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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000168-MR

DOVIE MUSICK, acting by and through her Next Friend and Attorney-in-Fact, JOYCE DAVENPORT — APPELLANT

v.

APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE EDWIN M. WHITE, JUDGE
ACTION NO. 06-CI-00499

AF & L INSURANCE COMPANY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,[1] SENIOR JUDGE.

STUMBO, JUDGE: Dovie Musick appeals from an order of the Christian Circuit Court granting summary judgment in favor of AF & L Insurance Company. The circuit court determined that AF & L properly terminated the payment of assisted living facility benefits to Musick under a long term care insurance policy issued by AF & L. For the reasons stated below, we reverse the order on appeal and remand the matter for further proceedings.

[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

The facts are not in controversy. Ms. Musick purchased a long term care insurance policy from AF & L effective May 2, 2001. The policy provided for the payment of nursing home benefits to Musick of up to $100 per day for a maximum of three years. It expressly stated that the "NURSING HOME CARE MAXIMUM BENEFIT PERIOD" is "3 Years." This provision is shown on the policy under the heading "LONG TERM CARE BENEFITS."

The policy also provided for the payment of assisted living facility benefits.[2] Next to the line stating "ASSISTED LIVING FACILITY BENEFITS," the policy schedule showed the word "INCLUDED" without indicating a separate benefits period. The words "ASSISTED LIVING FACILITY BENEFITS" and "INCLUDED" are shown under the heading "ADDITIONAL BENEFITS."

At some time thereafter (which the parties do not reference), Ms. Musick apparently began receiving assisted living facility benefits under the terms of the policy. On about January 24, 2006, she received a letter from AF & L stating that the assisted living facility benefits had been exhausted and that further benefits would not be payable. Ms. Musick sought clarification from AF & L during the weeks that followed, and maintained that the three year maximum benefit period did not apply to assisted living

[2] Musick characterizes the assisted living facility benefits as a rider. AF & L states that this coverage was not a rider, but rather was merely included with the policy to clarify and replace certain terms found in the policy. The "Consideration" page of the policy shown as Appendix C to the Appellant's brief repeatedly refers to that page as a "rider," but the page is merely definitional in nature and does not provide additional coverage. While not dispositive of Ms. Musick's argument, it appears that the assisted living facility benefits provision is not additional coverage (a.k.a. a "rider") but rather is merely a benefit of the underlying long term care coverage.

facility benefits. When no agreement could be reached regarding the extent and duration of the assisted living facility coverage, on April 25, 2005, Ms. Musick filed the instant action in Christian Circuit Court seeking a declaratory judgment. Specifically, she sought a judicial determination that the assisted living facility benefits were not limited by the three year benefit period.

Thereafter, both Ms. Musick and AF & L filed motions for summary judgment. After considering the motions, the circuit court rendered an order on December 22, 2006, granting summary judgment in favor of AF & L and denying Ms. Musick's motion. As a basis for the order, the circuit court found that a declaration of rights was a matter of law to be decided by the trial court; that the policy schedule did not provide a separate maximum benefit for assisted living benefits, but stated that such benefits were "included" in the overall long term benefits policy; that the parties contracted for a three year benefit period; and, that because the three year period was exhausted, Ms. Musick was not entitled to any further benefits as of January, 2006. In sum, the court determined that the three year period applied to both nursing home and assisted living facility benefits. This appeal followed.

Ms. Musick now argues that the Christian Circuit Court erred in granting summary judgment in favor of AF & L. She maintains that the insurance policy did not apply a maximum benefit period to the assisted living facility benefits, and that AF & L's alternate construction of the policy does no more than raise an ambiguity that should be resolved against AF & L as drafter of the contract. The corpus of her argument is that the

policy does not expressly state, nor even imply, that the assisted living benefits were included in the nursing home or long term care benefits for purposes of the 3 year maximum benefit period. She notes that the policy states that, "Each day You receive any Nursing home care will count as one full day toward the Long Term Care Maximum Benefit Period," but notably does not state that care in an assisted living facility would count toward that same 3 year benefit period. She contends that the circuit court erred in concluding that no genuine issue of material fact existed on this issue and that AF & L was entitled to a judgment as a matter of law.

In response, AF & L argues that the circuit court properly concluded that the three year period applied to assisted living facility benefits. It notes that the phrase "3 years" appears under the heading "LONG TERM CARE BENEFITS," which necessarily includes "ASSISTED LIVING FACILITY BENEFITS." It maintains that no ambiguity exists on the face of the policy, that the only reasonable interpretation of the policy language is that assisted living facility benefits are subject to the same three year maximum benefit period as nursing home care and long term care benefits, and that the circuit court properly so found.

Having closely reviewed the record and the law, as well as having considered the written and oral arguments, we must conclude that the policy's description of "ASSISTED LIVING FACILITY BENEFITS" as "INCLUDED" is subject to more than one reasonable interpretation. As such, the action was not appropriate for summary judgment and the circuit court erred in failing to so find.

Resolution of this issue centers to great degree on the policy definitions.

