FSCO A01–000819

BETWEEN:

BECKY L. FAN

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

DECISION ON A PRELIMINARY ISSUE

Before: Tanja Wacyk

Heard: January 3, 10, 14, May 3, 2002, at the offices of the Financial Services Commission of Ontario in Toronto and in Unionville
Written submissions received on July 2, 2002

Appearances: Harvey S. Consky and Sue Chen for Ms. Fan
Heather Kawaguchi and Michelle Brown for State Farm Mutual Automobile Insurance Company

Issues:

The Applicant, Becky L. Fan, was injured in a motor vehicle accident on December 30, 1999. She applied for statutory accident benefits for housekeeping and home maintenance from State Farm Mutual Automobile Insurance Company ("State Farm"), payable under section 22 of the *Schedule.*[1] However, State Farm refused to pay benefits. The parties were unable to resolve their dispute through mediation, and Ms. Fan applied for arbitration at the Financial Services Commission of Ontario under the *Insurance Act*, R.S.O. 1990, c.I.8, as amended.

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[1]The *Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996,* Ontario Regulation 403/96, as amended by Ontario Regulations 462/96, 505/96, 551/96, 303/98 and 114/00.

State Farm raises a preliminary issue with regard to Ms. Fan's entitlement to benefits. The preliminary issue is:

1. Pursuant to subsection 30(2)(a) of the *Schedule*, is State Farm relieved of any obligation to pay Ms. Fan benefits under section 22 of the *Schedule* by reason of a material representation which induced State Farm to enter into the contract of automobile insurance?

Result:

1. Pursuant to subsection 30(2)(a) of the *Schedule*, State Farm is relieved of any obligation to pay Ms. Fan benefits under section 22 of the *Schedule* by reason of a material representation she made, and which induced State Farm to enter into the contract of automobile insurance

EVIDENCE:

Thomas Davis

Mr. Davis, Senior Auto Underwriter Team Leader for State Farm, testified that pursuant to State Farm's Guidelines, there are essentially two categories of contracts to provide insurance – Plan A and Plan B.

For the purpose of this decision, the essential elements required to qualify for the plans are as follows:

Plan A

- conviction free for three years;
- accident free for three years;[2]
- free for five years from any significant convictions;
- have a valid license;
- be licensed to drive in North America for at least three years;
- have not driven without insurance for a specified period of time; and,
- have made no material misrepresentations in the past three years.

Plan A is the "preferred rating plan" which provides the lowest rates.

Plan B

- only one or two minor convictions under the *Highway Traffic Act;*
- no significant or criminal code conviction in last three years;
- only one accident within three years;[3]
- if less than three years driving experience can also be placed in the plan.

If an individual has been convicted of fraud in the past nine years, they will be ineligible for either Plan A or B.

If a driver has more than one "at fault" accident in three years, State Farm won't write the policy, as this increases its risk exposure. Rather, the applicant would be given an opportunity to purchase insurance at the Facility rate, which is high risk coverage offered by an independent agency.

The above criteria apply to all drivers listed on the policy.

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[2] I understood this to mean free of "at fault" accidents

[3] I understood this to mean "at fault" accident

Ms. Fan applied for insurance coverage in December 1999. Her Application lists herself, her son Charles Lee, and her daughter Dianna, as the drivers to be insured.

In a box titled "Special Instructions"was written: "Kindly add 6 star on Veh #1 & MLD for both." The "6 star" refers to a discount available if an applicant is licensed for six years, free of at fault accidents for at least six years, and is conviction free for three years. "MLD" refers to a multi-line discount and applies if a home owner and life policy are written as well. This discount is available only to those qualifying for Plan A.

On the receipt of Ms. Fan's Application at State Farm's Underwriting Department, and in the normal course, motor vehicle reports regarding her driving record were ordered from the Ministry of Transportation and Auto Plus. Mr. Davis testified that these reports suggested a history of accidents not referred to in the Application. Consequently, Co-operators General Insurance Company, Ms. Fan's insurer, was contacted for further clarification.

Co-operators advised that Ms. Fan had had four accidents. Of those, accidents occurring on March 1998 and November 1999 were considered at fault. The only accident noted on Ms. Fan's Application was the one which occurred in November 1999. The note indicated that Ms. Fan's son, Charles Lee, had been the driver and stated as follows:

> The insured hit by t/p who was witnessed running through a red light when driving a rental car.

The agent who had received the Application was then contacted and confirmed the Application accurately reflected Ms. Fan's answers.

