MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

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IN THE
COURT OF APPEALS OF INDIANA

America Freedom Insurance Company,

Appellant-Plaintiff,

v.

Marc Hires
and
Dennis Kellams,

Appellees-Defendants.

September 7, 2022

Court of Appeals Case No. 22A-CT-539

Appeal from the Vigo Superior Court

The Honorable Lakshmi Reddy, Judge

Trial Court Cause No. 84D02-1611-CT-7683

Bailey, Judge.

Case Summary

[1] Marc Hires procured an automobile insurance policy from American Freedom Insurance Company (hereinafter, "American Freedom"), representing that he did not use the insured vehicle for business. Hires' vehicle struck a pedestrian, Dennis Kellams, who filed a personal injury action against Hires. American Freedom filed a declaratory judgment complaint seeking a declaration that it had properly voided its entire contract with Hires due to his material misrepresentation as to business use, and that American Freedom owed no duty to indemnify Hires or Kellams. The trial court denied American Freedom declaratory relief and American Freedom on appeal presents a single, dispositive issue: whether the judgment concluding that American Freedom had no right to rescind for a material misrepresentation is clearly erroneous.[1] We affirm.

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[1] [1] American Freedom articulates issues challenging several of the trial court's findings as irrelevant and unsupported by the evidence presented at trial. As American Freedom observes, the trial court entered some findings of fact and conclusions thereon which are superfluous. That is, the trial court need not have addressed whether independent agent Sam Boaz was negligent and whether any such negligence could be attributed to American Freedom. The instant action is not a claim of negligent procurement of insurance but rather a claim for declaratory relief, with American Freedom contending that it was entitled to rescind a voidable policy.

[2] Also, the trial court referenced *Founders Ins. Co. v. May*, 44 N.E.3d 56 (Ind. Ct. App. 2015), *trans. denied*. There, the Court suggested that "an insurer cannot on the ground of fraud or misrepresentation retrospectively avoid coverage under a compulsory or financial responsibility law so as to escape liability to a third party." *Id.* at 61. In this vein, the trial court presumed that Kellams lacked uninsured motorist coverage. But whether Kellams was insured under a policy that included uninsured motorist insurance was not a matter in controversy; no evidence was elicited in that regard. Thus, any discussion of the public policy

Facts and Procedural History

[2] In 2015, Hires sought the assistance of independent insurance broker Sam Boaz of the Sam Boaz Agency to procure an automobile insurance policy for a truck driven primarily by Hires and occasionally by his wife. Because Hires has difficulty reading, the application was filled out by someone other than Hires. Hires signed the application, which listed his employment status as unemployed, and he also signed a Statement of Non-Business Use pertaining to the vehicle.[2] American Freedom issued Hires a policy with an effective date of August 5, 2015, to February 5, 2016.

[3] On October 28, 2015, Hires was driving his truck enroute to his mother's house when he was involved in an accident with Kellams. Hires and his mother frequently engaged in metal scrapping together. It is unclear whether they had intended to do so on the day of the accident. However, it is uncontested that

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considerations of rescinding the American Freedom policy that were premised upon the trial court's assumption that a pedestrian lacks uninsured motorist insurance was also irrelevant.

[3] Finally, American Freedom explicitly conceded that it was not attempting to enforce an exclusionary clause of the policy. The parties agreed that Hires was not using his vehicle for a business purpose at the time of the accident occurrence. In short, the controversy distilled to whether American Freedom established that its policy with Hires was void such that the Notice of Rescission was effective. For these reasons, we address the single, dispositive issue of right to rescind for material misrepresentation.

[2] This statement indicated that the vehicle would not be used for "delivery, business, or commercial purposes." (App. Vol. II, pg. 18.)

Hires was not involved in business activity at the time that the accident occurred.

[4] Kellams filed a personal injury lawsuit against Hires, and Hires sought indemnification from American Freedom. When Hires was deposed, he revealed that he had used his truck for the procurement and transport of scrap metal that he offered for sale. American Freedom issued a Notice of Policy Rescission to Hires, effective August 5, 2015, stating that Hires had operated the truck for an unacceptable business use not disclosed in the application process. American Freedom refunded to Hires paid premiums in the amount of $176.00.

[5] On November 22, 2016, American Freedom filed its Complaint for a declaratory judgment.[3] Hires answered the Complaint, denying that he had made a material misrepresentation. On December 14, 2021, a bench trial was conducted, at which Hires was the sole witness. Hires testified that he had not been asked about his employment as part of the insurance application process. He described his scrapping activities as a hobby that he pursued with his mother. According to Hires, he made fifteen to twenty stops per day in Terre Haute to pick up and sell cans and scrap materials. On the day of the accident, he was not hauling any such materials.

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[3] Kellams' lawsuit against Hires was stayed pending the disposition of the declaratory judgment action.

[6] The parties stipulated to the admissibility of Hires' federal tax returns for the calendar years 2014, 2015, and 2016. Hires had reported gross receipts from an unincorporated entity called Hires Scrapping in the amounts of $5,010.00 in 2014, $2,902.00 in 2015, and $2,155.00 in 2016. Hires had reportedly placed his vehicle into business use on March 1, 2015, and he had claimed a mileage deduction.

