

I

The plaintiff Continental Insurance Company (“Continental”) claims in this action that the insurance policy at issue is void ab initio because of material misrepresentations made by the insured, Ruby Alice Matney (“Matney”), on her application.¹ Following discovery, Continental has moved for summary judgment. The motion has been briefed and argued and is now ripe for decision.

The facts of the case, either undisputed or, where disputed, taken in the light most favorable to the plaintiff, are based on the summary judgment record and are as follows.

Matney applied for automobile insurance with Continental on July 5, 2001, by completing an application with an agent at Southwest Virginia Professional Insurance Agency, Inc.² The requested policy was to cover a 1991 Buick LeSabre, a 1992 Chevrolet pickup truck, and a 1996 Chevrolet pickup truck. When asked on the application to provide the names of all “residents/dependents (licensed or not) and

¹ The plaintiff asserts jurisdiction of this court pursuant to diversity of citizenship and amount in controversy. *See* 28 U.S.C.A. § 1332(a) (West 1993 & Supp. 2003). The parties agree that I must apply Virginia law to this controversy.

² The defendants maintain that Matney did not physically go to the insurance agency to complete an application but do not suggest an alternative manner in which the application was completed. (Answer ¶ 1.) For purposes of the present motion, this factual dispute is immaterial, and it is undisputed that Matney did complete an application seeking insurance coverage from Continental.

regular operators,” Matney listed herself and her sister Nancy Matney. (Pl.’s Summ. J. Br. Ex. 1.) Continental issued a policy effective July 10, 2001. The policy was renewed for an additional one-year term on July 10, 2002.

On September 2, 2002, Jackie McCoy (“McCoy”), Matney’s relative,³ was involved in an accident while driving Matney’s 1996 Chevrolet pickup truck. McCoy and her daughter Leslie Nichole McCoy were injured in the accident and have asserted claims under the policy.⁴ Continental investigated the claim and discovered that the 1996 Chevrolet pickup truck displayed personalized license plates with the letters “JACKIE M” and that McCoy and her husband Leslie Allen McCoy were “regular drivers of the vehicles listed on [Matney’s] application for insurance.” (Pet. for Dec. J. ¶ 14.) Continental thereupon issued a reservation of rights letter and subsequently filed the present declaratory judgment action.⁵

³ The record contains conflicting assertions as to Jackie McCoy’s relationship to Ruby and Nancy Matney. (Pet. for Dec. J. ¶ 12; Answer ¶ 4; Pl.’s Summ. J. Br. 2, 3, Exs. 4, 5.)

⁴ The nature of the claims is not disclosed by the parties. The policy afforded liability coverage, uninsured and underinsured motorist coverage, and medical expense payments.

⁵ The defendants to this action are Matney, her sister Nancy Matney, McCoy, and McCoy’s daughter Leslie.

During discovery,⁶ Continental deposed both Matney and McCoy. Both admitted that McCoy would drive the truck during the time period when Matney completed and signed the application for insurance. In her interrogatory responses, McCoy stated that between January 2001 and September 2002, she “would usually drive the vehicle on the first of every month to get a check and again on the fifteenth of every month to help grandma get her check.” (Pl.’s Summ. J. Br. Ex. 4.) Matney further testified, without specifying the time period, that McCoy would drive the car to take Matney places and to go to the drug store and the grocery store for Matney. McCoy also stated that driving Matney’s vehicles “wasn’t an everyday thing.” (Pl.’s Summ. J. Br. Ex. 5.) They both confirmed that McCoy would sometimes park the car overnight at her house after driving it. This was done “more than once,” but “not too many times.” (Pl.’s Summ. J. Br. Exs. 3, 5.)

As to other drivers, Matney in her deposition denied ever letting McCoy’s husband drive the 1996 pickup truck and maintained that she did not know if McCoy had ever let her husband drive it. Matney also stated in her interrogatory responses⁷

⁶ The record contains snippets of deposition testimony and interrogatory responses. Neither the plaintiff nor the defendants adequately substantiated their positions on summary judgment by supplying the court with complete deposition transcripts or interrogatory responses. This is particularly problematic for Continental, since it has the burden of proof at trial and thus bears the burden of producing sufficient evidence for summary judgment.

⁷ Exhibit 6 attached to the plaintiff’s summary judgment brief purports by its title to be defendant Nancy Matney’s interrogatory responses. However, the substance of the

that, since January 2001, she has lived with Hursel Justice and Russell Matney and that, since January 2000, she has allowed Russell Matney and Bradley Matney to drive the 1996 pickup truck.

Both Matney and McCoy also admitted that McCoy had asked Matney to request “JACKIE M” plates in August 2001 when Matney purchased tags.

Douglas Moyer, presumably a member of the plaintiff’s underwriting department, testified in his deposition that McCoy, had she been listed on the application as a regular operator, would have been viewed by Continental as increasing its exposure to risk because she was a “younger driver than the other drivers on the policy.” (Pl.’s Summ. J. Br. Ex. 7.) He concluded that the premiums charged to Matney would have increased had McCoy been listed on the policy.

