 124 to mean an examination by a physician.

[5] [6] [7] 5. *Issues for a jury.* The motion judge, although construing the statute to require an examination by a physician, determined that the statements were “wilfully false, fraudulent or misleading” based on the presumption that a person signing a written instrument knows its contents. She also relied on language contained in *Sullivan v. Manhattan Life Ins. Co. of New York*, 626 F.2d 1080, 1082 (1st Cir.1980) (which interpreted § 186, not § 124). While Russell twice signed the policy and thereby twice certified that the statements were true,⁹ in view of the purpose of § 124 to increase the burden on insurers where **464 no medical examination is had, see *Protective Life Ins. Co. v. Sullivan*, 425 Mass. at 623, 682 N.E.2d 624, and *Torres v. Fidelity & Guar. Life Ins. Co.*, 34 Mass.App.Ct. at 380, 611 N.E.2d 733, the question whether the defendant insurer has met its burden of proving the statements “wilfully false, fraudulent or misleading” is not to be determined on summary judgment. As stated in *Sullivan v. John Hancock Mut. Life Ins. Co.*, 342 Mass. 649, 655–656, 174 N.E.2d 771 (1961), quoting from *Rappe v. Metropolitan Life Ins. Co.*, 322 Mass. 438, 440, 77 N.E.2d 641 (1948), with reference to § 186, where a lesser burden applies: “An incorrect statement does not necessarily indicate actual intent to deceive.” A fortiori, the same holds true for the higher burden imposed by § 124.

If, as alleged, Russell informed Pumphrey of his stroke and if the circumstances of the signing were as alleged by the plaintiff, *252 it can not be decided as matter of law that the incorrect statements on the policy were “wilfully false,

fraudulent or misleading.” This is a jury question. See *id.* at 656, 174 N.E.2d 771.

[8] [9] 6. *Action against Pumphrey.* The judgment in favor of Pumphrey is affirmed. If it is determined that Russell was wilfully false in his statements, the plaintiff will not be entitled to recover from the insurer; if he was not, she will obtain the proceeds of the policy. **Prudential** is bound by the knowledge received by Pumphrey who, it is undisputed, was **Prudential's** agent and, it appears, had at least apparent authority to receive these statements. See *Sullivan v. John Hancock Mut. Life Ins. Co.*, *supra* at 654–655, 174 N.E.2d 771. For this reason Pumphrey's negligence, if any, in failing to inform **Prudential** of Russell's stroke, assuming he was told of it by Russell, would have no effect on the plaintiff's recovery from **Prudential**. Pumphrey's failure, if any, would thus not have caused the plaintiff any damage.

[10] 7. *Chapter 93A claim.* The plaintiff's G.L. c. 93A claim is without merit, as **Prudential's** action in contesting the policy was not unreasonable. See *Guity v. Commerce Ins. Co.*, 36 Mass.App.Ct. 339, 343, 631 N.E.2d 75 (1994). See also *Van Dyke v. St. Paul Fire & Marine Ins. Co.*, 388 Mass. 671, 677, 448 N.E.2d 357 (1983).

The judgment is reversed and the case is remanded to the Superior Court for further proceedings on the plaintiff's claim against **Prudential** to recover on the policy. The Superior Court is directed to enter orders dismissing the plaintiff's G.L. c. 93A claim against **Prudential** and all claims against Pumphrey.

So ordered.

All Citations

56 Mass.App.Ct. 244, 776 N.E.2d 458

Footnotes

1 Louis Pumphrey.

2 General Laws c. 175, § 124, in relevant part, provides:

“In any claim arising under a policy issued in the commonwealth by any life company, without previous medical examination ... the statements made in the application as to the age, physical condition and family history of the insured shall be held to be valid and binding on the company; but the company shall not be debarred from proving as a defense to such claim that said statements were wilfully false, fraudulent or misleading.”

General Laws c. 175, § 186, provides:

"No oral or written misrepresentation or warranty made in the negotiation of a policy of insurance by the insured or in his behalf shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter misrepresented or made a warranty increased the risk of loss."

3 Another negative answer failed to reveal that Russell had been hospitalized for surgery for bilateral inguinal hernias. The application also contained a catchall question, also answered in the negative, which asked whether anyone proposed for coverage had "any disease, disorder or condition not indicated above."

4 **Prudential** indicated that it had another form which was similar but asked more medical history questions.

