

becomes conclusive in the absence of any rebuttal evidence. We hold, therefore, that the trial court erred in failing to grant the defendant's motion for summary judgment since no disputed issue of a material fact existed as to whether the loss in this case fell within the exclusionary language of the policy. The judgment of the trial court is reversed and the complaint is dismissed. Costs are adjudged against the plaintiff.

TOMLIN, P.J. (W.S.), and FARMER, J., concur.



Gunson SINE, Plaintiff/Appellant,

v.

TENNESSEE FARMERS MUTUAL  
INSURANCE COMPANY,  
Defendant/Appellee.

Court of Appeals of Tennessee,  
Middle Section, at Nashville.

April 16, 1993.

Permission to Appeal Denied by  
Supreme Court Sept. 7, 1993.

Action was brought upon farm owner's insurance policy. The Circuit Court, Houston County, Leonard W. Martin, J., entered summary judgment for insurer, and appeal was taken. The Court of Appeals, Cantrell, J., held that insured's misrepresentations in insurance application with respect to title to property and prior theft losses and misrepresentation that property was mortgaged for \$30,000 when in fact it was mortgaged for \$43,250 materially increased the risk of loss, such that policy was void.

Affirmed and remanded.

#### 1. Insurance ⇄255

Misrepresentation increases risk of loss when it is of such importance that it natural-

ly and reasonably influences judgment of insurer in making the contract for purposes of statute providing that misrepresentation by insured in insurance application does not void the policy unless misrepresentation increases risk of loss. T.C.A. § 56-7-103.

#### 2. Insurance ⇄271.3

When it appears that insurance application contains misrepresentation, it is question of law for court whether misrepresentation materially increases risk of loss such that policy is void. T.C.A. § 56-7-103.

#### 3. Insurance ⇄288.4

Having found that insured's representations with respect to title to property and prior theft losses, made in application for farm owner's policy, were false, trial judge should have ruled on whether they materially increased the risk of loss so as to void the policy since question of whether misrepresentation increased risk of loss was one for the court. T.C.A. § 56-7-103.

#### 4. Insurance ⇄282(1), 286

Insured's misrepresentations, in insurance application for farm owner's policy, with respect to title to property and prior theft losses and misrepresentation that property was mortgaged for \$30,000 when in fact it was mortgaged for \$43,250 materially increased the risk of loss, such that policy was void. T.C.A. § 56-7-103.

Gunson E. Sine, pro se.

Arthur E. McClellan, McClellan, Powers, Ehmling & Dix, P.C., Gallatin, for defendant/appellee.

#### OPINION

CANTRELL, Judge.

This is an action on an insurance policy. The trial judge granted summary judgment to the insurance carrier because of a false answer in the application. We affirm.

#### I.

On April 1, 1986, Gunson Sine signed an application for a farm owner's policy with the

Tennessee Farmers Mutual Insurance Company. The application showed that Arlie and Elizabeth Sine owned the property and that Gunson and his wife, Shannon, lived there; that the property was mortgaged for \$30,000; and that the applicant had not had any previous policies cancelled or any prior insurance losses. The answers with respect to the title to the property, the amount of the mortgage, and Mr. Sine's prior insurance losses turned out to be false. Although Mr. Sine denies giving some of the answers, the proof is uncontradicted that he signed the application with the erroneous information in it. Tennessee Farmers issued a policy covering the house and its contents.

On July 10, 1987, fire destroyed the house. The company, upon investigating the loss, refused to pay the loss because of the misrepresentations in the application. The trial judge granted summary judgment to the insurance company, finding the representation that the property was mortgaged for \$30,000, when in fact it was mortgaged for \$43,250, was a misrepresentation that materially increased the risk of loss.

## II.

[1] The policy issued by Tennessee Farmers contained a provision—probably a standard provision in insurance policies—rendering the policy void for the intentional concealment or misrepresentation of any material fact relating to the insurance. A material fact is defined in Tenn.Code Ann. § 56-7-103 as one that increases the risk of loss when relied upon by the company in issuing the policy.<sup>1</sup> A misrepresentation increases the risk of loss when it is of such importance that it “naturally and reasonably influences the judgment of the insurer in making the contract.” *Seaton v. Nat. Grange Mut. Ins. Co.*, 732 S.W.2d 288, 283-89 (Tenn.App.1987).

[2] When it appears that the insurance application contains a misrepresentation, it is a question of law for the court whether the

1. 56-7-103. **Misrepresentation or warranty will not avoid policy—Exceptions.**—No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor, by the assured or in his behalf, shall be deemed

misrepresentation materially increases the risk of loss. *Broyles v. Ford Life Ins. Co.*, 594 S.W.2d 691, 693 (Tenn.1980).