[7] On February 11, 2022, the trial court issued its sua sponte findings, conclusions, and order denying American Freedom declaratory relief. In relevant part, the trial court concluded that the Business/Artisan Use clause of the American Freedom policy did not apply to Hires' metal scrapping activity; as such, Hires had made no material misrepresentation. American Freedom now appeals.

Discussion and Decision

Standard of Review

[8] Where, as here, the trial court enters findings of fact and conclusions thereon without an Indiana Trial Rule 52 written request from a party, the entry of findings and conclusions is considered to be sua sponte. *Dana Companies, LLC v. Chaffee Rentals*, 1 N.E.3d 738, 747 (Ind.Ct.App.2013), *trans. denied*. Where the trial court enters specific findings sua sponte, the findings control our review and the judgment only as to the issues those specific findings cover. *Id*. Where there are no specific findings, a general judgment standard applies, and we may affirm on any legal theory supported by the evidence adduced at trial. *Id*.

[9] A two-tier standard of review is applied to the sua sponte findings and conclusions made: whether the evidence supports the findings, and whether the findings support the judgment. *Id.* Findings and conclusions will be set aside only if they are clearly erroneous, that is, when the record contains no facts or inferences supporting them. *Id.* A judgment is clearly erroneous when a review of the record leaves us with a firm conviction that a mistake has been made. *Id.* In conducting our review, we consider only the evidence favorable to the judgment and all reasonable inferences flowing therefrom. *Id.* We will neither reweigh the evidence nor assess witness credibility. *Id.*

Analysis

[10] In some circumstances, a party fraudulently induced to enter into a contract may treat the contract as entirely invalid. *Allianz Ins. Co. v. Guidant Corp.*, 884 N.E.2d 405, 414-15 (Ind. Ct. App. 2008), *trans. denied*. An insurance contract is treated as an ordinary contract. *See id.* at 416.

> The right to void coverage due to fraud in the making of the policy is well established in the common law. In the insurance context, this protects the insurer's right to know the full extent of the risk it undertakes when an insurance policy is issued. Accordingly, a material misrepresentation or omission of fact in an insurance application, relied on by the insurer in issuing the policy, renders the coverage voidable at the insurance company's option. … Some decisions have described this as a failure of the "meeting of the minds" as to the terms of the contract, specifically the risk to be insured. … The materiality of the representation or omission is a question of fact to be resolved by the factfinder unless the evidence is such that there can be no reasonable difference of opinion.

Colonial Penn. Ins. Co. v. Guzorek, 690 N.E.2d 664, 672-73 (Ind. 1997) (internal citations omitted). A representation is "material" if the fact omitted or misstated, if it had been accurately stated, might reasonably have influenced the insurer in deciding whether to reject or accept the risk or charge a higher premium. *Bush v. Washington National Ins. Co.*, 534 N.E.2d 1139, 1142 (Ind. Ct. App. 1989), *trans. denied*.

[11] The policy issued by American Freedom to Hires included the following definition:

> Business/Artisan use means use of the insured auto in a trade, profession, occupation, course of employment, job, work, or skill in a particular craft in which one is engaged. Business/Artisan use includes, but is not limited to, occupations such as sales, service or travel to hospitals, clinics, courthouses, job sites, client homes, carpentry, plumbing, masonry, real estate or insurance agents, lawyers, doctors, and accountants.

(App. Vol. II, pg. 18.) "Unless it is clear from the language of the policy, an insurance contract should not be interpreted to remove from coverage a risk against which an insured intended to protect himself." *Asbury v. Indiana Union Mut. Ins. Co.*, 441 N.E.2d 232, 236 (Ind. Ct. App. 1982). While each case is fact-sensitive for determining whether an activity is a "business," as a general rule, "an insured is engaged in business only when he pursues a continued or regular activity for the purpose of earning a livelihood." *Id.* at 238. The factfinder must decide what constitutes a business. *Id.* at 239.

[12] American Freedom alleged that Hires purchased the policy with the intention of conducting activities that would fall within the Business/Artisan definition and failed to inform American Freedom of the same. American Freedom alleged this to be material to its coverage and rating decision. Here, the trial court acted as the factfinder. The trial court observed that Hires had no tax identification number or business registration, and the court ultimately determined that the activity in which Hires and his mother had regularly engaged together was a hobby. According to the trial court, any proceeds were "hardly enough to make a living." Appealed Order at 7. Finding that Hires' omission to report a hobby had not amounted to a material misrepresentation in the insurance application process, the trial court concluded that American Freedom was not entitled to rescind the policy.

[13] The evidence in support of the trial court's finding as to a lack of material misrepresentation is as follows. Hires, the sole witness at the bench trial, characterized his metal scrapping activity as a hobby. He made fifteen to twenty stops per day to obtain cans or metal and deliver the same. Hires sold some items but generated very little income. His primary income was derived from the full-time employment of his wife. A review of the record does not leave us with a firm conviction that a mistake has been made.

Conclusion

[14] The judgment denying declaratory relief to American Freedom is not clearly erroneous.

[15] Affirmed.

Riley, J., and Vaidik, J., concur.