Mr. Davis received Ms. Fan's Application on December 30, 1999, and was still reviewing it when the notice of the accident at issue in this arbitration was received.

Mr. Davis was shown a letter dated January 7, 2000, addressed to Ms. Fan and sent by the Claims Team Manager. The letter indicated that notification regarding the December 30, 1999 accident had been received, and that State Farm may have no duty to respond "because:1.7.2. When We Cancel [*sic*]."[4] The letter further stated that State Farm was reserving all its rights under the policy, including its right to deny coverage in its entirety. Although not aware the letter had been sent, Mr. Davis interpreted it to mean State Farm was not assuming any responsibility as it was still reviewing the Application.

The review of Ms. Fan's Application was completed on January 6, 2000 and, following authorization from a superior, the policy was rescinded by two registered letters dated January 11, 2000. As coverage would have applied to a 2000 BMW and a 1998 Cadillac, a separate letter was sent regarding each. Both letters stated:

> In your signed application for automobile insurance dated December 15, 1999, you materially misrepresented your accident record.
> Rule Number: NR7
>
> We are enclosing $893.29.[5] This represents full return of all amounts received in connection with this application.
>
> For your protection, we urge you to contact your State Farm agent or any agent of your choice, who will be pleased to discuss with you the purchase of new automobile insurance coverage.

In cross-examination, Mr. Davis agreed that at the time the Application was taken, the agent had bound State Farm to cover the risk. Consequently, at that point, there was a valid policy of insurance in place.

[4] Exhibit 4

[5] $1306.24 - referred to in companion letter

He further agreed that the first paragraph of the letters of January 11, 2002 to Ms. Fan did not indicate whether State Farm had chosen to rescind or cancel the policy, but indicated that had it been a cancellation, a notice of fifteen days would have been given.

By letter dated January 15, 2000, to State Farm's Ombudsman, Ms. Fan indicated she was first advised of the termination of her policy by a telephone call from the Claims Department on January 7, 2000.[6] The letter went on to take issue with the termination.

The Ombudsman responded on February 2, 2002, as follows:

> Thank you for your letter about your concerns over the termination of your automobile insurance policies. Your applications for insurance were received in our office on December 30, 1999 with an effective date of December 15, 1999. On the applications an accident dated November, 1999 was disclosed with details as follows: "the insured was hit by third party who was witnessed running through the red light when driving a rental car".
>
> A standard Loss History Report enquiry revealed the following accidents:
>
> - September 17, 1997: not at fault collision accident
> - March 24, 1998: at fault collision accident
> - November 9, 1999: at fault collision accident
>
> The September, 1997 and March, 1998 accidents were not disclosed on your application. We confirmed that the November, 1999 accident was at fault, contrary to your statement on the signed application.
>
> It is State Farm's policy to accept new clients with no more than one at fault accident within the last three years. Because there were two at fault accidents and in complete [*sic*] disclosure on the signed application we have rescinded the policy contracts back to their inception dates. As indicated in the rescission letters we sent to you via registered mail, we took this action in compliance with our underwriting guidelines filed with Ontario Financial Services Commission as indicated in our letter which rescinded the policy.

[6] Exhibit 6

Winnie Chan

Due to illness, Ms. Chan testified at her home in Unionville.

Ms. Chan was employed as an agent with Sandra Lee's agency from March 1997 until December 1999. She left her employment with the agency because of illness and had not yet returned.

Ms. Chan recalled speaking to Ms. Fan and taking her Application for insurance. She testified Ms. Fan called on the afternoon of December 15, 1999 and requested a quote for her automobile insurance.

Ms. Chan initially collected all the required information over the telephone. She inquired about all the vehicles in the household, as well as all the drivers, their ages, and their driving and ticket histories.

Ms. Chan maintained that, in keeping with standard procedure, she asked three times whether there had been any accidents or any tickets in the last three years. She noted information about prior accidents and tickets is very important as it affects the quotation and rates. However, in this instance, Ms. Fan responded three times that there were no accidents and no tickets.

In addition, Ms. Chan testified that she asked Ms. Fan about her driving record for six years, as she would qualify for a "six star discount" if she were accident and ticket free for six years. Ms. Fan's answers indicated she would qualify for Plan A and the discount. Consequently, Ms. Chan quoted a price consistent with that information. Ms. Fan indicated she was agreeable to the price and arranged to come in at 5 p.m. that afternoon.

Ms. Fan then arrived at Ms. Chan's office with her son, Charles Lee, at the appointed time.

