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United States District Court,
S.D. Texas, Houston Division.

COLONIAL PENN LIFE INSURANCE COMPANY, Plaintiff,
v.
ASHLEY E. PARKER, et al., Defendants.

CIVIL ACTION NO. 4:17-CV-01233
|
Filed in TXSD on 01/24/2019

MEMORANDUM & ORDER

Andrew S. Hanen United States District Court Judge

***1** Before the Court are a Motion for Summary Judgment filed by the Defendants [Doc. No. 18] and the Plaintiff's Response thereto [Doc. No. 22] and a Motion for Summary Judgment filed by the Plaintiff [Doc. No. 23] and the Defendants' Response thereto [Doc. No. 26] as well as various replies and ancillary briefing.

I.

The underlying facts are basically uncontroverted. Robert Lee Parker ("Parker" or "Decedent"), a veteran, applied for a whole life insurance policy from the Colonial Penn Life Insurance ("Colonial" or "Plaintiff") on October 30, 2014. The policy was to have benefits totaling $20,000, and Ashley E. Parker and Aden L. Barron ("Defendants"), as beneficiaries, were to share that amount on a 50%-50% basis, should decedent die. On November 20, 2014, Plaintiff issued the policy.

On June 22, 2015—some seven months later—Parker died in a motor vehicle accident (per the death certificate). The Defendants timely made a claim for the face amount of the policy. There is no dispute that the policy contract number is NW66886552, that it became effective as of November 20, 2014, and that it had a face amount of $20,000. There is also no dispute that the Defendants are the beneficiaries of any proceeds due and owing pursuant to the policy. Further, it is without question that the policy includes a standard two-year incontestability clause:

> Except for non-payment of premium, this policy is incontestable after it has been in force during the insured's lifetime for two years after the Effective Date.

As stated above, Parker's death occurred within seven months of the effective date. Consequently, this clause does not serve to bar the Plaintiff's contest herein.

II.

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "The movant bears the burden of identifying those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–25 (1986)). Once a movant submits a properly supported motion, the burden shifts to the nonmovant to show that the Court should not grant the motion. *Celotex Corp.*, 477 U.S. at 321–25. The nonmovant then must provide specific facts showing that there is a genuine dispute. *Id.* at 324; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The Court must draw all reasonable inferences in the light most favorable to the nonmoving party in deciding a summary judgment motion. *Id.* at 255.

III.

The instant controversy stems from two issues: (1) Colonial claims that Parker failed to pay the policy premiums and that the policy lapsed in April of 2015; and (2) Colonial claims that Parker did not accurately fill out the application and that, had the correct information

been supplied, the policy would have never been issued. It is for these reasons the Plaintiff rescinded/cancelled the contract of insurance and refused the Defendants' claim. In their briefing, the Defendants do not contest the former proposition regarding Parker's lapse in payments with either factual or legal arguments. They do contest at length the application issue and argue vehemently that Colonial has not shown fraud or intent to deceive on Parker's part and therefore cannot prevail on this motion.

IV.

A. Non-Payment of Premium

***2** Colonial has claimed and provided appropriate summary judgment evidence supporting its position that Parker had a monthly premium of $98.25. Parker made the premium payments without problems in December of 2014 and in January and February of 2015; however, in March of 2015 he made his premium payment late and made no payments thereafter. Colonial sent premium notices in April of 2015 for $98.25 and May of 2015 for $196.50 ($98.25 for May and the past due $98.25 amount for April), but neither invoice was paid nor did Parker otherwise respond to these notices.

The policy states:

> You have a grace period of 31 days after the due date to pay any premium after the first. Coverage will stay in effect during the grace period; however, if death occurs any unpaid premiums will be deducted from the Death Benefit. If any premium is not paid when due or during the grace period, this policy will terminate at the end of the grace period, subject to the Non-forfeiture Benefits Provision. [This policy had no accrued cash value and consequently had no non-forfeiture benefits.]

The 31-day grace period ended on May 21, 2015 without any payments. In June of 2015, Colonial sent a letter cancelling the policy as of April 20, 2015 due to the missed April and May payments. [1] Thus, the policy had lapsed prior to Parker's passing. [2]

Defendants have offered no summary judgment evidence and very little argument to counter the Plaintiff's contention that there was no policy in place due to the failure to pay premiums. In fact, in their response to this section of the Motion for Summary Judgment, the Defendants concede that they cannot admit or deny most of Colonial's contentions. [3] They certainly do not bring forth any admissible summary judgment evidence to create an issue of material fact. That being the case, Defendants cannot prevail as a matter of law on any cause of action asserting either a claim for breach of the policy, a claim concerning the Plaintiff's handling, or any claims relating to Parker's death. Plaintiff's motion for summary judgment is hereby granted on this point.

