STATE OF MICHIGAN

COURT OF APPEALS

EVA ESMAN,

Plaintiff-Appellant,

v

THE EQUITABLE LIFE ASSURANCE SOCIETY,

Defendant-Appellee.

UNPUBLISHED
August 26, 1997

No. 196071
Macomb Circuit Court
LC No. 93-001398-CK

Before: Markman, P.J., and Holbrook, Jr., and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment entered in favor of defendant after a bench trial. We vacate the trial court's decision and remand for further proceedings..

Plaintiff purchased a disability insurance policy from defendant. In October 1986, plaintiff, a real estate broker, was injured when she tripped and fell on the sidewalk outside a house she was showing. Defendant initially paid disability benefits to plaintiff under the accident coverage provisions of the policy. In June 1988, defendant terminated plaintiff's accident benefits based on its conclusion that she suffered from degenerative arthritis (as opposed to post-traumatic arthritis) and that, in any event, she was not totally disabled by her back condition. Plaintiff then indicated to defendant that she had a heart condition. Defendant began paying sickness disability payments to plaintiff based on information that she was disabled by a heart condition. In August 1988, defendant terminated her sickness disability payments because it did not find her back condition disabling and there was no doctor certification that her heart condition was disabling, but it reinstated the sickness disability payments in January 1989 on the basis of plaintiff's heart condition.

Plaintiff filed a declaratory action seeking continuation of disability benefits beyond the age of 65. The policy provided for benefits up to age 65 if a disability was the result of sickness but provided for lifetime benefits if a disability was the result of an accident. The definition section of the policy provided in pertinent part:

ACCIDENT TOTAL DISABILITY means disability caused by injury.

> **SICKNESS TOTAL DISABILITY** means disability caused or contributed to by sickness or by any of the following:
>
> (1) hernia;
>
> (2) bodily or mental infirmity;
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> (3) bacterial infection other than that stemming from injury on the exterior of the body;
>
> (4) pregnancy or complications of pregnancy;
>
> (5) medical or surgical treatment of any of (1) through (4) above or of any sickness or disease.
>
> Disability caused or contributed to by any of (1) through (5) above is not accident total disability.

The trial court held that plaintiff's treating physician indicated that she suffered from degenerative disc disease that was aggravated by the injury resulting from the October 1986 fall. It held that her physician testified that plaintiff was totally disabled but "did not exclude this disease as a cause of her disability nor did he exclude it as a contributing factor." The court concluded that the October 1986 injury aggravated a pre-existing degenerative disease and that such a disability "is properly classified as a sickness disability since it was caused or contributed to by a sickness as that term is defined in the policy."

On appeal, plaintiff first contends that the court erred as a matter of law in its interpretation of the policy.

> An insurance policy is a contract and should be interpreted according to its plain meaning. The court is mindful of the rule of law that where the provisions of an insurance policy are uncertain or ambiguous, or the meaning is not clear, that those terms should be given such interpretation or construction as is most favorable to the insured. This rule does not mean, however, that the plain meaning of plain words should be perverted, or that a word or phrase, the meaning of which is specific and well recognized, should be given some alien construction merely for the purpose of benefiting the insured. [*Coffer v American Life Ins*, 168 Mich App 144, 148-149; 423 NW2d 587 (1988), citing *Wozniak v John Hancock Mutual Life Ins Co*, 288 Mich 612, 615; 286 NW 99 (1939).]

Where a policy is truly ambiguous, this Court has observed that the policy should be construed in favor of coverage:

> Insurance policies must be construed in accord with the ordinary and popular sense of the language used therein. * * * Insurance policies drafted by the insurer must also be

> construed in favor of the insured to uphold coverage. * * * This same rule applies to exclusion provisions in the policy. * * * To be given full effect, an insurer has a duty to clearly express the limitations in its policy. * * * A technical construction of policy language which would defeat a reasonable expectation of coverage is not favored. [*Herring v Golden State Ins Co*, 114 Mich App 148, 155; 318 NW2d 641 (1982), citing *Crowell v Federal Life and Casualty Co*, 397 Mich 614; 247 NW2d 503 (1976).]