Ms. Chan testified that she first showed Ms. Fan the quotation, and reviewed the information regarding coverages and rates. She testified she recalled inquiring about any accidents or tickets again, as she did not want to "fool herself" in the event Ms. Fan did not qualify for Plan A, or was not entitled to a multi-line discount.

Ms. Chan also indicated that if a family has under-aged drivers, they will qualify for student driver training and a student discount if the requirements for Plan A are met.

Ms. Fan's coverage with Co-operators, her former insurer, had not yet expired but, while Ms. Fan indicated she wished to switch insurers, Ms. Chan testified she did not indicate the reason at the time.

Ms. Chan testified that "not one word" of the Application had been filled in prior to Ms. Fan's arrival. Rather, she completed the Application by asking Ms. Fan the questions which appeared on the Application and recording her answers. She maintained that she asked every question one by one. In addition, some of the information was copied from ownership records and other documents.

According to Ms. Chan, Mr. Lee did not remain throughout the entire interview. Rather, he would go out and then return. However, she indicated she was sure Mr. Lee was present when she asked about tickets and accidents. Ms. Chan indicated that she and Ms. Fan spoke in Cantonese, and that Mr. Lee spoke Cantonese as well.

Ms. Chan testified she did not review the Application with Ms. Fan, but indicated that the information must be accurate or else the premium would change. Ms. Fan acknowledged this and signed the Application.

Arrangements were then made for Ms. Fan to come to the agency's new premises on a subsequent day to pay the premiums for the insurance.

The next day, Ms. Chan completed the agency's portion of the Application, indicating that the applicable rate plan was "A" and requesting a six star discount on the Cadillac, Ms. Fan's vehicle, as she had six years of accident-free driving. Ms. Chan also requested a multi-line discount as Ms. Fan applied for both automobile and life insurance that day.

The scratched out word "NIL" appears on Ms. Fan's Application under the heading "Previous Insurance Claims." The section also contains the notation regarding Mr. Lee's November 1999 accident, referred to earlier.

Ms. Chan explained that the NIL had been written when Ms. Fan indicated there had been no accidents for the past three or six years.

However, when Ms. Fan came to the office two days later to deliver a cheque for the policy, she indicated to Ms. Chan she needed to tell her something. Ms. Fan then advised that Mr. Lee had been in an accident and that she was engaged in a dispute with Co-operators as a result. Ms. Fan indicated that Mr. Lee was not at fault and that a witness could confirm this.

Ms. Chan then scratched out the NIL and recorded the details conveyed by Ms. Fan.

As a result of this new disclosure, Ms. Chan sought the advice of Ms. Lee. According to Ms. Chan, Ms. Lee advised her to record the details and, if the Underwriting Department confirmed it was an at fault accident, then the premiums would be increased. Ms. Chan then conveyed this to Ms. Fan. She testified that she also again asked about any other accidents involving Ms. Fan or others in the household, and Ms. Fan responded that there had been no other accidents.

Ms. Chan then forwarded Ms. Fan's Application to State Farm's Underwriting Department for processing.

The next time Ms. Chan heard from Ms. Fan was when she claimed benefits resulting from her accident of December 30, 1999, involving a shattered sun roof. Ms. Chan completed a loss report and sent it to the Claims Department.

Ms. Fan was subsequently advised by the Claims Department that coverage would not be provided because Ms. Fan had not reported her at fault accident.

Ms. Fan then contacted Ms. Chan, and when advised why coverage had not been approved, insisted she had reported the accident to Ms. Chan.

Becky Fan

Ms. Fan testified with the assistance of an interpreter.

Ms. Fan had previously bought house insurance from Ms. Chan, and contacted her on December 15, 1999 regarding taking out an automobile insurance policy. She testified that she gave her history to Ms. Chan over the telephone, described the cars to be insured, and advised Ms. Chan that the reason she was changing insurers was because she was unhappy with how Co-operators had dealt with an accident her son had had.

Ms. Chan then arranged for Ms. Fan to come in to see her. Ms. Fan testified that, accompanied by her son, she met with Ms. Chan that afternoon between 4 and 5 p.m.

In the course of filling out her Application, Ms. Chan asked Ms. Fan questions, and then recorded the answers. They spoke in Cantonese, and had no difficulty communicating.

When reviewing the various sections of the Application, Ms. Fan could recall providing some but not all of the information. However, she then testified that they spoke as "old friends" and Ms. Chan may have gotten the additional information from their conversation.