V.

Plaintiffs second contention—that Parker's insurance application contains critical misstatements—also has merit. Below, the application is reproduced in pertinent part:

Tabular or graphical material not displayable at this time.

Question 3b and its answer are at issue:

In the past 3 years have you had or been treated for:

* * *

b. Cancer ... mental or nervous disorder, drug or alcohol abuse ...

As can be seen, Parker answered, "no" by marking the corresponding box. The application continues on to stress that the accuracy of the information provided is important. Directly above Parker's signature it states:

I have read the questions and my answers are true and correct to the best of my knowledge and belief ... The application will be made part of any policy issued and, within the first two years, a material misrepresentation or

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answer can be used to contest coverage as of its effective date or to deny a claim.

***3** The application was signed by Parker and dated October 30, 2014. Thus, his answers as to the preceding three-year period should cover treatment back to October 30, 2011. Colonial claims that there is overwhelming evidence of both alcohol and drug abuse during this time period. They have also presented uncontroverted evidence that in this kind of application and policy that had Parker, or any other applicant for that matter, answered accurately with a "yes" instead of the "no" with which he responded, the application would have been automatically rejected and no policy would have been written.

A. The Evidence of Drug and Alcohol Abuse [4]

Parker, as a veteran, was receiving most, if not all of his medical treatment and counseling at the main Houston Veterans Administration ("VA") Hospital Facility (more formally known as the Michael E. DeBakey Veterans Administration Medical Center). Those records are included in Plaintiff's summary judgment evidence. [5] The Court below will summarize the records provided in chronological order providing the date and quoting the records. [6] The following excerpts are pertinent to Plaintiff's claims:

Tabular or graphical material not displayable at this time.

[7]

These records paint a poignant and somewhat disheartening picture of a veteran suffering from multiple problems who was having trouble adjusting to civilian life. Some of those problems were caused by his drug and alcohol abuse. It is clear that for years doctors, therapists, and social workers at the VA tried to dissuade Parker from using drugs and alcohol and tried to persuade him to participate in Alcoholics/Narcotics Anonymous and/or other programs designed to help one cope with substance abuse problems.

The records clearly support the Plaintiff's conclusion that the Decedent had a substance abuse problem during the pertinent time period in question. They also support an argument that Parker, regardless of what happened in his private life—demotions, loss of employment, fights—and regardless of what he was advised by medical personnel, refused to accept how serious his abuse problem was and his need for treatment and/or abstinence.

***4** It is this latter proposition that forms the crux of the Defendants' Response to the Motion for Summary Judgment. First, they argue that Parker never thought he had a drinking or drug problem—therefore his answer on the policy application was not false. As a corollary they argue that mere inaccuracy does not vitiate the policy. They argue that in order for the Plaintiff to prevail, it must prove knowledge on Parker's part and an intent to defraud. Absent this measure of proof, Defendants' claim the policy cannot be rescinded and its benefits must be paid.

B. Misrepresentations and Insurance Policies

In its Motion for Summary Judgment, Plaintiff contends that Parker's medical records prove that he misrepresented whether he received treatment for substance abuse in the timeframe specified on the insurance application. [Doc. No. 23 at 1]. Plaintiff provides evidence that on Parker's application for life insurance, he represented that he had not suffered from a substance abuse problem, nor had he received treatment for a substance abuse problem in the three years prior to filling out his insurance application. [*Id.* at 11-12]. As is evident from the selected records reproduced above, Plaintiff provides evidence that Parker had, in fact, suffered from and received treatment for a substance abuse problem in the time period specified on the application. [Doc. No. 22 at 9]. Based on this misrepresentation, Plaintiff argues that it was entitled to rescind the life insurance policy, thereby avoiding payment. [Doc. No. 23 at 1]. Defendants respond that there is no evidence that Parker abused substances, was treated for substance abuse, or that his representation on his insurance application was false; therefore, Plaintiff was not justified in rescinding the contract. [Doc. No. 26 at 6].