The policy defines "Nursing Home" as follows:

> NURSING HOME means a place which: 1) is legally operated to provide nursing care (skilled, intermediate, custodial) for sick or injured persons at their expense; 2) is licensed by the state as a convalescent nursing facility, a skilled nursing facility, an intermediate care facility, a custodial care facility; or any equivalent facility which meets the requirements of this definition; 3) provides, in addition to room and board accommodations, 24 hour nursing service by or under 24 hour on-site supervision by a Physician, licensed registered nurse (RN), a licensed practical nurse (LPN), or licensed vocational nurse (LVN); 4) maintains a daily record of each patient which is available for our review; and 5) administers a planned program of observation and treatment by a Physician (other than the proprietor or an employee of such facility) which is in accordance with existing standards of medical practice for the Injury or Sickness causing confinement. "NURSING HOME" does not mean a facility or any part of a facility used primarily for: rest care; training or education; care of the aged; or treatment of alcoholism, drug addiction or Mental or Nervous Disorders. Facilities primarily engaged in providing retirement residences, such as apartments or other self-contained living units, are not Nursing Homes, however, a distinctly separate part of such facility may be a Nursing Home if it meets this definition.

Alternatively, the policy defines "Assisted Living Facility" as follows:

> ASSISTED LIVING FACILITY means a facility that: 1) is engaged primarily in providing ongoing care and related services to at least ten (10) inpatients in one location; 2) provides 24 hour per day care and service sufficient to support needs resulting from the inability to perform Activities of Daily Living or Cognitives Impairment; 3) has an awake, trained and ready to respond employee on duty at all times to provide such care; 4) provides three meals a day and accommodates special dietary needs; 5) is licensed by the appropriate licensing agency in the state to provide such care; 6) has formal arrangements for the services of a Physician or

> Professional Nurse to furnish medical care in case of emergency; and 7) has the appropriate methods and procedures for handling and administering drugs. An Assisted Living Facility does not mean an individual residence or independent living unit or apartment. If the facility has multiple licenses and/or multiple purposes, only the section, wing, ward or unit that specifically qualifies as an Assisted Living Facility will qualify.

There is little question that an assisted living facility is not a nursing home under the policy language. Under the policy definition, the former merely requires, for example, "an awake, trained and ready to respond employee," whereas the latter must have "24 hour on-site supervision by a Physician, licensed registered nurse (RN), a licensed practical nurse (LPN), or licensed vocational nurse (LVN)." While there are other differences in the definitions, the difference in the staffing requirement - taken alone - reveals that assisted living facilities are not nursing homes.

Similarly, the policy states in unambiguous terms that "LONG TERM CARE means Nursing Home Care." Since assisted living facility care by definition is not nursing home care, it follows then that assisted living facility care also is not long term care - at least as defined by the policy at issue.

This brings us to the corpus of the issue on appeal. The three year limitation on benefits set forth in the policy is shown directly next to the line stating "NURSING HOME CARE MAXIMUM BENEFIT PERIOD," and both phrases appear under the heading "LONG TERM CARE BENEFITS." May one state with reasonable certainty that the policy description of "ASSISTED LIVING FACILITY BENEFITS" as "INCLUDED" - which is shown under the separate heading of "ADDITIONAL

BENEFITS" - necessarily refers to "LONG TERM CARE BENEFITS" or "NURSING HOME CARE MAXIMUM BENEFIT PERIOD?" Since the policy's own definitional terms exclude assisted living facility care from both nursing home care and long term care, this question must be answered in the negative. Stated differently, what are assisted living facility benefits "included" as part of? The simple answer is that the policy definitions, coupled with the ambiguous manner in which the policy schedule is set forth, preclude the summary making of such a determination. That is to say, while AF & L argues that assisted living facility benefits must be "included" in the "NURSING HOME MAXIMUM BENEFIT PERIOD," the face of the policy which AF & L drafted expressly precludes this conclusion by defining "assisted living facility" as something separate and distinct from the term "nursing home." It is just as plausible, if not more so, that the language at issue was intended to mean that assisted living facility benefits are "included" in the policy.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56.03. "The record must be viewed 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, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). "Even though a trial court may believe the party opposing the motion may not succeed at trial, it should not render a summary

judgment if there is any issue of material fact." *Id.* Finally, "[t]he standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." *Scifres v. Kraft,* 916 S.W.2d 779, 781 (Ky.App. 1996).

When viewing the record in a light most favorable to Ms. Musick and resolving all doubts in her favor, we must conclude that the ambiguous nature of the policy language coupled with the definitional distinction between "assisted living facility" and "nursing home" precluded the entry of summary judgment in favor of AF & L. The plain language on the face of the policy does not reveal what assisted living facility benefits are "included" as part of. Accordingly, summary judgment was not supported by the record.

For the foregoing reasons, we reverse the summary judgment of the Christian Circuit Court and remand the matter for further proceedings.

ALL CONCUR.

BRIEFS AND ORAL ARGUMENT FOR APPELLANT:

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