

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 25-3538

ZENITH SMITH, an individual,
Appellant

v.

THE INDEPENDENT ORDER OF FORESTERS

On Appeal from the U.S. District Court, D. Del.
Judge Gregory B. Williams, No. 1:24-cv-00658

Before: SHWARTZ, CHUNG, and FISHER, *Circuit Judges*
Submitted: Oct. 2, 2026; Filed: Oct. 5, 2026

NONPRECEDENTIAL OPINION*

FISHER, *Circuit Judge*.

Zenith Smith sued The Independent Order of Foresters under Delaware state law claiming breach of contract, breach of the covenant of good faith and fair dealing, and bad-faith refusal to pay an insurance claim. The District Court granted Foresters' motion for summary judgment because Foresters rescinded the policy based on material misrepresentations Smith made in the application for coverage. We will affirm.¹

An insurance policy is voidable under Delaware law when an applicant makes

* This is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

¹ The District Court had jurisdiction under 28 U.S.C. § 1332 (diversity). We have jurisdiction under 28 U.S.C. § 1291 (final decisions of district courts). We review summary judgment orders *de novo*. *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014).

“[m]isrepresentations” or “incorrect statements” that are “[m]aterial either to the acceptance of the risk or to the hazard assumed by the insurer.”² A misrepresentation is material “if it would be likely to induce a reasonable person to manifest his assent.”³ The District Court concluded that Smith made at least three misrepresentations when she applied for a Foresters policy insuring the life of Shaun Davis: that the phone number, email, and bank account from which premiums would be paid belonged to Davis, when in fact they belonged to her. The District Court held that these misrepresentations were “likely to induce a reasonable [insurer] to manifest [its] assent,”⁴ and “call[ed] into question the identity and other facts about the [i]nsured.”⁵ This information is material because it assures the insurer that it is communicating with the insured, and that the insured participates in acquiring the policy, is able to tender premiums, and has the power to authorize Foresters to take actions related to the bank account.

Smith offers four arguments aimed at demonstrating a genuine dispute of material fact, but none are persuasive. “A factual dispute is material if it bears on an essential element of the plaintiff’s claim, and is genuine if a reasonable jury could find in favor of

² 18 Del. C. § 2711(2); *see also Johnson v. Am. Mod. Home Ins. Co.*, 2021 WL 3771825, at *2 (Del. 2021) (acknowledging the “statutory right to rescind [a] policy” for “misrepresentation[s]” under 18 Del. C. § 2711). “Delaware courts give” unreported decisions like *Johnson* “substantial precedential weight.” *Crystallex Int’l Corp. v. Petróleos De Venezuela, S.A.*, 879 F.3d 79, 85 n.8 (3d Cir. 2018). “[W]e thus give such opinions substantial precedential weight as well.” *Id.*

³ *United Westlabs, Inc. v. Greenwich Ins. Co.*, 2011 WL 2623932, at *12 (Del. Super. Ct. June 13, 2011) (citation omitted), *corrected* (July 1, 2011), *aff’d*, 38 A.3d 1255 (Del. 2012).

⁴ App. 26–27 (quoting *United Westlabs*, 2011 WL 2623932, at *12).

⁵ App. 27.

the nonmoving party.”⁶

First, Smith argues there is a genuine dispute about whether the misrepresentations are material because she and Davis shared household responsibilities and finances, and they regularly used Ms. Smith’s contact and bank account information. But Smith does not cite facts to dispute that she retained exclusive control of the phone number and email on the application, and expected Davis to be reached through his own phone number.⁷ And although it is common for couples to share finances, Smith failed to indicate when prompted in the application that someone other than Davis would pay the premiums. Furthermore, assuming that Davis signed the application, this signature certified that he was the owner of the bank account, and that he authorized Foresters to take actions related to the bank account to ensure payment. Smith does not cite facts that demonstrate that Davis had power to authorize such actions. No reasonable jury would find that these obfuscations are not material misrepresentations, as they falsely assured Foresters it could communicate with Davis, that he was actively involved and would be paying the premiums, and that Foresters was authorized to take certain actions with respect to the bank account listed in the application.

Second, Smith argues there is a genuine dispute regarding materiality because Foresters knew that Smith and Davis shared contact information. Smith refers to a phone conversation she had with Davis and a Foresters representative where the representative

⁶ *Natale v. Camden Cnty. Corr. Facility*, 318 F.3d 575, 580 (3d Cir. 2003).

⁷ App. 247 (recording of Smith and Davis on the phone with a Foresters representative in which Smith instructed Davis, “Check your texts”).

refused to discuss the policy with Smith until Davis provided authorization. The representative read Smith's phone number and email address and asked Davis if that was the "correct contact information" for the policy.⁸ Davis said it was. But that is not sufficient for a reasonable jury to conclude that Foresters knew Smith and Davis shared this contact information. Rather, it further reveals the obfuscation: if Foresters had attempted to contact Davis through the information in the application, it would instead contact Smith, even though the policy could only have been discussed with Davis or authorized individuals.