Ms. Fan testified that she did not notice if the Application was blank when they began. Nor did she read it before she signed it, because Ms. Chan was very busy and Ms. Fan indicated she did not want to take up too much of her time.

According to Ms. Fan, Mr. Lee was present the entire time.

Ms. Fan maintained she told Ms. Chan about all the accidents involving herself, and her children. Her only explanation for why only the one accident had been recorded on the Application was that Ms. Chan was getting ready to move the next day.

Regarding her son's accident, Ms. Fan testified that when she arrived at the scene of the accident, her son told her he had been hit by a car that ran through the light as it changed from yellow to red. Ms. Fan maintained that another driver at the scene of the accident confirmed this and indicated to her that the driver of the other car was at fault. The witness also left his telephone number with her son.

Ms. Fan testified that although the ticket was issued, in the end the case was dropped and her son was not convicted. Ms. Fan testified that an agent had been hired to contest the ticket. However, it was not clear from her evidence whether the matter was ever heard or what the result was.

Ms. Fan testified that when she notified Co-operators about the accident, she was advised that unless the witness insisted the other driver ran the red light, then the accident was her son's fault. Ms. Fan expressed her frustration with that approach as she felt Co-operators, as her insurer, had a duty to speak to the witness to determine what happened.

Ms. Fan maintained that when she gave the same information to Ms. Chan, she responded that her son was "not yet at fault,"and that she would speak to an underwriter about the matter.

Ms. Fan returned to the agency on December 17, 1999 with a cheque to pay for the balance of the cost of the insurance. While she received a "pink slip," binding State Farm on that day, she testified she did not receive a copy of the policy. Nor was it explained to her. While Ms. Fan agreed she spoke to Ms. Chan about her son's accident that day, she maintained it had been discussed the first day as well.

Ms. Fan denied having a conversation with Sandra Lee, the owner of the agency, regarding her son's accident – although she indicated they had had a general discussion regarding the office move.

Ms. Fan then received a call from Ms. Chan on January 7, 2000, advising that she was not accepted as an "insured party" and could not claim her loss.

In cross-examination, Ms. Fan conceded she had accidents on September 17, 1997 and March 24, 1998.

On October 24, 1999, her daughter Dianna was involved in an accident when her car was hit by someone else.

Ms. Fan was also directed to the scratched out word "NIL," written under the heading of "Previous Insurance Claims." Ms. Fan testified she was not aware of who had written the word or what it means.

Ms. Fan was referred to a transcript of an interview with Sarah Hunter, Accident Benefits Claims Adjuster at the Markham Claims Office on January 19, 2000.[7] In that transcript, at page 12, Ms. Fan states that the Application was already completed when she arrived at Ms. Chan's office.

[7] Exhibit 8

However, at the hearing, Ms. Fan denied this was the case. She also stated that her memory at the hearing was better than the day she was interviewed by Ms. Hunter, as she was ill at the time.

When Ms. Fan was asked to identify any additional portions of the transcript which she believed were incorrect, she testified that her answer regarding the disclosure of prior claims was incorrect. More specifically, when it was suggested at the interview that she had not indicated she had prior claims when the Application was being filled out, she responded:[8]

> No they well they didn't ask me because I assume I tell them.

Ms. Fan testified that that answer was incorrect. She indicated it was incorrect because she had, in fact, stated that she had a previous insurance claim.

When it was suggested that her answer indicated she was not sure, as she had used the word "assume," Ms. Fan replied that they did not ask her and she assumed they knew about her history because she had told them previously.

Although in her evidence-in-chief Ms. Fan had testified that her son was not at fault, in cross-examination she initially testified that because her son was charged, the accident was and should be her son's fault. However, Ms. Fan subsequently again testified that Mr. Lee was not at fault in the accident.

Charles Lee

Mr. Lee testified that he accompanied his mother to Ms. Chan's office in order to explain his accident, as his mother had difficulty doing so and he knew all the details.

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[8] Exhibit 8 - p. 11

Mr. Lee testified that his mother advised Ms. Chan about "all the past accidents," including his. However, Mr. Lee appeared familiar with only the details of his accident and that of his mother's when she drove into the garage door. When he was asked, in chief, whether his mother had disclosed any other incidents or claims he responded that he thought "that was about it." He testified that this was essentially all he recalled, as he was in and out, waiting for his sister who was coming to show her driver's license.

Regarding his accident, Mr. Lee indicated that the charges had not been resolved, and a court date was still pending. He indicated he believed the matter was "lost in the system."

