

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

JANUARY TERM 2004

**GREAT SOUTHERN LIFE INSURANCE
CO.,**

Appellant,

v.

FILAMENA PORCARO, as Personal
Representative of the Estate of John Anthony
Porcaro, deceased, and **JEFF D.
HACKMEIER & ASSOCIATES, INC.,**

Appellees.

CASE NO. 4D03-659

Opinion filed February 25, 2004

Appeal from the Circuit Court for the Fifteenth
Judicial Circuit, Palm Beach County; Thomas M.
Lynch, IV, Judge; L.T. Case No. 01-4462 11.

Wendy S. Leavitt of Steel Hector & Davis LLP,
Miami, for appellant.

Kenneth E. Cohen and Jeffrey E. Holman of
Holman & Cohen, Hollywood, for appellee
Filamena Porcaro, as Personal Representative of
the Estate of John Anthony Porcaro, deceased.

POLEN, J.

Great Southern appeals the denial of its motion
to enforce the settlement agreement as well as the
final summary judgment in favor of Filamena
Porcaro requiring it to pay the \$1,500,000 policy
amount on John Porcaro's life insurance policy.
We affirm the trial court's denial of Great
Southern's motion to enforce the settlement
agreement. However, we reverse the final
summary judgment for the reasons which follow.

John Porcaro's life was insured in the amount of
\$1,500,000 under a term life policy issued by Great
Southern Life Insurance Company. Mr. Porcaro
mysteriously disappeared around June 13, 1998.
More than two years after he was last seen, his
wife filed a petition in probate court to have him
declared dead. She notified Great Southern of the
hearing, but it elected not to participate, requesting
only that Mrs. Porcaro inform the company of the
outcome of the hearing. After the uncontested
hearing, the probate court declared Mr. Porcaro
dead as of the date it issued the order, October 18,
2000.

After Great Southern refused to pay out on the
policy, Mrs. Porcaro, as representative of Mr.
Porcaro's estate, sued Great Southern for the
\$1,500,000 policy amount. Mrs. Porcaro and
Great Southern filed competing motions for
summary judgment. Mrs. Porcaro claimed Great
Southern was statutorily barred from contesting
coverage, and collaterally estopped from rearguing
the issue of Mr. Porcaro's death. Great Southern
alleged that Mrs. Porcaro, as representative of
Mr. Porcaro's estate, lacked standing to bring the
suit for proceeds under the insurance policy
because one of Mr. Porcaro's business interests,
Father and Son Moving & Storage, Inc., not Mr.
Porcaro's estate, was the beneficiary of the
policy.

The court ruled: 1) Great Southern was not
collaterally estopped from arguing the date of Mr.
Porcaro's death; 2) the insurance policy is
incontestable as a matter of law; 3) Great
Southern failed to overcome the presumptive date
of Mr. Porcaro's death; 4) by demanding the
continued payment of premiums, Great Southern
waived its right to contest the reinstatement; and
5) Great Southern was estopped from denying
liability because it did not raise defenses within the
contestability period. The court also granted Mrs.
Porcaro's motion to strike Great Southern's
affirmative defenses. The court entered final
judgment ordering Great Southern to pay Mr.

Porcaro's estate \$1,500,000 on the policy and \$309,699.60 in prejudgment interest.

In this appeal, Great Southern argues the trial court erred in denying its motions for summary judgment and to enforce a purported settlement agreement it entered with Mrs. Porcaro. It also argues the court erred in granting Mrs. Porcaro's motion for summary judgment and motion to strike Great Southern's affirmative defenses.

We find there are material issues of fact that still remain to be resolved which preclude summary judgment. First, for purposes of this suit it is uncertain whether Mr. Porcaro is actually dead. Great Southern presented deposition evidence from which a jury could reasonably determine that Mr. Porcaro may have fled to avoid prosecution and, thus, still be alive. Furthermore, the probate court's ruling does not constitute prima facie evidence of Mr. Porcaro's death. While a death certificate obtained through probate proceedings provides some evidence of death, death certificates no longer have prima facie evidentiary value outside the context of probate proceedings. See Ch. 97-237, § 106, at 4169, Laws of Fla. (eliminating provision in section 382.025(5), Florida Statutes, that provided for such prima facie evidentiary value in "all courts and cases"); Branca by Branca v. Sec. Beneficial Life Ins. Co., 773 F.2d 1158 (11th Cir. 1985) (holding section 731.103, Florida Statutes, providing for prima facie evidentiary value upon the presentation of enumerated evidence of death, applies only in probate proceedings). Therefore, the burden was on Mrs. Porcaro to establish her husband's death. It was error for the trial court to accord presumptive evidentiary value to the death certificate, placing the burden on Great Southern to demonstrate that Mr. Porcaro was alive.

There is also a material issue of fact with regard to the reinstatement of insurance that precludes summary judgment. After lapsing, Mr. Porcaro's insurance policy was reinstated in August 1998. Great Southern argued the reinstatement was

invalid either as a result of fraud or as a result of Mr. Porcaro dying prior to the reinstatement becoming effective. The trial court found Great Southern was precluded from challenging the validity of the reinstatement on the grounds of fraud as it failed to make this challenge during the contestability period provided for in sections 627.455 and 627.472, Florida Statutes. Pursuant to these sections, a reinstatement is incontestable on the ground of fraud after it has been in force, during the lifetime of the insured, for a period of two years. Because the probate court death certificate provides only some evidence of Mr. Porcaro's death, and a jury could reasonably conclude that Mr. Porcaro actually died prior to the date ruled by the probate court, closer to the date of his disappearance, there is a material issue of fact as to whether Mr. Porcaro died within the two-year incontestability period. Therefore, it was improper for the trial court to grant summary judgment on this ground. It was also error for the trial court to strike Great Southern's affirmative defenses on the ground that the reinstatement was incontestable.

Finally, there is a material issue of fact as to whether Great Southern waived its ability to contest the reinstatement by continuing to collect premium payments. While it is true that an insurer can waive the right to contest a policy through the continued acceptance of premiums, the insurer must have the intention to relinquish the right. See Leonardo v. State Farm Fire & Cas. Co., 675 So. 2d 176, 178 (Fla. 4th DCA 1996). Great Southern presented evidence that at the time it continued to accept the payment of premiums, it was not aware the policy may have been fraudulently reinstated. This evidence created a material issue of fact as to whether Great Southern intended to waive its ability to contest the policy; thus, summary judgment on this ground was improper.

We decline to address the remaining issue in this appeal as we find it to be without merit. The final summary judgment of the trial court is reversed

and remanded for further proceedings consistent herewith.

AFFIRMED in part, REVERSED in part.

GROSS, J., and OFTEDAL, RICHARD L.,
Associate Judge, concur.

***NOT FINAL UNTIL DISPOSITION OF ANY TIMELY
FILED MOTION FOR REHEARING.***