IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

HOWARD ANTHONY JESMER,

Plaintiff,

v. No. 2:19-cv-02715-MSN-atc

ERIE INSURANCE COMPANY,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This cause comes before the Court on Defendant Erie Insurance Company's Motion for Summary Judgment, filed on October 16, 2020. (ECF No. 24.) Plaintiff filed his Response on November 13, 2020. (ECF No. 25.) Defendant filed its Reply on November 24, 2020. (ECF No. 27.) For the reasons below, Defendant's Motion is **GRANTED**.

Background

This matter arises out of Defendant's denial of Plaintiff's insurance claim. (ECF No. 1-3 at PageID 17.) Plaintiff originally filed this action seeking to enforce the insurance policy in addition to damages pursuant to Tenn. Code Ann. § 56-7-105 in the Circuit Court of Fayette County. (ECF No. 1.) Defendant then promptly removed this matter. (*Id.*)

A. The denial of Plaintiff's insurance claim

In January 2017, Plaintiff applied for insurance for his home at 310 Fields Drive, Arlington, Tennessee. (ECF No. 24-5 at PageID 147–150.) Defendant agreed to insure Plaintiff based on the information provided in his application. (ECF No. 1-3 at PageID 12; ECF No. 24-1 at PageID 118–119.) The policy protected Plaintiff from damage to his home or its contents. (ECF No. 1-3

at PageID 12–13.) Additionally, the policy covered expenses if Plaintiff was forced to find substitute housing due to uninhabitability of his home. (*Id.* at PageID 13.)

On August 5, 2018, a fire destroyed Plaintiff's home and all its contents. (*Id.* at PageID 12.) Plaintiff timely submitted a claim under the policy. (*Id.*) Defendant denied Plaintiff's claim. (*Id.* at PageID 15–16.) Defendant based its denial on purported misrepresentations by Plaintiff in his application related to business activity at the residence. (*Id.* at PageID 24.)

On April 9, 2019, counsel for Plaintiff inquired why Defendant denied Plaintiff's claim. (ECF No. 1-3 at PageID 16, 21.) In response, Defendant explained that Plaintiff was operating his father's business, H&M recycling,[1] from the residence. (*Id.* at PageID 16, 24.) Defendant's continued denial of Plaintiff's claim prompted the filing of this lawsuit. (*Id.* at PageID 16–17, 21–22.)

B. The insurance application

As part of acquiring insurance with Defendant, Plaintiff completed Defendant's application. (*See* ECF No. 24-5.) The application asked Plaintiff several questions. (*Id.*) In particular, one question asked, "[i]s Applicant conducting any business or occupational pursuits at the premises?" (*Id.* at PageID 148.) In response, Plaintiff stated that he did not. (*Id.*) Plaintiff, along with Defendant's agent, signed the application. (*Id.* at PageID 150.) By signing the application, Plaintiff certified that he had given "true and complete answers to the questions in this application." (*Id.*)

Defendant's Motion attacks the veracity of Plaintiff's answer to the question concerning

1. H&M Recycling is a towing company owned by Plaintiff's father, Howard Jesmer, that is currently based in Orange Beach, Alabama. (ECF No. 25-1 at PageID 161.) However, before the August 2018 fire, H&M Recycling primarily operated out of Arlington, Tennessee. (ECF No. 24-2 at PageID 125; ECF No. 24-3 at PageID 130–31.)

any business activity on the premises. (ECF No. 24-1 at PageID 121–22.) Despite Plaintiff's answer to the contrary, Defendant contends that Plaintiff operated his father's business, H&M Recycling, out of the residence. (*Id.* at PageID 121–22.) This misrepresentation by Plaintiff increased Defendant's risk of loss. (*Id.* at PageID 122.) In rebuttal, Plaintiff denies making a false statement because his activity at the residence does not constitute a business pursuit. (ECF No. 25 at PageID 158.)