Traditionally, under Texas case law, there are five elements a movant must establish in order to rescind an insurance contract. The insurer must plead and prove the following: "(1) the making of the representation; (2) the falsity of the representation; (3) reliance thereon by the insurer; (4) the intent to deceive on the part of the insured in making same; and (5) the materiality of the representation." *Mayes v. Massachusetts Mut. Life Ins. Co.*, 608 S.W.2d 612, 616 (Tex. 1980). Although Texas courts have long abided by this test, in 2003 the Legislature

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recodified the Texas Insurance Code. *See Federated Life Ins. Co. v. Jafreh*, No. 09-20859, 2010 WL 3278362, at *3 (5th Cir. Aug. 18, 2010) (discussing the recodification of the Insurance Code). The amended version of the code took effect on April 1, 2005 and thus applies to this case. The recodified requirements for rescission appear in Chapter 705, "Misrepresentations by Policyholders."

In the recodified version of the rescission requirements, the applicable elements vary based on the type of insurance contract and the length of that contract's existence. There are three main subchapters within Chapter 705. Subchapter A of Chapter 705 applies to all insurance policies (subject to the exception described below), Subchapter B contains "Special provisions related to life, accident, and health insurance policies," and Subchapter C contains "Special provisions related to life insurance policies." Under Section 705.105, Subchapter A does not apply to insurance contracts (1) that contain provisions "making the policy incontestable after two years" and (2) "on which premiums have been duly paid." TEX. INS. CODE § 705.105. The insurance contract in this case contains a standard two-year incontestability clause, and for purposes of this analysis, the Court will hypothetically assume that premiums were "duly paid"; accordingly, Subchapter A will not be applied. [8]

***5** Plaintiff argues that while provisions of Chapter 705 have replaced the five-element *Mayes* test, four of the elements (that is, all of the *Mayes* elements, minus the intent requirement) were incorporated into the new statutory construction. [Doc. No. 23 at 13]. Plaintiff points out that under Section 705.104, the intent requirement has been limited to apply only to policies that are more than two years old. Defendants respond that Plaintiff is still required to prove all five elements, including the intent requirement, as stated in *Mayes.* The Court will now discuss each of these elements and the parties' related arguments, saving the intent-requirement analysis for last.

Plaintiff has provided evidence that Parker made a representation on his application and that Parker's representation, as a matter of law, was false. A "representation is made if the applicant signs a statement indicating the answers in the application are true and correct when the policy is delivered," and untrue answers on an application constitute misrepresentations. *United of Omaha Life Ins. Co. v. Halsell*, No. SA-08-CV-1007-XR, 2010 WL 376428, at *3 (W.D. Tex. Jan. 25, 2010) (first quoting *Darby v. Jefferson Life Ins. Co.*, 998 S.W.2d 622, 628 (Tex. App—Houston [1st Dist.] 1995, no writ), then citing *Mayes*, 608 S.W.2d at 616); *see also* TEX. INS. CODE § 705.051 (requiring the insurer to demonstrate that the insured made a false misrepresentation on the application). In *Halsell*, the court found that the insurer properly rescinded the insurance contract based on the insured's misrepresentation about his history of substance abuse on the life insurance application. *Id.* [9] Here, as in *Halsell*, the signature line of the insurance application reads: "I have read the questions and my answers are true to the best of my knowledge and belief." [Doc. No. 23, Ex. 1 at 7]. Parker answered "no" when asked "In the past 3 years, have you had or been treated for: ... drug or alcohol abuse...?" [Doc. No. 23, Ex. 1 at 7]. To the contrary, Plaintiff points to Parker's VA records (excerpts reproduced above), which show that he was both diagnosed and treated for alcohol abuse almost continuously for the three years preceding the insurance application date. [Doc. No. 23, Ex. 1 at 254].

The VA records are replete with entries by caregivers discussing Parker's substance abuse, stating things such as, "7/28/14: Problem: substance abuse Veteran reports daily drinking 'around 2.' Voiced no plans to ever quit drinking." [Doc. No. 22, Ex. 12]. There are numerous notations in these records demonstrating that Parker suffered from "substance abuse – alcohol," "Alcohol abuse," and "Substance dependence: alcohol." [*Id.*]. On December 30, 2011, Parker admitted to his doctors that he was drinking too much and asked to be put back on the medication (Acamprosate) that had previously helped with his alcohol abuse. The records show this medication was in fact prescribed. On June 26, 2014, Parker reported currently being in substance abuse treatment. On November 19, 2014, the Progress Notes stated: "Current Substance Abuse: Alcohol Drinking" and "Veteran reported he began using in 1978. Since that time he has been to two treatments, completed in 2004 and currently in one. Drug of choice was crack cocaine and alcohol." The application was dated October 30, 2014 —so both before and immediately after the date where he represented he did not have and had not been treated for drug or alcohol abuse, he was in substance abuse treatment. In fact, this last medical visit was less than a week before the policy was issued. Defendants argue that this does not necessarily mean that Parker "regularly or repeatedly used drugs" or "excessively or compulsively