Sandra Lee

Ms. Lee, the owner of the agency, testified in Reply. Ms. Lee has been a State Farm Agent for about ten years. Ms. Lee testified that she and her staff operate as "front underwriters" in that they take all the necessary information from applicants and forward it to State Farm – which has its own underwriters.

Ms. Lee's description of how an Application is processed was consistent with Ms. Chan's testimony regarding how she proceeded with Ms. Fan's Application. Ms. Lee emphasised that all questions must be asked three times.

Ms. Lee testified that during Ms. Fan's and Mr. Lee's attendance at the office she was required to let Mr. Lee back into the office at least two times.

Ms. Lee signed the completed Application as the agent, and as everything looked all right, she did not speak to Ms. Fan that day.

When Ms. Fan attended at their new offices two days later, Ms. Chan advised Ms. Lee that there were some changes to Ms. Fan's Application, as she had failed to report an accident during her initial interview. She and Ms. Chan then spoke to Ms. Fan and she advised them of the details of Mr. Lee's accident. No other accidents were mentioned.

Ms. Lee then advised Ms. Chan to record the accident on Ms. Fan's Application, which she did, crossing out the "NIL" which had been entered the previous day. While she didn't see Ms. Chan cross it out, Ms. Lee saw her write the rest.

Ms. Lee also identified Ms. Chan's telephone notes from her initial conversation with Ms. Fan, and which, in addition to information regarding the drivers, such as their ages, the territory, and the vehicles, included the notation "clean record."[9]

Ms. Lee maintained that a new Application was not necessary at that stage as, based on the information she had, she could not determine if the accident was Mr. Lee's fault. If not, then the premium would remain the same. Otherwise, Ms. Fan would only be eligible for Plan B, and required to pay a higher premium.

However, the second accident, which had not been disclosed, "changed everything." That accident, which involved Ms. Fan driving into a garage door, is treated as an at fault accident as it involves only one vehicle.

Ms. Lee also testified that while she recalls attending at Ms. Chan's home when Ms. Chan was interviewed by Mr. David Elliott of State Farm, only Ms. Chan answered questions.[10] I note this as it was subsequently raised in argument to challenge Ms. Lee's credibility.

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[9] Exhibit 9a

[10] Exhibit 8

APPLICABLE STATUTORY PROVISIONS:

Section 233 of the *Insurance Act* states:

233.--(1) Where,

(a) an applicant for a contract,

(i) gives false particulars of the described automobile to be insured to the prejudice of the insurer, or

(ii) knowingly misrepresents or fails to disclose in the application any fact required to be stated therein;

(b) the insured contravenes a term of the contract or commits a fraud; or

(c) the insured wilfully makes a false statement in respect of a claim under the contract,

a claim by the insured is invalid and the right of the insured to recover indemnity is forfeited..

(2) Subsection (1) does not invalidate such statutory accident benefits as are set out in the *Statutory Accident Benefits Schedule*.

Subsection 30(2) of the *Schedule* addresses this issue of material misrepresentation and provides as follows:

(2) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 20, 21 or 22,

(a) in respect of any person who has made, or who knows of, a material misrepresentation that induced the insurer to enter into the contract of automobile insurance or who intentionally failed to notify the insurer of a change in the risk material to the contract; . . .

ARGUMENT AND ANALYSIS:

Material Misrepresentation

Argument

State Farm argued that Ms. Fan had made a material misrepresentation regarding her accident history and that of the drivers to be listed on the policy in her Application for insurance. State Farm further maintained that the misrepresentation had induced State Farm to enter into the contract of Insurance.

The first issue to be determined is whether Ms. Fan made a material misrepresentation regarding her accident history and that of drivers to be listed on the policy.

State Farm relied on Ms. Chan's and Ms. Lee's evidence that Ms. Fan had repeatedly been asked about her accident history as well as that of her children, the other listed drivers – and that only one accident was disclosed.

State Farm also relied on the handwritten notes identified as those take by Ms. Chan during her first phone call with Ms. Fan, which included the notation "clean record."

State Farm pointed out that accident history is very important for the purpose of determining eligibility for discounts – and that these discounts were offered on the basis of the information provided by Ms. Fan during her telephone call and initial meeting with Ms. Chan. Furthermore, argued State Farm, both Ms. Chan and Ms. Lee were aware that any accidents not listed on the Application would be discovered through the usual record search.