Legal Standard

Federal Rule of Civil Procedure 56 permits a party to move for summary judgment — and the Court to grant summary judgment — "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). A party asserting the presence or absence of genuine issues of material facts must support its position either by "citing to particular parts of materials in the record," including depositions, documents, affidavits or declarations, stipulations, or other materials, or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). In ruling on a motion for summary judgment, the Court must view the facts contained in the record and all inferences that can be drawn from those facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 907 (6th Cir. 2001). The Court cannot weigh the evidence, judge the credibility of witnesses, or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may

discharge this burden either by producing evidence that demonstrates the absence of a genuine issue of material fact or simply "by 'showing' — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325. Where the movant has satisfied this burden, the nonmoving party cannot "rest upon its . . . pleadings, but rather must set forth specific facts showing that there is a genuine issue for trial." *Moldowan v. City of Warren*, 578 F.3d 351, 374 (6th Cir. 2009) (citing *Matsushita*, 475 U.S. at 586; Fed. R. Civ. P. 56). The nonmoving party must present sufficient probative evidence supporting its claim that disputes over material facts remain and must be resolved by a judge or jury at trial. *Anderson*, 477 U.S. at 248–49 (citing *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968)); *see also White v. Wyndham Vacation Ownership, Inc.*, 617 F.3d 472, 475–76 (6th Cir. 2010). A mere scintilla of evidence is not enough; there must be evidence from which a jury could reasonably find in favor of the nonmoving party. *Anderson*, 477 U.S. at 252; *Moldowan*, 578 F.3d at 374.

The Court's role is limited to determining whether there is a genuine dispute about a material fact, that is, if the evidence in the case "is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. Such a determination requires that the Court "view the evidence presented through the prism of the substantive evidentiary burden" applicable to the case. *Id.* at 254. Thus, if the plaintiff must ultimately prove its case at trial by a preponderance of the evidence, on a motion for summary judgment the Court must determine whether a jury could reasonably find that the plaintiff's factual contentions are true by a preponderance of the evidence. *See id.* at 252–53.

Finally, if the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the movant is entitled to summary judgment. *Celotex*, 477 U.S. at 323. The Court must construe Rule 56 with due regard not only

for the rights of those "asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury," but also for the rights of those "opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis." *Id.* at 327.

Discussion

This matter is before the Court based on diversity jurisdiction. (ECF No. 1 at PageID 2.) Therefore, the Court applies Tennessee law to resolve this dispute. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

A. Applicable Law

Defendant contends that it is entitled to judgment as a matter of law because, if Plaintiff had accurately answered the question concerning his business operations, Defendant would not have issued him a policy due to its increased risk of loss. (ECF No. 24-1 at PageID 122.) As the basis for its argument, Defendant relies on Tenn. Code Ann. § 56-7-103, which provides that:

> No written or oral misrepresentation or warranty made in the negotiations of a contract or policy of insurance, or in the application for contract or policy of insurance, by the insured or in the insured's behalf, shall be deemed material or defeat or void the policy or prevent its attaching, unless the misrepresentation or warranty is made with actual intent to deceive, or unless the matter represented increases the risk of loss.

This provision authorizes an insurer to void the policy when misrepresentations made by the applicant in obtaining the policy increases the insurer's risk of loss. *See Smith v. Tenn. Farmers Life Reassurance Co.*, 210 S.W.3d 584, 590 (Tenn. Ct. App. 2006); *Snead v. Nationwide Prop. and Cas. Ins. Co.*, 653 F. Supp.2d 823, 826 (W.D. Tenn. 2009).

To avoid coverage, the insurer must first show that the applicant's answer contained a misrepresentation. *See Kentucky Cent. Life Ins. Co. v. Jones*, 799 F. Supp. 53, 55 (M.D. Tenn. 1992). "Whether an insured's answer in an application is a misrepresentation is ordinarily an issue

of fact to be determined by the jury at trial." *Acuity Mut. Ins. Co. v. Frye*, 699 F.Supp.2d 975, 985 (E.D. Tenn. 2010); *see also Womack v. Blue Cross and Blue Shield of Tenn.*, 593 S.W.2d 294, 295 (Tenn. 1980). However, the Court can decide this issue at the summary judgment stage if "reasonable minds" could only reach one conclusion as to the alleged misrepresentation. *See Frye*, F. Supp. 2d at 985.