Based on this evidence, the plaintiff seeks a grant of summary judgment in its favor claiming that the evidence shows that there is no genuine issue of material fact that McCoy and her husband were regular operators of the 1996 pickup truck on July 5, 2001,⁸ when Matney signed and submitted the insurance application to

responses indicates that they are actually Ruby Matney’s responses.

⁸ The parties have not argued that Matney was obligated under the terms of the policy to notify Continental of any change of circumstances that may have occurred after Matney signed and submitted the application.

Continental.⁹ Continental's primary claim is that Matney knew of the frequency with which McCoy and her husband drove the pickup truck but nevertheless failed to list them on the application as regular operators of the vehicle, thereby making a misrepresentation. The plaintiff maintains that these misrepresentations were material to the issuance of the policy because they impacted the risk taken by the insurance company and are relied upon to reflect either a rejection of the application or the imposition of a higher premium. As a result, Continental seeks to void ab initio the policy in question and to thereby decline coverage for the claims asserted by McCoy and her daughter for their injuries.

In response, the defendants maintain that the burden of proof lies on the plaintiff to make a prima facie case of misrepresentation, which it has failed to do. Specifically, the defendants counter that the evidence produced by Continental has shown neither that Matney engaged in a misrepresentation on the application, nor that Continental relied on any alleged misrepresentation, making it material. Additionally, the defendants assert that Continental has waived its right to invoke this policy defense because it failed to provide notice to the claimants of its intent to rely on the

⁹ In its summary judgment brief, Continental alleges that Hursel Justice and Russell Matney resided with Matney and that Matney has also permitted Hursel Justice and Russell Matney to operate her insured vehicles since January 2001. However, in its suit papers, Continental relied only on the claim that McCoy and her husband were regular drivers. (Pet. for Dec. J. 4.)

defense within forty-five days after discovering the breach or the claim, as required by Va. Code Ann. § 38.2-2226 (Michie 2002).¹⁰

II

Summary judgment is appropriate when there is “no genuine issue of material fact,” given the parties’ burdens of proof at trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see* Fed. R. Civ. P. 56(c). In determining whether the moving party has shown that there is no genuine issue of material fact, a court must assess the factual evidence and all inferences to be drawn therefrom in the light most favorable to the non-moving party. *See Ross v. Communications Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985).

Pursuant to Va. Code Ann. § 38.2-309 (Michie 2002),¹¹ an insurance company contesting a claim on the basis of an insured’s alleged misrepresentation in an application bears the burden to show that the statement at issue was untrue and that

¹⁰ In oral argument, the defendants also resisted summary judgment on the ground that they had not completed discovery, but they filed no affidavit showing specifically what evidence might be uncovered by additional discovery. *See* Fed. R. Civ. P. 56(f) (requiring filing of affidavit when party cannot present facts essential to justify opposition to summary judgment). Accordingly, I will not consider this defense to summary judgment.

¹¹ Section 38.2-309 provides in pertinent part that “[n]o statement in an application . . . made before or after loss under the policy shall bar a recovery upon a policy of insurance unless it is clearly proved that such answer or statement was material to the risk when assumed and was untrue.”

the insurance company's reliance on the false statement was material to the company's decision to issue the policy or to assess a certain premium. *See Commercial Underwriters Ins. Co. v. Hunt & Calderone, P.C.*, 540 S.E.2d 491, 493 (Va. 2001). The materiality of a misrepresentation depends upon "the intimate conceptual relationship between reliance and materiality." *Montgomery Mut. Ins. Co. v. Riddle*, 587 S.E.2d 513, 515 (Va. 2003). To meet this burden, the insurer must produce proof of actual reliance on the misrepresentation. *Id.* at 513-515.

Under this standard, whether Matney's failure to list McCoy and her husband as "regular operator[s]" on the application was a misrepresentation depends upon the definition of a "regular operator." A copy of the application completed and signed by Matney as contained in the record indicates that the application itself did not define a "regular operator." (Pl.'s Summ. J. Br. Ex. 1.) The term also remains undefined under Virginia law in the context of misrepresentations on insurance applications. However, Virginia courts attempting to define the parameters of "regular use" in the context of exclusions from liability coverage for "non-owned" vehicles have determined that "regular use" is that use which is principally for the borrower's own purposes and is not a casual or incidental use. *State Farm Mut. Auto. Ins. Co. v. Smith*, 142 S.E.2d 562, 567 (Va. 1965). An exception to the principal personal use requirement may exist only where the borrower has "frequent, daily, and

extensive use, dominion, and control” of the vehicle and where the insured’s purpose in furnishing the vehicle to the borrower is specifically that it be used regularly by her. *State Farm Mut. Ins. Co. v. Jones*, 383 S.E.2d 734, 736 (Va. 1989). This interpretation of “regular use” is substantiated by other jurisdictions that have held that a “regular operator” for purposes of a misrepresentation on an application for insurance does not include one who drives a vehicle once a month but does include one who uses the vehicle several times per week. *Compare Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 671 (Ind. 1997), with *Progressive Specialty Ins. Co. v. Carter*, 868 P.2d 32, 35 (Or. Ct. App. 1994).

