

RENDERED: DECEMBER 13, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-001966-MR

HEALTHCARE UNDERWRITERS
GROUP

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES D. ISHMAEL, JR., JUDGE
ACTION NO. 08-CI-00332

MARGARET STRANGE

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: LAMBERT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: Healthcare Underwriters Group (Healthcare Group) brings this appeal from an October 18, 2012, Judgment of the Fayette Circuit Court upon a petition for declaration of rights to adjudicate entitlement to insurance coverage. We affirm.

In June 2006, Margaret Strange filed a complaint against, *inter alios*, Dr. Charles R. Combs (Action No. 06-CI-2585). Strange claimed that Dr. Combs breached the standard of care while operating upon her thumb on August 10, 2005. As a direct result of Dr. Combs' professional negligence, Strange alleged that she endured additional medical procedures, pain and suffering, lost wages, and permanent injury.

While the medical malpractice action was pending, Healthcare Group filed a Petition for Declaration of Rights (Action No. 08-CI-0332) and named, *inter alios*, Strange as a defendant. Healthcare Group had provided a professional liability insurance policy to Dr. Combs which coverage was effective during the time of his operation on Strange. In the petition, Healthcare Group maintained that an exclusion (Exclusion B) in the professional liability policy was triggered by Dr. Combs' violation of sundry medical licensure laws through his use of controlled substances during the operation. Consequently, Healthcare Group sought an adjudication that Exclusion B legally operated to bar coverage in connection with Dr. Combs' surgery on Strange.

By Opinion and Order entered September 26, 2012, in the declaratory judgment action, the circuit court determined that coverage under the professional liability policy was not excluded by Exclusion B:

Dr. Combs is an orthopedic surgeon who performed hand surgery on [Strange] at Samaritan Hospital on or about August 10, 2005. Following that surgery and after dictation of an "Operative Note", Dr. Combs collapsed and fell to the floor. He was taken to

the Emergency Room at Samaritan Hospital where he tested positive for opiates in his system. Other physicians were called in to address [Strange's] condition as Dr. Combs had been admitted to Samaritan Hospital. The situation was referred to the Kentucky Board of Medical Licensure (hereinafter "KBML") where, after an investigation and an independent review and analysis of the situation, Dr. Combs' medical license was affected.

A law suit [sic] was thereafter filed by Margaret against Dr. Combs, Kentucky Hand Center and Samaritan Hospital for alleged negligence arising out of the surgery in question. That medical negligence suit is still pending in another Division of the Fayette Circuit Court. HUG [Healthcare Underwriters Group] is a liability insurance carrier which wrote a Policy of insurance covering Dr. Combs for alleged medical negligence which covered the time period in question subject to certain Exclusions and other contractual provisions.

HUG brought this Declaratory Judgment action seeking an adjudication by this Court that HUG does not owe coverage to Dr. Combs under the circumstances of this particular surgery. The HUG coverage question would include whether there was a duty to defend Dr. Combs in the underlying medical negligence action and whether HUG also has a duty to indemnify Dr. Combs under said Policy to the event that a monetary Judgment is rendered in favor of [Strange] against Dr. Combs arising out of the surgery performed on [Strange] by Dr. Combs on or about August 10, 2005.

In its Complaint, HUG asserts that it owes no coverage, duty to defend or duty of indemnification in favor of Dr. Combs because of . . . Exclusion [B]

. . . .

Further, liability for negligence as alleged by Margaret in her underlying medical negligence law suit [sic] is not liability "resulting from" a violation of a professional licensure law. Certainly, a single act can

result in both liability for negligence and responsibility for violation of the Kentucky professional licensure law. HUG's claimed Exclusion [B] may very well be applicable to any fine or penalty invoked by KBML for violations of a licensure law but this Court can not [sic] conclude that an act of ordinary negligence in a professional service comes within that coverage exclusion.

Subsequently, the circuit court rendered a final judgment on October 18, 2012, thus precipitating this appeal.

Healthcare Group contends that the circuit court erred by denying its motion to dismiss Strange as a party to this declaratory judgment action.

Specifically, Healthcare Group alleges that Strange was not a party to its contract of professional liability insurance with Dr. Combs and possesses no interest that would be affected by the petition for declaration of rights.

The record reveals that Healthcare Group filed its petition for declaration of rights on January 23, 2008, and specifically named Strange as a defendant. Over a year later, on May 15, 2009, Healthcare Group then filed a motion to dismiss Strange as a party due to lack of standing.

Our Supreme Court recently held that "the lack of standing is a defense which must be timely raised or else will be deemed waived." *Harrison v. Leach*, 323 S.W.3d 702, 708 (Ky. 2010). Considering the procedural facts herein, Healthcare Group did not timely raise the lack of standing issue. It is undisputed that Healthcare Group named Strange as a party in the complaint and, thereafter, waited for well over a year to file a motion seeking to dismiss her as a party.

Considering the facts herein, we conclude that Healthcare Group waived the issue of standing and that the circuit court properly denied Healthcare Group's motion to dismiss Strange as a party.

Healthcare Group next argues that the circuit court improperly interpreted Exclusion B of the professional liability policy. In particular, Healthcare Group maintains:

[Healthcare Group] notes that it is unclear whether the Trial Court was making a finding of ambiguity in the policy. To wit, the Court was asked to answer the following specific question: "Does the policy exclusion cited by HUG exclude coverage for damages from alleged medical negligence if that negligence also resulted in violation of professional licensure laws?" In answering that precise question in the negative, the Court, however, also stated that the exclusion in question was capable of two reasonable interpretations, and noted that it was "at best ambiguous." As such, [Healthcare Group] asked the Court to address whether it was making a finding of ambiguity via a Motion to Alter, Amend or Vacate but this motion was denied. This is a significant question that remains.