Third, Smith similarly argues that the insurance broker knew that Smith and Davis shared contact information and a bank account. However, Smith has not established that the broker's knowledge, had it been demonstrated, could be imputed to Foresters. Although Smith contends that whether the broker was acting as an agent of Foresters or herself is a disputed question of fact, she cites no facts bearing on an agency relationship. Absent indicia to the contrary, an insurance broker is presumptively "the agent of the insured," not the insurer, therefore "notice to the broker is not notice to the insurer."⁹

Finally, Smith contends that the question of materiality is a factual issue ill-suited for resolution on summary judgment. However, courts frequently decide questions of materiality as a matter of law when evidence of the underlying misrepresentation is not in dispute, and materiality is sufficiently clear that no reasonable jury could decide in favor

⁸ *Id.*

⁹ *Bradford, Inc. v. Travelers Indem. Co.*, 301 A.2d 519, 524 (Del. Super. Ct. 1972), *overruled on other grounds by State Farm Mut. Auto. Ins. Co. v. Johnson*, 320 A.2d 345 (Del. 1974).

of the nonmovant.¹⁰ This case is no different. Smith undisputedly provided her own contact information and bank account, misrepresenting they were Davis's. And assuming Davis signed the policy, this suggests that he could authorize Foresters to take certain actions with respect to Smith's bank account, when there is no evidence that he could do so. No reasonable jury could conclude that misrepresentations related to the identity and finances of the insured are not material to an insurer's decision to issue a policy.

Smith further offers two legal arguments that would establish a dispute of material fact, but neither are supported by Delaware law. Smith first contends that a § 2711 material misrepresentation claim requires that Foresters prove it justifiably relied on the alleged misrepresentation. However, the statute is written in the disjunctive, and applies to a misrepresentation that (1) is "[f]raudulent," or (2) is "[m]aterial either to the acceptance of the risk or to the hazard assumed by the insured," or (3) causes the insurer to issue a policy it otherwise would not have.¹¹ While justifiable reliance is an element of fraud under § 2711(1),¹² it is not an element of materiality under § 2711(2),¹³ upon which the District Court based its judgment. Second, Smith argues that the materiality standard applicable to

¹⁰ See, e.g., *United Westlabs*, 2011 WL 2623932, at *12 (failure to disclose prior legal proceedings in liability insurance application was material as a matter of law); *Mulrooney v. Life Ins. Co. of the Sw.*, 2014 WL 4407854, at *9 (Del. Super. Ct. Sep. 3, 2014) (misrepresentation of insured's height in health insurance application was material as a matter of law); *Brasure v. Optimum Choice Ins. Co.*, 37 F. Supp. 2d 340, 346 (D. Del. 1999) ("nondisclosures of serious disease or ailments" in health insurance application were "material as a matter of law").

¹¹ 18 Del. C. § 2711.

¹² See, e.g., *Hoechst Celanese Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 1994 WL 721618, at *2 (Del. Super. Ct. Apr. 8, 1994).

¹³ See, e.g., *United Westlabs*, 2011 WL 2623932, at *12.

shareholder proxy disputes under § 14(a) of the Securities Exchange Act, a federal statute, “should apply” to § 2711(2), a Delaware statute.¹⁴ However, she provides no authority for displacing state law with an inapposite federal standard.

Separate from the merits of her material misrepresentation arguments, Smith also argues that the policy’s incontestability clause bars Foresters from rescinding the policy. However, Smith has forfeited this argument because she did not “unequivocally put [her] position before the trial court at a point and in a manner that permit[ted] the [C]ourt to consider its merits.”¹⁵ In the District Court, Smith made only two “fleeting reference[s]”¹⁶ to the existence of the incontestability clause in the factual sections of her complaint and summary judgment brief. But even if Smith had not forfeited this argument, it would fail on the merits. The policy is incontestable “after it has been in effect during the lifetime of the insured for two years.”¹⁷ If an insured dies during a policy’s contestability period, the “operation of the incontestability clause” is “suspended.”¹⁸ Here, the policy was issued on July 28, 2021. The contestability period therefore would have ended on July 27, 2023. However, Davis’s death on June 18, 2022, suspended the contestability period, allowing Foresters to challenge the policy’s validity.

Finally, Smith asserts that it was procedurally inappropriate for the District Court to instruct Foresters to provide evidence it had rescinded the policy, accept Foresters’

¹⁴ Appellant’s Br. 30.

¹⁵ *Shell Petroleum, Inc. v. United States*, 182 F.3d 212, 218 (3d Cir. 1999).

¹⁶ *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 262 (3d Cir. 2009).

¹⁷ App. 74.

¹⁸ *Suskind v. N. Am. Life & Cas. Co.*, 607 F.2d 76, 83 (3d Cir. 1979).

subsequent rescission letter, and then grant summary judgment on that basis. However, Foresters argued on summary judgment that “the Policy is voidable under 18 Del. C. § 2711,”¹⁹ providing notice of its intent to rescind the policy through this litigation. Insurers often bring claims to rescind policies under § 2711 before formally rescinding them through court action.²⁰ Smith further admits she “could find no specific case law” warranting a contrary conclusion.²¹

For the reasons stated above, the judgment of the District Court will be AFFIRMED.

¹⁹ App. 156.

²⁰ See, e.g., *Mulrooney*, 2014 WL 4407854, at *1, *14; *Oglesby v. Penn Mut. Life Ins. Co.*, 877 F. Supp. 872, 887, 890 (D. Del. 1994).

²¹ Appellant’s Br. 32.