In *Crowell*, *supra* at 623, the Michigan Supreme Court stated:

> The principal purpose for which one insures against sickness and accident is to provide indemnity for the period of inability to engage in gainful employment. In such cases, technical construction of policy language which would defeat a reasonable expectation of coverage is not favored.

In the insurance contract at issue, there is some ambiguity in the interplay of the definitions of accident total disability and sickness total disability. Taken literally, the final sentence of the definition of sickness total disability could be construed to mean that one cannot recover accident total disability if, in addition to any injury, sickness contributes in any way to one's disability. That is, it could be construed to bar recovery as accident total disability if the individual suffers from any non-accident related infirmity.

However, in construing life insurance policies in *Kangas v New York Life Ins Co*, 223 Mich 238; 193 NW 867 (1923) and *Nickola v United Commercial Travelers of America*, 372 Mich 600; 127 NW2d 309 (1964), the Supreme Court stated that clauses which provide coverage only where an accident is the *sole* cause of death, directly and independently of all other causes, should not be literally interpreted.

> In most cases a policy of this character would be of little or no value to the insured if the limiting language be literally interpreted as claimed by the defendant. Death from an external injury, unless instantaneous, is usually the result of various concurring causes. The injury sets in motion other agencies and awakens dormant internal ailments which contribute to death. These are conditions rather than causes. If such insurance contracts are to be of any value to the man who pays for the risk assumed, a construction as fair and reasonable as the limiting language will permit should be placed upon them.
>
> "We think the only reasonable interpretation to be placed upon this clause is to say that the injury must stand out as the predominant factor in the production of the result, and not that it must have been so virulent in character as necessarily and inevitably to have produced that result, regardless of all other conditions and circumstances. . . ." [*Kangas, supra* at 243-244 (citing *Driskell v Insurance Co*, 117 Mo App 362; 93 SW 880 (1906).]

The *Kangas* Court held that such clauses require the trier of fact to analyze the facts to determine what the "efficient, dominant, proximate cause" of the death was. *Id.* at 244-245.

Here, neither the trial court, nor defendant itself, construed the policy to require that an accident be *the independent cause* of the disability. The trial court construed the interplay of the two types of coverage as follows: "If an insured has suffered an injury which disables her, the insured is still entitled to accidental total disability benefits if defendant is satisfied she would be totally disabled because of the injury, alone." This interpretation is consistent with the testimony provided by defendant's agent, in which she stated: "If [plaintiff] were totally disabled due to an accident in and of itself regardless of any sickness, then [the benefits] would continue [past age 65]." This construction of the insurance contract does not bar recovery of accident benefits whenever a non-accident related sickness exists, but rather turns on whether the accident- related injuries alone would totally disable the insured. This construction gives meaning to the definitions contained in the contract without defeating the insured's reasonable expectations of coverage. Accordingly, here, unlike in *Kangas*, there is no need to resort to resort to a standard (e.g., the "predominant factor" test) outside of the contract in order to avoid defeating the insured's reasonable expectations.

While we find no error in the court's articulation of the appropriate standard under the insurance contract, we question whether it properly applied the standard here. The only evidence regarding plaintiff's back condition was provided by plaintiff's treating physician. In an August 1995 deposition, plaintiff's treating physician testified that he believed she was currently disabled. He testified that her symptoms began after the October 1986 fall. He stated that there was evidence of degenerative arthritis but that it, alone, would not have rendered her disabled. He stated that "[m]ost of what she has is post-traumatic arthritis" and concluded that plaintiff "had degenerative arthritis compounded by and aggravated first after the trauma of the fall." In its opinion, the trial court concluded that plaintiff's disability was properly classified as sickness total disability because the physician did not exclude disease as a cause or contributing factor of the disability. The proper standard is whether the injuries plaintiff incurred in the October 1986 accident totally disabled her, regardless of any non-accident related ailments.

On remand, the trial court should re-examine the evidence (receiving additional evidence, if necessary) to determine whether plaintiff was totally disabled by injuries sustained in the accident, regardless of the existence of any non-accident related sickness or infirmity. If the court so finds, plaintiff would be entitled to accident total disability benefits under the policy. If it finds to the contrary, then plaintiff would not be so entitled.

We vacate the trial court's decision and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen J. Markman
/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell