RENDERED: JANUARY 6, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002225-MR

MELISSA SLONE HASTINGS — APPELLANT

v.

APPEAL FROM FLOYD CIRCUIT COURT
HONORABLE JOHNNY RAY HARRIS, JUDGE
ACTION NO. 08-CI-00314

MODERN WOODMAN OF AMERICA — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CLAYTON, AND WINE, JUDGES.

WINE, JUDGE: Melissa Slone Hastings (Slone) appeals from a summary judgment of the Floyd Circuit Court in favor of Modern Woodmen of America (Modern Woodmen)[1] in a contract action involving an accidental death rider to a life insurance policy.

[1] The notice of appeal names the Appellee as "Modern Woodman of America"; however, the correct name is "Modern Woodmen of America."

Slone was listed as the beneficiary on a life insurance policy secured by her husband Charles, now deceased, through Modern Woodmen. The policy included an accidental death benefit in the amount of $75,000 in addition to the standard policy amount. However, the accidental death rider contained the following specific exclusion:

> No accidental death benefit will be payable if death of the insured results from, or is caused by:
>
> . . .
>
> 4) The voluntary taking or using of any hallucinogen, narcotic or drug, except on the advise (sic) of a licensed physician.

On January 20, 2005, Charles died from a prescription drug overdose. The coroner's report showed the presence of multiple drugs in his system, including methadone, diazepam, and hydrocodone. The drugs found in Charles's system at his death were all drugs he had previously been prescribed,[2] although not all of them were current prescriptions. Slone filed for the accidental death benefit from Modern Woodmen and the claim was denied on the grounds that the policy excluded from coverage any death resulting from the use of drugs not taken on the advice of a licensed physician. Slone thereafter filed suit in the Floyd Circuit Court.

[2] Although there is a question as to one of the drugs, diazepam, since Charles was prescribed a closely related drug, temazepam. Reviewing the evidence in a light most favorable to Charles for the purposes of summary judgment review, we will assume that the drug was, in fact, the one that he was prescribed.

After discovery, Modern Woodmen filed a motion for summary judgment. The trial court granted judgment and Slone now appeals.[3] On appeal, Slone argues that an issue of material fact exists as to whether the drugs found in Charles's system were taken on the advice of a physician.

Upon review, we ask whether the trial court accurately determined that there were no genuine issues as to any material fact and that Modern Woodmen was entitled to judgment as a matter of law. *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). We owe no deference to the trial court when making this inquiry. *Blevins v. Moran*, 12 S.W.3d 698, 700 (Ky. App. 2000).

In determining whether there was a genuine issue of material fact regarding whether Charles took the medications which caused his death on the advice of a physician, we must look to the evidence of record and view it in a light most favorable to Slone. *Steelvest, Inc. v. Scansteel Service Center, Inc*., 807 S.W.2d 476, 480 (Ky. 1991). The evidence of record showed that Charles's last prescription for methadone was on December 16, 2004 (approximately one month before he died); his last prescription for diazepam was on February 10, 2004 (approximately eleven months before he died); and his last prescription for

[3] As a brief note, we find no merit to the assertion that Slone's brief should be dismissed for failing to name Modern Woodmen in the body of the notice of appeal when they were named in the heading. *Morris v. Cabinet for Families and Children*, 69 S.W.3d 73 (Ky. 2002). Likewise, we are not inclined to strike Modern Woodmen's brief simply because of the margin spacing. Moreover, in regard to Modern Woodmen's argument concerning whether Slone should have appealed from the December 27, 2010, order, the trial court did not have jurisdiction to enter the order since the court lost jurisdiction once the notice of appeal was filed on December 9, 2010. *Young v. Richardson*, 267 S.W.3d 690, 695 n.2 (Ky. App. 2008).

hydrocodone was on December 28, 2001 (approximately three years before he died).