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used alcoholic drinks." [Doc. No. 26 at 7]. The Court does not find Defendants' argument convincing. These records eliminate any issue of fact concerning whether Parker suffered from substance abuse and/or received treatment for substance abuse in the three years preceding his representation on the application to the contrary.

***6** Plaintiff has also provided evidence that it relied on Parker's misrepresentation. [10] "Reliance is established when the insurer does not know the representations are false." *Halsell*, 2010 WL 376428, at *4. Here, Colonial has provided evidence that it did not know that Parker's misrepresentations were false. [Doc. No. 23, Ex. 1 at 5 ¶ 24]. Further, it has offered uncontroverted proof that if Parker had accurately answered "yes" to the substance abuse inquiry, it would have never issued the policy.

Plaintiff purports that its summary judgment evidence demonstrates that the misrepresentation was material, thereby satisfying the materiality element of the *Mayes* test and the codified version of the requirement. *See* TEX. INS. CODE § 705.051 (requiring the insurer to prove that the misrepresentation was material). "The representation is material if it actually induces the insurance company to assume the risk." *Halsell*, 2010 WL 376428, at *5 (first quoting *Darby*, 998 S.W.2d at 628, then citing *Robinson v. Reliable Life Ins. Co.*, 569 S.W.2d 28, 28 (Tex. 1978)). Here, as in *Halsell*, the insurer has submitted undisputed evidence that had it known the truth about the insured's substance abuse problem, it would not have issued the policy. [Doc. No 23, Ex. 1 at 5 ¶ 25]; *Halsell*, 2010 WL 376428, at *5. Accordingly, Plaintiff has shown that the insured's misrepresentation was material.

Finally, as for the intent requirement, Plaintiff alleges that since the policy was not two years old at the time of Parker's death, it is not required to establish intent under the recodified code. *See* TEX. INS. CODE § 705.104. Assuming *arguendo* that Parker had paid all of his premiums and that the insurance contract was not rescinded for failure to pay, Subchapter B of the Texas Insurance Code would apply. [11] Subchapter B states:

> A misrepresentation in an application for a life, accident, or health insurance policy does not defeat recovery under the policy unless the misrepresentation:
>
> (1) is of a material fact; and
>
> (2) affects the risks assumed.

TEX. INS. CODE § 705.051.

Defendants do not dispute the applicability of TEX. INS. CODE § 705.051. [12] Instead, Defendants claim that "nothing in Section 705.051 of the Texas Insurance Code eliminates the requirement that a misrepresentation be intentional in order for the misrepresentation to void a life insurance policy"—in other words, that the intent requirement from *Mayes* was not eliminated. [Doc. No. 25 at 1]. Plaintiff disagrees, stating that the Legislature eliminated the intent requirement as described in *Mayes* by omitting the requirement from Section 705.051 and making the intent requirement apply only to insurance policies older than two years. Plaintiff cites TEX. INS. CODE § 705.104, which requires that an insurer prove that the misrepresentation was intentional if the policy is being contested "on or after the second anniversary of the date of issuance of the policy." Plaintiff argues that since the contract is less than two years old, only Section 705.051 applies.

***7** Most Texas and related federal cases that discuss misrepresentations on insurance applications concern life insurance contracts that went into effect prior to the April 2005 recodification. Accordingly, there are no cases that clearly reconcile the inconsistency between the intent element from *Mayes* and the lack of an explicit intent requirement in parts of the updated legislation. Nevertheless, "prior law and legislative history cannot be used to alter or disregard the express terms of a code provision when its meaning is clear from the code when considered in its entirety, unless there is an error such as a typographical one." *Fleming Foods of Tex., Inc. v. Rylander*, 6 S.W.3d 278, 284 (Tex. 1999). Courts presume "that the legislature, in adopting the amendment, intended to make some change in the existing law, and therefore, [endeavors] to give effect to the amendment." *Suretec Ins. Co. v. Myrex Indus.*, 232 S.W.3d 811, 815 (Tex. App.—Beaumont Aug. 16, 2007, pet. denied). [13] Thus, where the Legislature was clearly aware of the *Mayes* test, yet opted not to include an intent requirement, this Court must conclude that this omission was intentional. Accordingly, this Court agrees that the policy at issue here is controlled by TEX. INS. CODE § 705.051, and that under this section, Plaintiff is not required to prove intent to deceive.