[3] The trial judge only ruled on the false statement in the application claiming the property was mortgaged for \$30,000 when in fact the mortgage was greater than \$43,000. He held that the statement was false and that “as a matter of law [it] materially increased the Defendant's risk of loss...” On the question of the title to the property and the prior theft losses, the court found these misrepresentations were false but that it was a jury question as to whether the misrepresentations increased the risk of loss.

As we have seen, the question of whether a misrepresentation increases the risk of loss is one for the court. Thus, having found the representations in the application were false, the trial judge should have ruled on whether they materially increased the risk of loss.

[4] We think all three of the misrepresentations as a matter of law materially increased the risk of loss. A misrepresentation as to the title to the property has been held sufficient to defeat a recovery on an insurance policy. *Alfred v. Bankers' and Shippers' Ins. Co.*, 167 Tenn. 278, 280, 68 S.W.2d 941, 942 (1934); *Hughes v. Home Ins. Co.*, 8 Tenn.App. 292, 298 (1928); *Payne v. Eureka-Security Fire & Marine Ins. Co.*, 173 Tenn. 659, 662, 122 S.W.2d 431, 432 (1938). Although there is a split of authority in other jurisdictions about whether a misrepresentation concerning the size of a mortgage on the property insured will defeat the policy, see 44 Am.Jur.2d *Insurance* § 1132 (1982), we think a misrepresentation of this magnitude—approximately fifty percent more than represented in the application—is sufficient to materially increase the risk to the insurer.

We think that the misrepresentation about prior theft losses by the insured is also material to the risk.

material or defeat or void the policy or prevent its attaching, unless such misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increases the risk of loss.

The judgment of the court below is affirmed and the cause is remanded to the Circuit Court of Houston County for any further proceedings necessary. Tax the costs on appeal to the appellant.

LEWIS and KOCH, JJ., concur.



STATE of Tennessee, Appellee,

v.

Thurman Pete ROLLAND, Appellant.

Court of Criminal Appeals of Tennessee,  
at Nashville.

April 29, 1992.

Permission to Appeal  
by Supreme Court  
July 27, 1992.

Defendant was convicted in the Circuit Court, Davidson County, Ann Lacy Johns, J., of four counts of armed robbery and 12 counts of aggravated kidnapping. Defendant appealed. The Court of Criminal Appeals, Summers, J., held that: (1) evidence did not sustain conviction on three counts of aggravated kidnapping; (2) evidence sustained conviction on nine counts of aggravated kidnapping; and (3) record supported finding that defendant was multiple or dangerous offender and that consecutive sentencing was appropriate.

Reversed in part, affirmed in part, and remanded with instructions.

### 1. Kidnapping ◊1

Evidence did not sustain conviction for aggravated kidnapping; in conjunction with armed robbery, defendant placed victims in closet for sole purpose of facilitating his getaway, restraint was for very short period of time and resulted in no additional risk of harm.

### 2. Kidnapping ◊5

Evidence sustained conviction for aggravated kidnapping; in conjunction with armed robbery, defendant placed victims in freezer and piled objects in front of door attempting to prevent them from getting out, and after very short period of time victims were able to open door and call police.

### 3. Kidnapping ◊5

Evidence sustained conviction for aggravated kidnapping; in conjunction with armed robbery, defendant placed victims in zero degree freezer, blocked their exit, and forced victims back into freezer when they attempted to escape.

### 4. Criminal Law ◊1210(4)

Record supported finding that defendant was multiple or dangerous offender and that consecutive sentencing was appropriate; defendant was convicted of four counts of armed robbery and nine counts of aggravated kidnapping arising from three separate incidents, defendant placed gun against at least one victim's head and struck another victim on side of head with pistol while hammer was pulled back and his finger was on trigger, and defendant placed victims in deep freezer and blocked their exit.

John E. Rodgers, Jr., Nashville, for appellant.

Charles W. Burson, Atty. Gen. & Reporter, Clinton J. Morgan, Sp. Asst. Atty. Gen., Nashville, Victor S. Johnson, III, Dist. Atty. Gen., Roe Ellen Coleman and Roger Moore, Asst. Dist. Attys. Gen., Nashville, for appellee.

### OPINION

SUMMERS, Judge.

This case involves an appeal as of right from verdicts of guilty on four counts of armed robbery and twelve counts of aggravated kidnapping. The appellant, Thurman Pete Rolland, challenges his aggravated kidnapping convictions as well as the consecutive sentences entered by the trial court.