State Medical Examiner Dr. Gregory James Davis testified in his deposition that the cause of Charles's death was multiple drug intoxication. Dr. Davis testified that he could not form an opinion as to whether the medications found on the autopsy were taken on the advice of a physician. However, Dr. Davis testified that the pharmacy records indicated that Charles was not taking the medications as directed. Davis testified that medical examiners usually do not see multiple drug intoxication deaths except where the individuals are taking the medications in ways other than directed. Specifically, Davis stated as follows:

> We do approximately one to two drug intoxication deaths per day in my office in Frankfort, which covers 58 counties in central and Eastern Kentucky. The vast majority of those, in fact, *all that I can remember* are in individuals who were not taking those medications as they were directed by a physician. (Emphasis added).

Davis further testified that medications are intended to be used within the time in the SIG, or instructions, to the prescription. For example, if a medicine says take one by mouth at night, the assumption would be that a thirty-day supply would be gone within thirty days.

Dr. Natalia Shrestha, Charles's last treating physician, was also deposed. She testified that she began seeing Charles as a patient in July of 2004. A letter introduced as an exhibit to her deposition showed that Charles had been dismissed from the care of his previous doctor for seeking multiple prescriptions

from different doctors and filling them at different pharmacies. Dr. Shrestha testified, upon seeing the letter, that she was under the impression that she was his only treating physician at the time and was unaware Charles had been dismissed from the care of another doctor. Dr. Shrestha further testified that, while it is not prudent for patients to keep medications for long periods of time, she would not be surprised by a patient's retaining unused medication years after its first being prescribed. She testified that she does not specifically instruct patients to dispose of unused medicine.

Licensed pharmacist Melissa Martin testified that hydrocodone and valium are both considered "PRN" medications. However, she could not say whether Charles's prescriptions were actually PRN. She explained that PRN medications are taken on an "as needed" basis, noting that an individual may take one as often as allowed, or not at all, as needed. She suggested that a person prescribed a sleep aid, for example, may only have trouble sleeping and need to take one a few nights a week or as little as once a month. Martin testified that prescriptions are valid for six months from the time they are written. Once filled, however, the situation changes; Martin testified that she had never seen an instruction from a doctor, nor did she know of any regulation, which would require a patient to dispose of a filled prescription after a period of time. Nonetheless, Martin testified that the potency of a drug decreases over time and it is not prudent to take drugs long after they are prescribed.

Documentary evidence showed, and the trial court found, that between January 1, 1999, and January 18, 2005, there were thirteen different physicians who prescribed Charles medication.[4] In January of 2003, Charles became a patient of a Dr. Phillip Fisher in Huntington, West Virginia. A letter from Dr. Fisher's office in the record, dated February 2004, indicates that Charles was requested to come into the office for a pill count. Charles only brought in one of his prescription bottles, which contained fewer pills than it should have for the date. Fisher thereafter dismissed Charles from his practice for obtaining controlled medications from multiple physicians and filling them at multiple pharmacies, in violation of the patient agreement. Charles then sought care from Dr. Shrestha; Charles died from multiple drug intoxication (overdose) within the next year.

The question arises, then, although Charles was obviously not taking the drugs as directed, whether the drugs may still have been considered taken "on the advice of a physician" because they were drugs previously prescribed to him. The construction and interpretation of a provision in an insurance policy presents a question of law for the courts. *Kemper National Insurance Companies v. Heaven Hill Distilleries, Inc*., 82 S.W.3d 869, 871 (Ky. 2002). Further, because we are also reviewing a summary judgment, we must determine whether the trial court correctly determined that no genuine issues of material fact existed and that the moving party was entitled to judgment as a matter of law. *Scifres*, 916 S.W.2d at

[4] Moreover, because only the records of Medzone Pharmacy were introduced, and since it is clear that Charles had other prescriptions through the documentary evidence from Dr. Fisher's practice, it appears these numbers must be less than the true numbers.