If it is determined that the application contains a misrepresentation, "it [then] becomes a question of law, not fact, for the court as to whether the misrepresentations materially increased the risk of loss." *Broyles v. Ford Life Ins. Co.*, 594 S.W.2d 691, 693 (Tenn. 1980); *see also Howell v. Colonial Penn Ins. Co.*, 842 F.2d 821, 823 (6th Cir. 1987); *Vermont Mut. Ins. Co. v. Chiu*, 21 S.W.3d 232, 235 (Tenn. Ct. App. 2000). A misrepresentation increases the insured's risk of loss under Tenn. Code Ann. § 56-7-103 "when it is of such importance that it 'naturally and reasonably influences the judgment of the insuror in making the contract.'" *Vermont Mut. Ins. Co.*, 21 S.W. 3d at 235 (quoting *Sine v. Tennessee Farmers Mut. Ins. Co.*, 861 S.W.2d 838, 839 (Tenn. Ct. App. 1993)). In other words, "the matter misrepresented must be of that character which the court can say would reasonably affect the insurer's judgment." *Vermont Mut. Ins. Co.*, 21 S.W. 3d at 325 (quoting *Volunteer State Life Ins. Co. v. Richardson*, 244 S.W. 44, 49 (Tenn. 1922)).

The Court "may use the questions an insurance company asks on its application to determine the types of conditions or circumstances that the insurance company considers relevant to its risk of loss." *Snead*, 653 F. Supp. 2d at 827 (citation omitted). In addition, courts also "frequently rely" on the insurer's representatives to explain how a truthful answer by the applicant would have influenced either the policy's premium or its issuance. *See id.* However, the Court must not simply take the insurer's word that it would have acted differently; the Court must make its own independent assessment that the misrepresented matter "would reasonably affect the

insurer's judgment." *See Howell*, 842 F.2d at 824 (quoting *Broyles v. Ford Life Ins. Co.*, 594 S.W.2d 691, 693 (Tenn. 1980)).

"The fact misrepresented need not be with reference to a hazard which actually produced the loss in question." *Loyd v. Farmers Mut. Fire Ins. Co.*, 838 S.W.2d 542, 545 (Tenn. Ct. App. 1992). At bottom, the insurer must show that it "was denied information which it sought in good faith and which was deemed necessary to an honest appraisal of insurability." *Id.* (citing *Johnson v. State Farm Life Ins. Co.*, 633 S.W.2d 484, 488 (Tenn. Ct. App. 1981)).

B. Whether Plaintiff made a misrepresentation on the insurance application

After reviewing the evidence and the parties' arguments, the Court finds that Plaintiff clearly misrepresented in his application the existence of business activity at the residence. In response to the question concerning whether the "[a]pplicant [is] conducting any business or occupational pursuits at the premises," Plaintiff responded that he was not. (ECF No. 24-1 at PageID 119; ECF No. 24-5 at PageID 148.) As proof that this answer was false, Defendant relies on the testimony of Howard Jesmer, Plaintiff's father and owner of H&M Recycling. Plaintiff works for his father's business as a tow truck driver. (ECF No. 24-2 at PageID 125; ECF No. 25-1 at PageID 161.) Mr. Jesmer testified that Plaintiff operated H&M Recycling out of the residence at 310 Fields Drive.[2] (ECF No. 24-2 at PageID 126; ECF No. 24-3 at PageID 130–33.)