State Farm also relied on the amended "NIL" which appeared on the Application as evidence of the reliability of State Farm's evidence over that of the Applicant.[11]

State Farm also listed a number of other inconsistencies between Ms. Fan's evidence and that of the other witnesses. For example, while Ms. Fan testified that Mr. Lee was with her throughout the entire interview, this was inconsistent with the evidence of the others, including Mr. Lee, that he left several times as he was waiting for his sister.

State Farm also took issue with Mr. Lee's evidence. The Insurer pointed out that although Mr. Lee testified that he attended at the agency with Ms. Fan to assist her in describing his accident to Ms. Chan, this is inconsistent with Ms. Fan's evidence that she gave a detailed explanation of the accident. Nor was reference made by Ms. Fan or any other witness to Mr. Lee having described the accident.

State Farm also pointed out that other than Mr. Lee's testimony in support of Ms. Fan's evidence regarding the family's accident history, he was unable to recall many aspects of his attendance at the meeting with Ms. Chan. Furthermore, at the hearing, Mr. Lee was not aware of the complete driving history which he testified his mother had provided.

Ms. Fan maintained that she did not misrepresent her accident history when applying for the insurance coverage. She pointed out that she had had an existing policy of insurance with Co-operators at the time. Consequently, she did not have any incentive to mislead State Farm regarding her accident history, and would know State Farm could easily find out by requesting a printout of claims from the Co-operators.

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[11] I note this evidence was not put to Ms. Fan as is required by the rule in *Browne v. Dunn, (1894), 6 L.R. 67 (House of Lords)*. While no objection was made at the time, and the opportunity to address this evidence in reply was not pursued, I have given little weight to this evidence.

However, while it was not contested that Ms. Fan's policy with Co-operators had not yet expired, there was no evidence to demonstrate Ms. Fan was aware a copy of her claims history could or would be requested.

Ms. Fan also argued that Ms. Lee's evidence was unreliable. This was based on Ms. Lee's evidence that she recalls attending at Ms. Chan's interview with Mr. Elliott of State Farm – but that only Ms. Chan answered questions.[12] While it appears from the transcript that most of the questions were answered by Ms. Chan, it is apparent Ms. Lee also answered some questions. Ms. Fan maintained that Ms. Lee's failure to recall being interviewed rendered her memory of other events suspect.

Finally, Ms. Fan argued that while she had given the details of all her accidents, Ms. Chan and Ms. Lee intentionally did not disclose this information as they wished to mislead the underwriters in order to earn their commission.

Analysis

I found Ms. Fan's evidence problematic. While some of the difficulty might be attributed to the fact English is her second language, this does not explain a number of concerns.

For example, as noted earlier, in the transcript of Ms. Fan's interview with Ms. Hunter, Ms. Fan indicated she had not been asked regarding prior claims. However, she then testified at the hearing that she was asked, and advised Ms. Chan regarding her prior claims.

Also in the transcript, Ms. Fan states that when she arrived at Ms. Chan's office, the Application had been filled out.[13] However, at the hearing, in examination-in-chief, Ms. Chan testified that she didn't

[12] Exhibit 8

[13] Exhibit 7 p. 12

notice whether the Application was completed or not. When confronted with the inconsistency, Ms. Fan indicated that, in fact, the Application was not completed.

The result was that she had given three answers to the same question, i.e. the Application was filled out, she did not notice if the Application was filled out, and the Application was not filled out.

I also note that while Ms. Fan testified that Mr. Lee's ticket had been resolved with no finding of guilt, Mr. Lee testified the matter was still outstanding.

Due to these inconsistencies, I found Ms. Fan's evidence to be unreliable.

Nor do I find Mr. Lee's evidence assists Ms. Fan. He appeared to recall little of what transpired at the initial meeting with Ms. Chan. Having testified that he heard his mother recount the accident history of the family, he was unable to provide the details of any other accidents other than his own and his mother's at fault accident. Indeed, his testimony was that these were the only accidents Ms. Fan referred to, and is inconsistent with his mother's evidence on that account.

I find Mr. Lee's minimal but focussed recall suggests he was coached on the primary issues in dispute and has little personal recall regarding the meeting.

Furthermore, I find Ms. Fan's suggestion that Ms. Chan and Ms. Lee intentionally did not disclose Ms. Fan's accident history in order to earn their commission to be without foundation.

In any event, I found the evidence of the witnesses for State Farm more compelling.

Ms. Chan was clearly familiar with the various requirements of both Plan A and Plan B and was experienced in taking applications. She knew that the information regarding the driving records of the listed drivers was critical, and would be subject to verification.