781. In both instances, our review is *de novo*. *Id.; Hugenberg v. West American Ins. Company/Ohio Cas. Group*, 249 S.W.3d 174, 185 (Ky. App. 2006).

Slone argues that, although the drugs were not taken "as prescribed," they were taken "on the advice of a physician." Slone argues that the policy exclusion contains no requirement that the medications causing accidental death are taken "as prescribed," and that the trial court essentially wrote this term into the contract. Slone further argues that the trial court erred in failing to recognize that there is a rebuttable presumption that a death is accidental.

Modern Woodmen argues that Slone cannot now argue the policy was ambiguous because ambiguity was not raised before the trial court. Further, they argue that the burden of proof rests solely upon Slone to prove that Charles obtained the prescriptions in a proper manner and took them on the advice of a physician. Modern Woodmen argues that it is irrelevant whether the death was intentional or accidental because the policy rider required that the drugs causing death be taken "on the advice of a licensed physician," and they were not.

Contrary to Slone's assertion, the general standard in Kentucky is that the beneficiary of a policy of life insurance bears the burden of proving accidental death. *Commonwealth Life Ins. Co. v. Hall*, 517 S.W.2d 488, 491 - 492 n.3 (Ky. 1974)(Policy holder "ha[s] the burden of proof on the issue of accidental death"). Indeed, in this jurisdiction, "[t]here has never been a presumption of accident[.]" *Id*. Rather, the only presumption that operates is in a situation where suicide is questioned, in which case there is a rebuttable presumption against suicide. *Id*.

Slone is not entitled to recover under the terms of the policy unless the drugs found in Charles's system at the time of death were taken "upon the advise (sic) of a licensed physician." In order for Slone's claim to survive summary judgment, there must be evidence of record, when viewed in a light most favorable towards her, from which the inference could be drawn that Charles was using the drugs on the advice of a physician.

Ambiguous coverage exclusions in a policy of insurance are typically strictly construed against the insurer. *Kemper*, 82 S.W.3d at 873-874. Absent any ambiguity in the insurance contract, however, the contract shall be construed according to its "plain and ordinary meaning." *Nationwide Mut. Ins. Co. v. Nolan*, 10 S.W.3d 129, 131 (Ky. 1999). When determining whether terms in an insurance contract are actually ambiguous, we apply the "reasonable expectations doctrine," which mandates that ambiguous terms in a policy of insurance must be interpreted in favor of the insured's reasonable expectations and construed as an average person would construe them. *True v. Raines*, 99 S.W.3d 439, 443 (Ky. 2003). "Only actual ambiguities, not fanciful ones, will trigger application of the [reasonable expectations] doctrine." *Id*.

In the present case, the exclusionary language, "on the advise (sic) of a licensed physician," is not ambiguous. We shall not interpret this clear and ordinary language to mean that an individual may retain old, unused medicine and combine it with new drugs without first asking his physician, as Slone would have us do. In the present case, had Charles taken only current prescriptions, and/or

perhaps engaged in some foreseeable misuse or minor error in following doctors' orders, there might be a genuine issue of material fact raised. On the contrary, Charles took medications, prescribed by different doctors unaware of each other, two of which were not even current prescriptions. This unfortunate decision led to his death. Taking a prescription that is three years old and one that is six months old, in combination with a current prescription written by a different doctor, cannot be considered as being on the advice of a physician. If this had been a case in which a patient were prescribed all current or near-current prescriptions, and different doctors, perhaps of different specialties, had knowingly or unknowingly prescribed their use concurrently, the result might have been different. It is foreseeable that in such a situation a pharmacy or pharmacies could fail to catch the conflict between the drugs. This is not that case. Charles took prescriptions prescribed by different doctors, which were not prescribed for use concurrently, one of which was three years old.

We conclude that Slone has failed to present sufficient evidence to avoid judgment as a matter of law. Thus, we affirm the well-reasoned judgment of the Floyd Circuit Court.

ALL CONCUR.

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