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2. At his deposition, Mr. Jesmer testified to the following:

> Q. So you moved to Fields Drive your operation in 2015, you believe?
> A. Somewhere around there.
> Q. And when did that change?
> A. It didn't. I mean, that's what Anthony was running at this house. He steadily was running that one. Then, you know, of course, you know, I'm opening up the other tow yard in Orange Beach.
> Q. Is it still H&M Recycling?
> A. Yeah.
> . . .
> Q. How many trucks generally at a time are we talking about?

Mr. Jesmer explained that around 2015, he moved H&M Recycling to the residence at 310 Fields Drive. (ECF No. 24-2 at PageID 125; ECF No. 24-3 at PageID 129.) Since that move, Plaintiff "steadily" operated the business out of the residence until the August 2018 fire. (ECF No. 24-3 at PageID 130–33.) For example, up until the fire, 310 Fields Drive served as the base of operations for eight (8) tow trucks.[3] (ECF No. 24-3 at PageID 133–34.) The drivers of these tow trucks would come and go from the residence and would leave their personal vehicles there while out on the job.[4] (ECF No. 24-3 at PageID 134.) The reason Mr. Jesmer left the tow trucks at the residence was because Plaintiff could watch over them. (ECF No. 24-3 at PageID 132–33.) It is undisputed that Plaintiff failed to disclose this information on his application. (ECF No. 24-2 at PageID 126.)

Plaintiff denies that his application misrepresented any alleged business activity at the residence. (ECF No. 25 at PageID 158.) First, Plaintiff asserts that his father did not live at the

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A. Eight trucks that Anthony runs, got eight tow trucks.
Q. And those were operating out of 310 Fields Drive until the fire loss?
A. Right
(ECF No. 24-3 at PageID 130, 133.)

3. At Mr. Jesmer's deposition, in response to the question "how many trucks generally at a time are we talking about," he stated "[e]ight trucks that [Plaintiff] runs, got eight tow trucks." (ECF No. 24-3 at PageID 133.) Further, those trucks operated out of the residence until the fire in August 2018. (*Id.*)

4. Mr. Jesmer testified to the following:
Q. Did your drivers typically when they weren't driving leave the dump trucks—sorry—the two [sic] trucks at 310 Fields?"
A. Yeah, they always were at 310.
Q. How many would you guess would be there at any given time?
A. Probably four to eight.
Q. You said that earlier, I remember, four to eight, and then whatever personal vehicles were there?
A. Yeah.
(ECF No. 24-3 at PageID 134.)

residence at the time he submitted his application. (ECF No. 25-1 at PageID 160.) More importantly, Plaintiff argues that his activities do not qualify as a "business pursuit," and thus, he did not misrepresent this matter on the application. (ECF No. 25 at PageID 157–58.) To support his assertion that his activities were not a "business pursuit," Plaintiff relies on a line of cases addressing exclusion provisions found within insurance policies in addition to explaining his responsibilities as a tow-truck driver.[5] (*Id.* at PageID 156–58.) These responsibilities, when viewed through lens of the cases Plaintiff cites, do not qualify as a "business pursuit."

To the Court's surprise, entirely absent from Plaintiff's Response is any reference to the testimony provided by Mr. Jesmer. This failure to address Mr. Jesmer's testimony bears directly on the viability of Plaintiff's claims, especially given the content of his testimony. Mr. Jesmer testified that: (1) Plaintiff operated H&M Recycling out of the residence until the August 2018 fire; (2) up to eight (8) tow trucks were housed at the residence; (3) the drivers of these tow trucks would come and go from the residence and would leave their personal vehicles while out on jobs; and (4) the reason trucks were left at the residence was because Plaintiff could watch over them. By not responding to these factual assertions by Mr. Jesmer, Plaintiff leaves this testimony unrebutted.[6]

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5. For example, Plaintiff would travel to locations such as Memphis, Nashville, and even Oklahoma to pick up vehicles. (ECF No. 25-1 at PageID 161.) Once secured, Plaintiff would then take these vehicles back to either H&M recycling or to another pre-selected destination for drop-off. (*Id.*) Plaintiff asserts that the only time a towed vehicle was brought to the residence is if he could not complete the delivery that day. (*Id.*) On those occasions, he would complete delivery the next day (*Id.*)