Consequently, there would be no point in offering the discounts accompanying Plan A if no inquiry was made regarding Ms. Fan's driving record and that of the other listed drivers, or if it were clear Ms. Fan did not qualify for them.

I find that the description of events by Ms. Chan and Ms. Lee regarding Ms. Fan's Application for insurance is consistent with what a reasonable person would expect given their knowledge of the application process, and that the information would be verified as a matter of course by the Underwriting Department.

While Ms. Fan is correct that Ms. Lee appears to have forgotten that both Ms. Chan and she were interviewed by Ms. Elliot, this is a relatively insignificant omission, and I do not find her failure in recalling it to be fatal to her credibility with regard to the primary issues in the case. The rest of her evidence was compelling in its detail and consistent with both Ms. Chan's evidence as well as the other circumstances surrounding the events at issue.

Consequently, other than Mr. Lee's accident, which I believe Ms. Fan disclosed at her second meeting with Ms. Chan, I find that Ms. Fan failed to disclose her accident history and that of the other listed drivers on the Application.

Furthermore, I find that she did so knowingly.

The general rule is that where a person signs an application for automobile insurance which contains untrue statements, that person is held to knowingly make a misrepresentation. This is also the case in instances where an applicant possesses information that the statements are untrue even though the applicant did not complete the application and signed it without reading it.[14] There is a duty on applicants to read the answers which an agent has filled in prior to signing the application.[15]

That being the case, Ms. Fan cannot hide behind her failure to read her Application.

Furthermore, I find that the misrepresentation was "material."

Arbitrators have made the following comments about "materiality."[16]

> A contract of insurance is a contract to insure an applicant against certain specific risks, at an agreed price. In my view, information which substantially affects the premium is material to the contract.

The test for materiality has also been articulated by the Privy Council in *Mutual Life Insurance* v. *Ontario Metal Products Co.*[17] as follows:

> ...it is a question of fact in each case whether if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

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[14] *Sleigh* v. *Stevenson,*[1943] 4 D.L.R. 465 (Ont. C.A.); *Hansra* v. *York Fire and Casualty Insurance Co.* (1982) 38 O.R. (2d) 281; *Tulloch* v. *Peopleplus Insurance Co. [2001]* O.J. 752 (Ont. Sup. Ct.)

[15] *Bonneville* v. *Progressive Insurance Co.,* [1955] O.R. 103

[16] *Fagundes and Kingsway General Insurance Company,* (OIC A96-001111, December 22, 1997); *Byford and Economical Insurance Mutual Insurance Company et. al,* (OIC A95-000110, April 17, 1996); *Aujla and Kingsway General Insurance Company,* (OIC A-015276, January 19, 1996).

[17] [1925] 1 D.L.R. 583 (P.C.)

In this instance, based on testimony of State Farm's witnesses, I find that had the accident claims history been disclosed, it would have resulted in State Farm either charging a higher premium in accordance with Plan B, or, as it ultimately did, refusing the risk. Ms. Fan would also not have been granted the discounts accompanying a six star rating.

Having determined that Ms. Fan has made a material misrepresentation that induced State Farm to enter into a contract of automobile Insurance, the result in this instance remains to be determined.

Effect of the Material Misrepresentation:

Argument

State Farm argued that if Ms. Fan was found to have made or knew of a material representation in her Application for insurance then, pursuant to subsection 30(2) of the *Schedule*, nothing further needs to be proven, and she is disentitled from receiving benefits under section 22 of the Schedule.[18]

Ms. Fan, relying on *Gill* v. *Zurich Insurance Co.,*[19] argued that on learning of a misrepresentation in an application for Insurance, an insurer has three courses open to it:

1. It may treat the policy as *void ab initio* and refund the premiums. If it chooses this position, the insurance company must declare it;
2. It may retain the premium and treat the contract as valid and subsisting; or
3. It may treat the policy as valid but cancel unilaterally in accordance with the statutory conditions for unilateral termination.

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[18] *Aujla and Kingsway (supra)*; *Lambton Mutual Insurance Company and General Accident Insurance Co. and Robert Findlay* (OIC P-005358 and P-005359, December 22, 1995); *Byford* and *Economical et. al (supra)*

[19] [1999] O. J. No. 3860 at p.8 (Eberhard J.), citing *Ellis* v. *London-Canada Ins. Co.* [1952] O.R. 644 at 653 (McRuer C.J.H.C.) (upheld on Appeal, 03/05, 2020)

On the facts of that case, the Court first found that the common-law principle of waiver continues to apply to subsection 17(3) of the *Schedule* in place before January 1, 1994.[20] Subsection 17(3), for the purposes of this case, contained essentially identical language to that at issue in this case.