5 The section reads "Fee—Please indicate your fee for the service(s) provided:

"Exam	\$ ____	ECG	\$ ____
Lab	\$ ____	X-Ray	\$ ____
		Total	\$ ____

6 We have not found a definition of the phrase "medical examination" in the Black, Webster or American Heritage dictionaries.

7 [Minnesota Stat. § 61A.11 \(1988\)](#), as quoted in the opinion, states: "In any claim upon a policy issued in this state without previous medical examination ... the statements made in the application as to the age, physical condition, and family history of the insured shall be valid and binding upon the company, unless willfully false or intentionally misleading."

8 Statute 1884, c. 235, a predecessor to current [G.L. c. 175, § 122](#), was enacted in order to prevent discrimination by life insurance companies against persons of color. That act provided that no distinction should be made between white persons and "colored persons wholly or partially of African descent." *Id.* at [§ 1](#). It also required that "[a]ny ... company which shall refuse the application of any such colored person for insurance upon such person's life, shall furnish such person with the certificate of some regular examining physician of such company who has made examination of such person stating that such person's application has been refused not because such person is a person of color, but solely upon such grounds of the general health and hope of longevity of such person as would be applicable to white persons of the same age and sex." *Id.* at [§ 2](#). Present [G.L. c. 175, § 122](#), still provides that if a company refuses an application of a "colored person," the company "shall furnish such person, on his request therefor, with the certificate of a regular examining physician of such company who made the examination stating" that such refusal was not because the applicant was a "person of color" but because of health.

In 1894, the first provision for registration of physicians, St. 1894, c. 458, was passed and provided in [§ 3](#) that "every ... person who is a graduate of a legally chartered medical college or university ... and every person who has been a practitioner of medicine in this Commonwealth continuously for a period of three years next prior to the passage hereof shall ... be entitled to registration." These persons were to receive certificates as qualified physicians. See St. 1894, c. 458, [§§ 3, 4](#).

In 1895, St. 1895, c. 366, [§ 1](#), was enacted to prohibit the issuance of a life insurance policy "without having previously made or caused to be made a prescribed medical examination of the insured by a registered medical practitioner." That provision was subsequently repealed. See St. 1952, c. 14.

9 The application was signed in two places by Russell, once after the background section (occupation, sports, information concerning his driver's license), and again after the medical history section. Preceding the first signature is the following statement: "I certify that to the best of my knowledge and belief the statements in this application are complete, true and correctly recorded." Preceding the second signature, the following language appears: "All the answers are, to the best of my knowledge and belief, complete, true and correctly recorded. It is understood that any new coverage could be invalidated if any information in the application is materially misrepresented."

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Table of Authorities (12)

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Cited	6. Rappe v. Metropolitan Life Ins. Co. 77 N.E.2d 641, Mass., 1948 Exceptions from Superior Court, Suffolk County; Baker, Judge. Action by Madeleine Rappe against the Metropolitan Life Insurance Company to recover on a life policy. Verdict for...	Case		”	464
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Treatment	Referenced Title	Type	Depth	Quoted	Page Number
Cited	 8. Sullivan v. John Hancock Mut. Life Ins. Co. 174 N.E.2d 771, Mass., 1961 Action on a life policy issued to the insured who died as the result of a ruptured intracranial aneurysm. The Superior Court, Brogna, J., rendered a verdict for the beneficiary,...	Case			464+
Cited	 9. Sullivan v. Manhattan Life Ins. Co. of New York 626 F.2d 1080, 1st Cir.(Mass.), 1980 Beneficiary and widow of insured sued insurer which refused to pay on group life policy because it considered that insured had misrepresented his health in his application. The...	Case			463
Cited	 10. Sullivan v. Town of Brookline 758 N.E.2d 110, Mass., 2001 GOVERNMENT - Public Safety. Retired police officer was required to undergo retraining before being reinstated.	Case			460
Mentioned	11. Torres v. Fidelity and Guar. Life Ins. Co. 611 N.E.2d 733, Mass.App.Ct., 1993 False Statements. Life insurer had to prove that misstatements in application were willfully false, fraudulent, or misleading to deny coverage.	Case			460+
Cited	 12. Van Dyke v. St. Paul Fire and Marine Ins. Co. 448 N.E.2d 357, Mass., 1983 Patient and his wife brought action against physicians' insurer to recover for unfair settlement practices. The Superior Court, Essex County, Bennett, J., granted insurer's...	Case			464