6. Pursuant to Local Rule 56.1(a), Defendant submitted with his Summary Judgment Motion a Statement of Undisputed Facts. (ECF No. 24-2.) Local Rule 56.1 requires that Plaintiff respond to each fact asserted by Defendant. LR 56.1(b). He did not. Accordingly, the failure to respond leads to the Court to conclude that the facts are admitted. LR 56.1(d); *see also Akines v. Shelby Cty. Gov't*, 512 F. Supp. 2d 1138, 1147–48 (W.D. Tenn. 2007).

Putting aside this fact, the Court addresses Plaintiff's argument that his activities do not constitute a "business pursuit." (ECF No. 25 at PageID 157–58.) In making this argument, Plaintiff relies on cases interpreting provisions within insurance policies that excluded "business pursuits" from the policy's ambit. (ECF No. 25 at PageID 156–57); *See Mid-Century Ins. Co. v. Williams*, 174 S.W.3d 230, 237 (Tenn. Ct. App. 2005) (analyzing whether day care services provided by the defendant fell within the business pursuits exclusion of the insurance policy); *State Farm Fire & Cas. Co. v. Sparks*, No. W2006-01036-COA-R3-CV, 2007 WL 4277454, at *4 (Tenn. Ct. App. Dec. 7, 2007) (determining whether a business pursuit exclusion applied to parties' ownership of an oil well); *Allstate Ins. v. Godsey*, No. 03A01-9107cv243, 1991 WL 261873, at *2 (Tenn. Ct. App. Dec. 13, 1991) (holding that the defendant did not operate a boat sales agency that would fall within the business pursuit exclusion). Plaintiff's argument on this point fails for three reasons. First, these cases are inapposite. Second, even when applying these cases to these facts, Plaintiff's claim fares no better. And finally, in light of the application's clear language, Plaintiff failed to respond accurately to the question at issue.

The cases relied on by Plaintiff involve interpretation of exclusion provisions found within an insurance policy. *See, e.g.*, *Mid-Century Ins. Co.*, 174 S.W. at 237. Naturally, the court had to refer to the policy itself to resolve the issue. Defendant, however, does not rely on an exclusion provision.[7] Rather, Defendant argues that the policy was void from inception due to misrepresentations in Plaintiff's application. (ECF No. 27 at PageID 186.) Interpreting a contract is a different matter than determining whether Plaintiff's application contained misrepresentations.

However, assuming *arguendo* that these cases apply, Plaintiff's argument still does not prevail. In deciding whether an activity qualifies as a "business pursuit," the Court looks to see

7. Indeed, neither party relies on any provision of the insurance policy in their briefings.

(1) if a profit motive exists and (2) if the activity is continuous or regular. *See Mid-Century Ins. Co.*, 174 S.W.3d at 240 (citing *Godsey*, 1991 WL 261873, at *3). Undoubtedly a profit motive exists here because Plaintiff received one thousand dollars ($1,000) a week as tow truck driver. (ECF No. 25-1 at PageID 162.) Expected compensation in return for services suffices as a profit motive. *See Mid-Century Ins. Co.*, 174 S.W.3d at 238–39 ("[W]e believe the AFDC payments, coupled with her expectation of compensation by Ms. Futrell for keeping Petey and Quisha, help to reveal Ms. Williams's motive in performing such services."). Further, the Court deems that Plaintiff's activity at the residence was continuous and regular. *See Mid-Century Ins. Co*, 174 S.W. at 240. Given that Plaintiff has not rebutted his father's testimony that he "steadily" operated the business out of the residence, this requirement is met. Thus, even if the Court adopts Plaintiff's desired approach, his claim still fails.

