

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000914-MR

MARY LEWIS, ON BEHALF OF THE JANET
C. FLATHERS REVOCABLE TRUST

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANN O'MALLEY SHAKE, JUDGE
ACTION NO. 05-CI-001472

MONUMENTAL LIFE INSURANCE COMPANY

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Although we find the lower court's legal reasoning both sound and persuasive, we reluctantly issue this opinion. The issue here could easily have been resolved had the insurance contract included an intent element in the medical exclusion clause. Since it did not, however, we begrudgingly agree with the trial court's finding that the medical exclusion clause unambiguously precludes coverage of death due to

taking prescribed medication not as directed by a physician, whether intentional or accidental.

The trial court entered a well-reasoned opinion in support of its conclusion, and being unable to improve thereon, we adopt it as our own:

This action comes before the Court on a Motion for Summary Judgment brought by the Defendant, Monumental Life Insurance Company (the “Defendant”) against the Plaintiff, Mary Lewis, Individually and as Administratrix of the Estate of Janet C. Flathers (the “Plaintiff”); and on a Cross Motion for Summary Judgment brought by the Plaintiff against the Defendant. The Plaintiff has filed a response to the Defendant's Motion for Summary Judgment to which the Defendant has filed a reply. In addition, the Defendant has filed a response to the Plaintiff's Cross Motion for Summary Judgment.

After a careful consideration of the record and the memoranda of the parties, as well as the applicable case, statutory and procedural law and being otherwise sufficiently advised, the Court grants the Defendant's Motion for Summary Judgment, and the Court denies the Plaintiff's Cross Motion for Summary Judgment.

Janet C. Flathers (“Flathers”) had an accidental death credit life insurance policy in effect with the Defendant when she died on May 5, 2003 (the “Policy”). Flathers' death certificate provides that her death was an accident based upon the underlying cause of Phenobarbital toxicity. In addition, James David Railey, M.D. (“Railey”), who was Flathers' internal medicine physician, testified in his deposition that the ingestion of Phenobarbital had within a reasonable degree of medical probability caused Flathers' death. Finally, in his affidavit, Paul Conners, M.D. (“Conners”) stated that Flathers' death was caused by Phenobarbital toxicity.

Flathers had an actual prescription from Railey that allowed her to take 97.2 milligrams of Phenobarbital twice a day. However, according to Railey's deposition and Conner's

affidavit, this prescription would not have created the 120.6 microgram per milliliter level of Phenobarbital that was found in Flathers' bloodstream before her death. In fact, Railey testified that the therapeutic range for Phenobarbital levels is only 15-40 micrograms per milliliter. Finally, Railey testified that he believed that Flathers had obtained her toxic Phenobarbital level by mistaking it for one of the other several medications she was taking - as a result of her impaired vision based upon retinal damage from neurosarcoidosis.

The Plaintiff, as trustee of the beneficiary of Flathers' Policy, subsequently filed a claim with the Defendant. On October 8, 2004, the Defendant denied the Plaintiff's claim based upon an exclusion contained in the Policy for deaths resulting from the "taking of any drug, medication, narcotic or hallucinogen, except as prescribed by a Physician" ("the Medication Exclusion"). On February 15, 2005, the Plaintiff filed this action, alleging that the Defendant had breached the Policy by denying the Plaintiff's claim.

The Defendant has filed a Motion for Summary Judgment, arguing that the Plaintiff is not entitled to benefits under the Policy because of the Medication Exclusion. The Plaintiff has filed a Cross-Motion for Summary Judgment, arguing (1) that the Medication Exclusion is ambiguous and inapplicable; (2) that the Medication Exclusion violates public policy; and (3) that the Medication Exclusion should have been included in the written application.

Summary judgment is used to "terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." Paintsville Hospital Co. v. Rose, 683 S.W.2d 255, 256 (Ky. 1985). In deciding whether or not to grant summary judgment, the Court must view the record in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor. Steelvest v. Scansteel Serv. Ctr., 807 S.W.2d 476, 480 (Ky. 1991). The trial judge must examine the evidence, not to

decide any issue of fact, but rather to discover if a real issue exists. Id.

The construction and interpretation of an insurance policy is a question of law for the Court. Kemper National Insurance Companies v. Heaven Hill Distilleries, Inc., 82 S.W.3d 869, 871 (Ky. 2002). “Where the terms of an insurance policy are clear and unambiguous, the policy will be enforced as written.” Id. At 873-874. “[T]erms used in insurance contracts 'should be given their ordinary meaning as persons with the ordinary and usual understanding would construe them.’” Motorists Mutual Insurance Company v. RSJ, Inc., 926 S.W.2d 679, 680 (Ky. App. 1996), *quoting* City of Louisville v. McDonald, 819 S.W.2d 319, 320 (Ky. App. 1991).

Ambiguous coverage exclusions are generally strictly construed against the insurer. Kemper 82 S.W.3d at 873-74. In addition, if an insurance exclusion is subject to two reasonable interpretations, the interpretation which is more favorable to the insured must be adopted. Motorists Mutual, 926 S.W.2d at 680. Nevertheless, a court may not use a nonexistent ambiguity to rewrite the insurance policy in favor of the insured. Id.

The Plaintiff, relying on Healthwise of Kentucky, LTD, v. Anglin, 956 S.W.2d 213 (Ky. 1997), contends that the “as prescribed” language in the Medication Exclusion is ambiguous and subject to two different reasonable interpretations. In Healthwise, the Supreme Court of Kentucky held that the terms “crime” and “legal intoxication” in an insurance policy were subject to two different reasonable interpretations, and adopted the interpretations that were more favorable to the insured. Id. At 216-17. The Healthwise Court relied on the fact that there are several different legal definitions for the terms “crime” and “legal intoxication.” Id.