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Under Section 705.104, an insurer must only prove intent to deceive where the insurance contract has been in effect for longer than two years. Section 705.104 states:

> A defense based on a misrepresentation in the application for, or in obtaining, a life insurance policy on the life of a person in or residing in this state is not valid or enforceable in a suit brought on the policy *on or after the second anniversary of the date of issuance of the policy* if premiums due on the policy during the two years have been paid to and received by the insurer, unless:
>
> (1) the insurer has notified the insured of the insurer's intention to rescind the policy because of the misrepresentation; or
>
> (2) it is shown at the trial that the misrepresentation was:
>
> (A) material to the risk; and
>
> (B) intentionally made.

TEX. INS. CODE § 705.104 (emphasis added). In other words, the section allows an insurer "to contest a life insurance policy two years after its date of issue" only if the insurer can prove that "the misrepresentation was material and intentionally made." *Federated Life Ins. Co.*, 2010 WL 3278362, at *3 (citing TEX. INS. CODE § 705.104). If Defendants are correct that an insurer must always prove intent to deceive, regardless of whether the policy was in effect for two or more years, then the language, "on or after the second anniversary of the date of issuance of the policy" would be superfluous. TEX. INS. CODE § 705.104. The Court "must not interpret the statute in a manner that renders any part of the statute meaningless or superfluous." *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 390 (Tex. 2014). Accordingly, the Court again finds that Plaintiff is not required to prove intent to deceive.

***8** In the present case, the policy was issued in November of 2014, meaning the 2005 recodifications of the Insurance Code apply. *See Federated Life Ins. Co.*, 2010 WL 3278362, at *3 ("It is the law in existence at the time of the issuance of the policy that applies."). Parker passed away within seven months after the insurance policy was issued. [Doc. No. 22 at]. Seven months is, of course, well within the two-year period described in TEX. INS. CODE § 705.104. [14] Thus, Plaintiff succeeds on this point as well —the policy was properly rescinded for misrepresentation on the application.

Nevertheless, even if intent is still required, Plaintiff has proven intent as a matter of law through Parker's VA records. These records show that Parker admitted having a drinking problem, asked for treatment, and received treatment, all during the pertinent three-year pre-application period. His answer to Question 3b is clearly incorrect because he both had and had been treated for substance abuse. While one can argue about whether Parker subjectively believed that he did not have a substance abuse problem (as he may have been in denial), it is clear that as a matter of law, Parker was treated for substance abuse and should have answered the question accordingly. Parker had to know what he was being treated for because he was the one who requested treatment and stated that the treatment medication (Acamprosate) had previously worked.

VI.

Even viewing this evidence in the light most favorable to the Defendants, it is clear that Parker did not make the premium payments as required and the policy lapsed before his death. Further, even if Parker had made the premium payments, the VA records eliminate all issues of fact that Parker suffered from substance abuse and received treatment within the pertinent three year window. Since the VA records show that Parker suffered from alcohol abuse for which he received treatment, he should have answered "yes" to the relevant question on his insurance application. By answering "no," Parker made a material misrepresentation upon which Plaintiff relied, and that misrepresentation under the law allows the insurer to rescind the insurance contract. That being said, the Plaintiff's Motion for Summary Judgment [Doc. No. 23] is granted, and the Defendants' Motion for Summary Judgment [Doc. No. 18] is denied. An appropriate judgment will be entered in a separate order.

All Citations

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Footnotes

1 While not directly pertinent to the issues in this case, in June, Colonial received a letter mailed in May from Americo Financial Life and Annuity Company, advising that the Colonial policy might be replaced because Parker found the Colonial policy to be too expensive.

2 The letter informing Parker of the cancellation was apparently dated the same day that Colonial was informed of Parker's death. While somewhat coincidental, the Defendants, however, do not raise this as an issue to the pending summary judgment motion.

3 In their response, Defendants on occasion mistakenly refer to themselves as "plaintiffs." Nevertheless, it is clear from the context that they have no controverting evidence on this issue.