Finally, Plaintiff's argument does not grapple with the insurance application's text and purpose. In looking at the application, it asked whether Plaintiff "conduct[ed] any business or occupational pursuits at the premises." (ECF No. 24-5 at PageID 148.) By using "any," the question intends to have a broad reach that would include even the occasional business pursuit at the residence. *See Any*, Merriam-Webster, https://www.merriam-webster.com/dictionary/any?src=search-dict-hed, (last visited Feb. 2, 2021) (defining "any" as "one or some indiscriminately of whatever kind" or "one, some, or all indiscriminately of whatever quantity"). Even if the Court only relies on Plaintiff's admission that he "occasionally" brought vehicles back to the residence as part of his duties, (ECF No. 25 at PageID 158; ECF No. 25-1 at PageID 161), this limited activity still falls under the question's broad reach. Therefore, it cannot be disputed that Plaintiff was not entirely forthright considering the question's plain text.

Further, Plaintiff misunderstands the purpose of these applications. Insurance applications, like the one Plaintiff completed, allow insurers to make "an honest appraisal of insurability." *Kentucky Cent. Life Ins. Co. v. Jones*, 799 F. Supp. 53, 55 (M.D. Tenn. 1992) (quoting *Johnson V. State Farm Life Ins. Co.*, 633 S.W. 2d 484, 488 (Tenn. Ct. App. 1981)). By not being forthright, Plaintiff deprived Defendant of the opportunity to properly weigh its risk in offering Plaintiff an insurance policy. To accept Plaintiff's argument would undermine the information seeking purpose of these applications.

Considering all the evidence, reasonable minds could only conclude that Plaintiff misrepresented the existence of business activity at the residence. *See Acuity Mut. Ins. Co. v. Frye*, 699 F.Supp.2d 975, 985 (E.D. Tenn. 2010). Thus, Defendant has carried its burden showing that Plaintiff's application contained a misrepresentation.

C. <u>Whether Plaintiff's misrepresentation increased Defendant's risk of loss</u>

Having determined that Plaintiff's application contained a misrepresentation, the Court must now address whether the misrepresented matter increased Defendant's risk of loss. *See Broyles v. Ford Life Ins. Co.*, 594 S.W.2d 691, 693 (Tenn. 1980); *see also Howell v. Colonial Penn Ins. Co.*, 842 F.2d 821, 823 (6th Cir. 1987); *Vermont Mut. Ins. Co. v. Chiu*, 21 S.W.3d 232, 235 (Tenn. Ct. App. 2000). This is a question of law for the Court to determine. *See Broyles*, 594 S.W. 2d at 693. Ultimately, the Court must determine whether the misrepresented information would "reasonably affect the insurer's judgment." *Vermont Mut. Ins. Co.*, 21 S.W. 3d at 325 (quoting *Volunteer State Life Ins. Co. v. Richardson*, 244 S.W. 44, 49 (Tenn. 1922)).

Defendant contends that Plaintiff's misrepresentation increased its risk of loss. (ECF No. 24-1 at PageID 122.) Had Defendant known of Plaintiff's business activity, it asserts it would not have issued Plaintiff his policy due to the increased risk of loss. (ECF No. 24-2 at PageID 126;

ECF No. 24-6.) On this point, Plaintiff's Response fails to address this issue entirely. After considering all the evidence, the Court agrees with Defendant.

Here, Defendant's application unambiguously asked if the applicant is "conducting any business or occupational pursuits at the premises." (ECF No. 24-5 at PageID 148.) In light of that, it appears Defendant considered any potential business activity relevant to its risk analysis. *See Snead v. Nationwide Prop. and Cas. Ins. Co.*, 653 F. Supp.2d 823, 827 (W.D. Tenn. 2009) (explaining that courts can use the insurer's application to determine what issues it finds relevant to its risk of loss). Further, failure to disclose the existence of business activity can increase the insurer's risk of loss. *See Vermont Mut. Ins. Co.*, 21 S.W. 3d at 236–37 ("Chiu's failure to disclose the continuation of her boarding business and the existence of boarders in her home increased the risk of loss."). In addition to this, Defendant's agent, Lisa Keller, explained that Plaintiff would not have been issued a policy had Defendant known of his business activity. (ECF No. 24-2 at PageID 126; ECF No. 24-6); *see also Snead*, 653 F. Supp.2d at 827 ("[C]ourts frequently rely on the testimony of insurance company representatives to establish how truthful answers by the proposed insured would have affected the amount of the premium or the company's decision to issue the policy.").