Having reviewed the evidence of record and viewing it in the light most favorable to the non-movants, I find that Continental has not met its burden of showing that the evidence presents no genuine issue of material fact that defendant Matney made an untrue statement on her application for insurance. The evidence indicates that on July 5, 2001, the date Matney signed the insurance application, McCoy was driving the 1996 pickup truck twice a month to help Matney collect checks and to run other errands for Matney, such as shopping at the grocery store and at the drug store. The record also indicates that the 1996 pickup truck exhibited “JACKIE M” license plates. Nevertheless, neither the frequency nor the purposes of McCoy’s use allow me to rule that she was a regular operator of the 1996 pickup

truck as a matter of law. As to McCoy's husband, the only evidence in the record is Matney's redacted deposition testimony that she never let McCoy's husband drive the 1996 pickup truck and that she did not know if McCoy had ever let her husband drive it. This evidence does not permit me to say as a matter of law that McCoy's husband was a regular operator of the vehicle in question. The limited nature of the record, Virginia guidance on similar questions, and persuasive authority from other jurisdictions all counsel that whether McCoy and her husband were regular operators of the 1996 pickup truck, and therefore whether Matney made an untrue statement on her insurance application, are questions of fact for the jury. I therefore decline the plaintiff's Motion for Summary Judgment with respect to this issue.

In order to have the policy with Matney declared void ab initio at the summary judgment stage, Continental must also show that the record exhibits no genuine issue of material fact that an untrue statement by Matney on the application, if it should be so proven, would be a misrepresentation that was material to Continental's decisions to issue the policy and set the rate of premium. A statement on an application may only be material if Continental actually relied on it. The record contains Moyer's testimony that McCoy would have been classified as a younger driver and that younger drivers are charged a higher premium. However, this testimony is insufficient. The record contains no facts suggesting either that it is Continental's

normal business practice to specifically examine a policyholder's statement as to who additional regular operators of the insured vehicles may be or that an employee of Continental did so examine Matney's response to the question in determining whether to issue the policy or in setting the rate of premium she would be charged. Having failed to supply such evidence, Continental has not met its burden to show actual reliance on any alleged misrepresentation and has consequently not shown materiality. I therefore deny the plaintiff's Motion for Summary Judgment as to this issue as well.

Finally, the defendants' invocation of Va. Code Ann. § 38.2-2226 in response to Continental's attempts to decline coverage for McCoy and her daughter's claims is not well-founded.¹² Section 38.2-2226, both by its plain language and by its chronicled application, pertains to violations of specific terms and conditions of the

¹² Section 38.2-2226 provides in pertinent part as follows:

Whenever any insurer on a policy of liability insurance discovers a breach of the terms or conditions of the insurance contract by the insured, the insurer shall notify the claimant or the claimant's counsel of the breach. Notification shall be given within forty-five days after discovery by the insurer of the breach or of the claim, whichever is later. Whenever, on account of such breach, . . . a reservation of rights letter is sent by the insurer to the insured, notice of such action shall be given to the claimant or the claimant's counsel within forty-five days after . . . the letter is sent, or after notice of the claim is received, whichever is later. Failure to give the notice within forty-five days will result in a waiver of the defense based on such breach to the extent of the claim by operation of law.

policy. See Va. Code Ann. § 38.2-2226; see also, e.g., *State Farm Fire and Cas. Co. v. Scott*, 372 S.E.2d 383, 384-85 (Va. 1988); *State Farm Mut. Auto. Ins. Co. v. Hertz Corp.*, No. 21490, 1999 WL 1417222, at *3 (Va. Cir. Ct. Aug. 20, 1999). The present action does not allege that the defendants violated any policy provisions but instead asserts Continental's right to render void a contract into which it entered by relying on misrepresentations of facts material to the risk it was assuming. See *State Farm Mut. Auto. Ins. Co. v. Butler*, 125 S.E.2d 823, 825-27 (Va. 1962). There is no precedent for the defendants' contention that section 38.2-2226 applies in a dispute where the plaintiff claims that the very terms and conditions of the policy should be of no legal effect from the very first moment when the policy was issued, as Continental claims here. Thus, I grant summary judgment in favor of Continental on this issue and find that, as a matter of law, section 38.2-2226 is irrelevant to the present controversy.

III

For the foregoing reasons, it is **ORDERED** as follows:

1. The plaintiff's Motion for Summary Judgment is granted in part and denied in part;

2. Summary judgment is granted in favor of the plaintiff as to the defense of failure of notice under Va. Code Ann. § 38.2-2226; and
3. The Motion for Summary Judgment by the plaintiff is otherwise denied.

ENTER: April 22, 2004

/s/ JAMES P. JONES
United States District Judge