4 Colonial bases its contention solely on the drug and alcohol abuse answer despite the fact that some medical records suggest that Parker had been treated for depression in the past and the records indicate in places that he was being treated for depression during the time in question.

5 These records are found in Exhibits A and B to Document 22 and Exhibits A and B to Document 23. All medical references are found in one of these four exhibits.

6 The medical records consist primarily of progress notes, test results, and interviews with the Decedent. At times dates are hard to discern either because of the length of the record or because there are multiple dates (such as when it was dictated or written as opposed to the actual performance date of the medical treatment or when the record was signed). The Court has made no effort to include all of the references to drug and alcohol abuse—and has not attempted to include any discussion of Decedent's mental health issues (although some topics such as depression are clearly mentioned in the notes quoted) as those are not the subject of Colonial's motion. Also, the operative date for determining the application's accuracy is obviously the application date (October 30, 2014) and the three preceding years. One will note the inclusion of one 2015 record. While not directly relevant it is included because it mentions events in the relevant three-year period. Finally, there are places where the records themselves reference dates before the relevant three-year period and while the Court has attempted to minimize those references some inclusion was unavoidable. None of the evidence either before or after the three-year period was used by the Court in reaching its opinion. Any emphasis was added by the Court unless otherwise indicated.

7 Acamprosate is a drug used to treat alcohol dependency.

8 Above, the Court found that the insurance contract was properly cancelled due to Parker's failure to pay the April 2015 and May 2015 premiums. For the purposes of this analysis, the Court will assume that Parker has hypothetically paid all premiums. As a result, this contract falls under Section 705.051 rather than Section 705.004.

9 Although the insurance contract in *Halsell* was issued in February 2008, the court applied the *Mayes* test with no discussion of the recodification of the Texas Insurance Code (or its effect on the common law test).

10 Reliance is not explicitly addressed in Chapter 705 but appears in the *Mayes* test.

11 Section 705.004, located in Subchapter A, covers Misrepresentations in Policy Applications; however, pursuant to Section 705.105, Subchapter A does not apply to the contract in question. *See* discussion of TEX. INS. CODE § 705.105, *supra.* Moreover, there is no intent requirement in Section 705.004, making it even more likely that the Legislature chose to eliminate the intent requirement from the rescission analysis for policies in effect for less than two years. *See* Andrew C. Whitaker, *Update on Texas Law on the Rescission of Insurance Policies*, 13 J. TEX. INS. L. 23, 24 (2015) ("Since the Texas Legislature clearly knew how to impose an intent requirement, its refusal to include one in the statutes setting forth the elements of a rescission claim—Sections 705.004 and 705.051—provides further evidence that intent to deceive is no longer an element of a rescission claim during the first two years [of] a life insurance policy").

12 As previously stated, Colonial has provided uncontroverted evidence that had Parker accurately answered "yes" to the substance abuse inquiry, it would have never issued the policy. Colonial has demonstrated that the misrepresentation was material and affected the risks assumed. *See* TEX. INS. CODE § 705.051(a)-(b).

13 *See also Traxler v. Entergy Gulf States, Inc.*, 376 S.W.3d 742 at 748 (Tex. 2012) ("We presume the Legislature is aware of relevant caselaw when it enacts or amends statutes. Further, "[i]t is a firmly established statutory construction rule that once appellate courts construe a statute and the Legislature re-enacts or codifies that statute without substantial change, we presume that the Legislature has adopted the judicial interpretation."); *Phelps v. State*, 532 S.W.3d 437, 443 n.6 (Tex. App.—Texarkana Apr. 10, 2017, pet. ref'd) (discussing amendments to the Texas Penal Code, stating "if the Legislature disagrees with the court's ruling, it can amend the statute, so that its failure to amend is considered as acquiescence to the court's ruling ... Yet where the Legislature substantively amends a statute after a decision has been issued interpreting the statute, the courts can no longer engage in the assumption that the Legislature acquiesced in the

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prior case holding.... by amending the statute, the Legislature exercised its policymaking responsibility in response to the prior case. Thus, when faced with post-decision statutory amendment, [a court is compelled to reevaluate] the statute out of deference to the Legislature's supremacy on statutory issues.").

14 The policy itself included a standard two-year incontestability clause. [Doc. No. 23-1 at 3-4]. As previously stated, because Parker died within seven months of the policy effective date, this clause does not bar Plaintiff from contesting a material misrepresentation.

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