Similarly, the Plaintiff argues that the “as prescribed” language can be reasonably interpreted in two different ways to mean (1) that the patient must have had a valid prescription for the medication in question or (2) that the patient must

have had a valid prescription for the medication in question and must have also taken the medication in accordance with the physician's dosage instructions. The Plaintiff asserts that the Court should adopt the more favorable first interpretation, and that the Court should find the Medication Exclusion inapplicable based upon Flathers' possession of a valid Phenobarbital prescription.

However, the flaw in the Plaintiff's argument is that it relies on the assumption that the term "as prescribed" is ambiguous and subject to two reasonable interpretations. The Court does not agree. Unlike the terms "crime" and "legal intoxication" in Healthwise which can be legally defined in varying ways, the term "as prescribed" in the Medication Exclusion is clear and unambiguous.

Ordinary people with ordinary understandings know that the term "as prescribed" incorporates both the name of the medication and the dosage specifications. The dosage information on a prescription is just as important, if not more important, than the name of the specific medication. In fact, without dosage instructions, people would have no idea how to safely and effectively take their medication. Therefore, after according the Medication Exclusion its ordinary meaning, it is clear that the term "as prescribed" means that the patient must take the specific medication in accordance with the physician's dosage instructions.

Although Kentucky courts have not yet addressed medication exclusions in accidental policies, courts in other jurisdictions have enforced similar exclusions according to their ordinary terms. *See* Duncan v. CUNA Mutual Insurance Society, 614 S.E.2d 592 (NC.App. 2005) and Guest v. Horace Mann Insurance Co. 310 S.E.2d 241 (Ga.App. 1983). Since it is uncontroverted that Flathers exceeded the dosage amount on her Phenobarbital prescription, it is clear that Flathers was not taking the medication "as prescribed." In addition, it is uncontroverted that Flathers' death was caused by the fact that Flathers did not take her Phenobarbital as prescribed. As such, pursuant to the clear terms in the Medication Exclusion, the Plaintiff is not entitled to coverage.

Notwithstanding the applicability of the Medication Exclusion, the Plaintiff, relying on Lewis v. West American Insurance Company, 927 S.W.2d 829 (Ky. 1996) and Woods v. Provident Life & Accident Ins. Co. of Chattanooga, 42 S.W.2d 499 (Ky. 1931), contends that the Court should not enforce the Medication Exclusion on public policy grounds. The Plaintiff contends that the Medication Exclusion violates public policy because (1) it excludes accidental coverage for the large number of people such as Flathers who may have had accidental medication mix-ups due to vision problems and other reasons and (2) because the Medication Exclusion does not allow for any consideration of whether the death was accidental.

In Lewis, the Supreme Court of Kentucky held that family exclusions in automobile liability insurance policies violated public policy because “[a]lmost every member of the public is potentially a member of this excluded class.” 927 S.W.2d at 836. These family exclusions had been created based upon the fear of family collusion, and were used to limit coverage for the insured's family members who were also involved in the automobile accident. Id. At 830. In finding a public policy violation, the Supreme Court of Kentucky relied upon Kentucky's long-standing policy that the possibility of collusion by a few was not “a valid reason to deny benefits to an entire innocent class.” Id.

The Court does not believe that such public policy concerns are present with the Medication Exclusion. Unlike the family exclusion in Lewis which affected a substantial part of the public, there is no indication that such large numbers of the public could be injured by the application of the Medication Exclusion. In fact, it can be argued that the Medication Exclusion benefits the public by stressing the importance of following instructions on a prescription.

In addition, the Court is not aware of any authority which requires, as a policy matter, that medication exclusions can only be applicable when the overdose is intentional. In fact, the courts in other jurisdictions, which have examined similar medication exclusions, have enforced them without any analysis into the intent of the party. See Duncan and

Guest, supra. In Woods, the Supreme Court of Kentucky did conduct an analysis into whether a poisoning was accidental or intentional. 42 S.W.2d at 501-02. However, the policy in Woods specified that the injuries had to result from an intentional act. Id. At 500¹. There is no such specific intent provision in the Medication Exclusion. Based on the above, the Court finds that the Medication Exclusion does not violate public policy.

Finally, the Plaintiff argues that the Medication Exclusion is inapplicable because it was not contained in Flathers' written application. The Plaintiff argues that the Medication Exclusion is a statement reducing benefits which should have been included in Flathers' application. The Plaintiff relies on the fact that the Policy provides that “[t]his Policy, your application, and any other attachments is the entire contract between us. Any statement you or the Insured makes is a representation and not a warranty. No statement will be used by us to void or reduce benefits unless that statement is a part of the written application.” However, taking the entire provision as a whole, it is clear that the application requirement only applies to statements made by the Insured.

Since Flathers' death resulted from her taking an amount of Phenobarbital which had not been prescribed by her physician, the Court finds as a matter of law that the Medication Exclusion is applicable; and that the Plaintiff is not entitled to benefits under the Policy. Consequently, the Court grants the Defendant's Motion for Summary Judgment, and the Court denies the Plaintiff's Cross Motion for Summary Judgment.

* * *

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

¹ The policy in Woods also contained a provision excluding coverage for injuries occurring “while under the influence of or affected by intoxicants or narcotics.” Id. at 500. However, the Woods court found this exclusion inapplicable and relied solely on the intentional act exclusion. Id. at 502.

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