In *Gill*, the Court further found that the insurer, after it had knowledge of the particulars of the misrepresentation, elected to waive reliance upon it, retained the premium, and treated the contract as valid and subsisting. Consequently, the insurer was held to have waived the protection afforded by section 17(3) of the *Schedule*.

In the instant case, Ms. Fan argued that State Farm's communications to her following its determination of the alleged misrepresentation, dated January 11, 2000,[21] were too vague to satisfy the requirements of either declaring her policy *void ab initio* or cancelled.

For ease of reference, the text of those letters is again set out below:

> In your signed application for automobile insurance dated December 15, 1999, you materially misrepresented your accident record.
> Rule Number: NR7
>
> We are enclosing $893.29.[22] This represents full return of all amounts received in connection with this application.
>
> For your protection, we urge you to contact your State Farm agent or any agent of your choice, who will be pleased to discuss with you the purchase of new automobile insurance coverage.

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[20] The *Statutory Accident Benefits Schedule — Accidents On or Between June 22, 1990 and December 31, 1993*, Regulation 672 of R.R.O. 1990, as amended by Ontario Regulations 660/93 and 779/93.

[21] Exhibits 2 and 3

[22] $1306.24 - referred to in companion letter

Ms. Fan argued that when State Farm became aware of the alleged misrepresentation in the insurance Application, it did not rescind the contract of insurance, as that required a written declaration of its intention.

Ms. Fan maintained that although State Farm may have intended to cancel the policy, it did not give appropriate notice, and a rescission requires a written declaration of intention.

Ms. Fan further submitted that even if the letters amounted to a cancellation, this took place after the accident.

Finally, Ms. Fan submitted that State Farm is estopped from now rescinding the policy as it had to take a position within a reasonable time of learning of a possible misrepresentation, and failed to do so.

Analysis:

Subsection 233(1)(a)(ii) of the *Insurance Act* provides that where a person knowingly misrepresents or fails to disclose in an Application for insurance any fact required to be stated therein, their claim is invalid and the right of the insured to recover indemnity is forfeited.

That provision is a forfeiture provision. It does not render the policy *void ab initio*.

In any event, subsection 233(2) provides that subsection 233(1) does not invalidate statutory accident benefits.

Consequently, the governing provision with regard to statutory benefits is subsection 30(2). It states an insurer is not required to pay an income replacement benefit, a non-earner benefit or benefit under sections 20, 21, or 22 in respect of a person who has made or who knows of a material misrepresentation that induced the insurer to enter into the contract of automobile insurance.

Subsection 30(2)(a) is an exclusion provision, and similarly to subsection 233(1) of the *Insurance Act*, it does not render the policy *void ab initio*. Nor, in my view, does it require an insurer to take any additional steps or give notice of the termination of the contract.

In my view, the decision in the *Gill* case cannot be interpreted to read those requirements into subsection 30(2)(a). Rather, that decision simply finds that on the facts of that case, the insurer, through failure to treat the contract at an end, and acceptance of further premiums, waived the right to rely on that exclusion.

I do not find that to be the case here. In this instance, State Farm returned all premiums and gave both verbal and written notice of its intent to treat the policy at an end. It was also clear from Ms. Fan's evidence, including her correspondence to the Ombudsman, that she understood her policy was terminated.

Consequently, I find that having made a material misrepresentation that induced State Farm to enter into the contract of automobile insurance, Ms. Fan is precluded from receiving those benefits referred to in subsection 30(2)(a) and, more specifically, benefits receivable pursuant to section 22 of the *Schedule.*

EXPENSES:

If the parties are unable to agree, they may now make submissions on the issue of expenses.

	September 13, 2002
Tanja Wacyk Arbitrator	Date

FSCO A01–000819

BETWEEN:

BECKY L. FAN

Applicant

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY

Insurer

ARBITRATION ORDER

Under section 282 of the *Insurance Act*, R.S.O. 1990, c.I.8, as amended, it is ordered that:

1. Pursuant to subsection 30(2)(a) of the *Schedule*, the State Farm Mutual Automobile Insurance Company is relieved of any obligation to pay Ms. Fan benefits under section 22 of the *Schedule* by reason of a material representation she made, and which induced State Farm to enter into the contract of automobile insurance.

September 13, 2002

Tanja Wacyk
Arbitrator

Date