However, this information alone is not dispositive, for the Court must make its own independent assessment. *See Broyles*, 594 S.W.2d at 693 ("It is not to be left to the insurance company to say. . . that it would or would not have issued the policy. . . . The matter misrepresented must be of that character which the court can say would reasonably affect the insurer's judgment.") (quoting *Volunteer State Life Ins. Co. v. Richardson*, 244 S.W. 44, 49 (Tenn. 1922)).

As an initial matter, it is not dispositive that Defendant "did not offer any specific evidence of facts, figures or examples to show precisely how" Plaintiff's business operation increased its

risk of loss. *See Vermont Mut. Ins. Co.*, 21 S.W.3d at 237. "It is only necessary to determine that the misrepresentation was sufficient to deny the insurer of information which they, in good faith, sought to discover, and which they must have deemed necessary to an honest appraisal of insurability." *Id.* (quoting *Johnson v. State Farm Life Ins. Co.*, 633 S.W.2d 484, 488 (Tenn. Ct. App. 1981)).

On this point, it is important to remember the extent of the business activity at the residence. Unrebutted testimony from Mr. Jesmer established that Plaintiff operated H & M recycling out of the residence until the August 2018 fire. (ECF No. 24-3 at PageID 130–33.) This business activity consisted of tow truck drivers coming and going from the residence. (*Id.* at PageID 134.) These employees would leave their personal vehicles at the residence. (*Id.*) And finally, when not in use, the tow trucks would remain parked at the residence so that Plaintiff could watch over them. (*Id.* at PageID 133.)

Given this substantial activity, Plaintiff's misrepresentation denied Defendant of its ability to make an "honest appraisal" of Plaintiff's insurability. At minimum, Plaintiff's misrepresentation prevented Defendant from receiving notice of its need to inquire further into Plaintiff's business activities. *See Vermont Mut. Ins. Co.*, 21 S.W.3d at 237 ("If Chiu had answered the question truthfully, Vermont Mutual could have taken additional measures to make a 'honest appraisal of insurability.'") Depending on the result of that inquiry, that could have affected Plaintiff's monthly premium or whether Plaintiff was issued a policy at all.

As possibly the worst result, Plaintiff's misrepresentation potentially exposed Defendant to hundreds of thousands of dollars in unknown risk. In addition to testifying to the business activity at the residence, Mr. Jesmer disclosed that the trucks left at the residence had an aggregate value of around four-hundred thousand dollars ($400,000) to five-hundred thousand dollars

($500,000). (ECF No. 24-3 at PageID 133.) Moreover, the Court cannot ignore the risk of having employees of the business coming and going from the residence. Ultimately, it cannot be disputed that this information, had it been disclosed, could have "reasonably influence[d] the judgment of the insurer in making the contract." *Snead*, 653 F. Supp.2d at 827. Thus, it appears the Plaintiff's misrepresentation increased Defendant's risk of loss within the meaning of Tenn. Code Ann. § 56-7-103. Accordingly, Defendant is entitled to judgment as a matter of law. Defendant's Motion is hereby **GRANTED.**

Conclusion

For the reasons stated, Defendant's Motion for Summary Judgment is **GRANTED**. This matter is hereby **DISMISSED WITH PREJUDICE**.

IT IS SO ORDERED, this 10th day of February, 2021.

s/ Mark Norris
MARK S. NORRIS
UNITED STATES DISTRICT JUDGE