[Healthcare Group] believes that the policy unambiguously excludes coverage as a matter of law. . . .

. . . .

HUG's position is that clause (B) excludes liability for the personal injuries allegedly suffered by Ms. Strange. Coverage is excluded because the alleged injuries were caused because Dr. Combs prescribed and consumed narcotics for himself, in violation of law, resulting in him being under the influence of narcotics and unable to properly perform the procedure in question. KRS 311.595(6), 311.597. Additionally, Dr. Combs had a fall prior to the procedure, which resulted in fractured ribs, a ruptured spleen, and internal bleeding. As

evidenced by his collapse following the procedure, Dr. Combs was in no condition to have attempted the surgery thereby violating KRS 311.595(8), which gives the Kentucky Board of Medical Licensure disciplinary powers when a licensee has been “or is unable to practice medicine according to acceptable and prevailing standards of care by reason of mental or physical illness or other condition including but not limited to physical deterioration that adversely affects cognitive, motor, or perceptive skills, or by reason of an extended absence from the active practice of medicine.”

Healthcare Group’s Brief at 7-10.

It is well-established that the interpretation and construction of an insurance contract is generally an issue of law for the court. *Stone v. Ky. Farm Bureau Mut. Ins. Co.*, 34 S.W.3d 809 (Ky. App. 2000). When the terms of an insurance contract are ambiguous, such terms should be interpreted against the drafter and in favor of effectuating coverage. *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633 (Ky. 2008); *Ky. Farm Bureau Mut. Ins. Co. v. McKinney*, 831 S.W.2d 164 (Ky. 1992).

Resolution of this issue revolves around the proper interpretation of

Exclusion B. Exclusion B provides:

This policy does not cover:

- B. Any liability resulting from any violation of any law, including but not limited to, antitrust, unfair competition, consumer protection or professional licensure laws, committed by the INSURED, at the direction of the INSURED, or with the INSURED’s consent, whether or not related to PROFESSIONAL SERVICES.

We view Exclusion B to be ambiguous. Healthcare Group urges this Court to adopt a broad interpretation of Exclusion B. This broad interpretation would effectively exclude coverage for “medical negligence if that negligence also resulted in violation of professional licensure laws.” Healthcare Group’s Brief at 7. We decline to do so. Rather, we interpret Exclusion B as barring only “liability” directly resulting from violation of the professional licensure laws. We do not interpret Exclusion B as concomitantly barring “liability” resulting from the insured’s commission of the tort of medical negligence even if a violation of professional licensure laws simultaneously occurred. In a medical malpractice action, liability results from the insured’s negligence, not from the insured’s violation of professional licensure laws. This distinction is pivotal. Therefore, we conclude that Exclusion B does not operate to exclude coverage for liability resulting from the tort of negligence allegedly committed by Dr. Combs during his operation upon Strange.

Healthcare Group also asserts that the circuit court erred by denying its motion to amend the declaratory complaint. On March 6, 2012, Healthcare Group filed a motion to amend its complaint and sought to additionally claim that the professional liability policy was subject to rescission under the terms of the policy and under Kentucky Revised Statutes (KRS) 304.14-110.

Kentucky Rule of Civil Procedure (CR) 15.01 governs amendment of a pleading; it reads:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

In this case, the record reflects that Healthcare Group filed the motion to amend the complaint only after Strange filed a responsive pleading. As a responsive pleading had been filed, the amendment of Healthcare Group's complaint was not automatic but was rather discretionary under CR 15.01. *See Graves v. Winer*, 351 S.W.2d 193 (Ky. 1961).

In determining whether to permit the amendment, the circuit court may consider factors such as “the failure to cure deficiencies by amendment . . . , the futility of the amendment, . . . prejudice [to] the opposing party or . . . injustice.” *Kenney v. Hanger Prosthetics & Orthotics, Inc.*, 269 S.W.3d 866, 869 (Ky. 2007) (citations omitted). And, it is ultimately within the discretion of the circuit court to allow an amendment to the pleading, and such ruling will not be disturbed on appeal absent an abuse of discretion. *Id.*

It must be pointed out that Healthcare Group's motion to amend was filed in 2012, some four years after it filed the original complaint in 2008.

Moreover, the record reveals that the facts underlying the motion to amend were

readily discernable and discoverable in 2008. And, Strange has set forth facts demonstrating prejudice:

There would have been unmistakable prejudice to Mrs. Strange had HUG been allowed to amend its Complaint in 2012, and that prejudice would be the same if this Court reversed the trial court's decision. Mrs. Strange filed her medical negligence action in June 2006. That action has been effectively stayed since this declaratory judgment action was filed in January 2008. Some discovery has been taken in the underlying litigation, but for the most part, the parties have been unwilling or effectively unable to pursue the case while the insurance coverage issue created by this declaratory judgment action is unresolved. If the First Amended Complaint is allowed, the parties will be required to conduct significant additional discovery, resulting in even further delay in pursuing the underlying medical negligence case against Dr. Combs. Some of that discovery will almost certainly involve taking additional depositions of HUG's corporate employees who have already been deposed, because of the new issues raised by HUG's allegations. Retaking those depositions will result in even more cost and further delay, all to the prejudice of Mrs. Strange, who deserves her day in court on her negligence claims, now approaching eight years old.

Strange's Brief at 11-12. Upon consideration of the whole, we are unable to conclude that the circuit court abused its discretion by denying Healthcare Group's motion to amend the complaint.

For the foregoing reasons, the Judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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