STATE OF MICHIGAN

COURT OF APPEALS

DONALD WOJCIECHOWSKI, JR., Personal Representative of the Estate of DONALD WOJCIECHOWSKI, Deceased, Plaintiff/Counter Defendant-Appellee,	UNPUBLISHED August 6, 2002
v	No. 228683 Wayne Circuit Court
FRANKLIN LIFE INSURANCE COMPANY, Defendant/Counter Plaintiff-Appellant.	LC No. 99-933834-CK

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order denying defendant's motion for summary disposition, dismissing defendant's counterclaim, granting plaintiff's motion for summary disposition, and entering a judgment for plaintiff. We reverse.

In 1988, Donna Wojciechowski, deceased, was diagnosed with breast cancer and subsequently began receiving treatments. Donna's medical records show that she was still being treated for conditions associated with breast cancer in 1994 and 1995. Additionally, Donna was diagnosed with anorexia and degenerative disc and joint disease in 1995.

On December 27, 1995, Donna and her husband, Donald Wojciechowski, deceased, purchased a used car from John Rogin Buick, Inc. On the same day, they applied for group credit life insurance in connection with the purchase of the car. The life insurance was underwritten by defendant. The application for the life insurance policy provided, in part, the following:

> You are applying for the credit insurance marked above. You should understand that untruthful answers to these questions may cancel your insurance protection.
>
> If it is the decision of the Company not to accept the risk based on the evidence of insurability provided, the insurance will be terminated and a refund of premium paid will be made within 60 days of the date of this Application for Insurance.

> 1. In the past 24 months, have you been treated for or diagnosed as having any of the following: stroke, cancer, acquired immune deficiency syndrome (AIDS), any disease of the heart, lungs, kidneys or liver, insulin dependent diabetes, digestive system, chemical dependency or mental or nervous disorder?
>
> 2. In the past 24 months, have you been treated for or diagnosed as having any disease or disorder of the bones, joints, back or spine, or during the past month, been restricted by reasons of health from full-time, active employment?

Donna answered "no" to both of these questions on the insurance application and they were given an insurance policy that became effective the same day.

Donald and Donna made all of their monthly payments on the car and insurance until Donna died on September 24, 1997. After discovering Donna's medical history, defendant rescinded the Wojciechowskis' life insurance policy and refused to pay the benefits. After Donald died, his son, Donald Wojciechowski, Jr. (hereinafter referred to as "plaintiff"), was appointed as personal representative of the estate. When defendant still refused to pay the benefits of the life insurance policy, plaintiff filed a complaint against defendant, alleging breach of contract. Defendant filed a countercomplaint against plaintiff, seeking a declaratory judgment that the Wojciechowskis' life insurance policy was properly rescinded and that defendant did not have any obligations to plaintiff or any other party under the policy.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that it was entitled to rescind the life insurance contract because Donna misrepresented her medical condition on the insurance application. Plaintiff then filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no evidence that Donna knowingly misrepresented her medical condition when applying for the life insurance. Plaintiff argued that, even if the information Donna supplied on the insurance application was inaccurate, defendant was not entitled to rescind the insurance contract because it had failed to take any action on the insurance contract until Donna died, which was over six months after the application for the policy.

The trial court entered an order denying defendant's motion for summary disposition, dismissing defendant's counterclaim, granting plaintiff's motion for summary disposition, and entering judgment for plaintiff. The trial court denied defendant's motion for summary disposition and dismissed defendant's counterclaim because it determined that "no treatment or diagnosis as listed on the medical application form for the insurance policy was made within 24 months prior to the date of [the] insurance application." The trial court granted plaintiff's motion for summary disposition because it determined that "Plaintiff is entitled to benefits under the insurance policy at issue, based upon Defendant's failure to terminate the policy and refund the premium paid within 60 days of the date of application, as set forth on the face of the application." The trial court then ordered that a final judgment be entered in favor of plaintiff for $10,190.50.

Defendant argues that the trial court erred in granting plaintiff's motion for summary disposition based on the sixty-day provision in the life insurance contract and consequently erred in denying its motion for summary disposition. Defendant argues that the trial court erred in interpreting the insurance policy to mean that defendant was required to terminate the insurance

policy within sixty days of the application when the applicant provided false information on the application. Defendant argues that the sixty-day termination time restriction only applies to the information provided on the application, not to false omissions from the application.

The parties filed their motions for summary disposition pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). The trial court must consider affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the nonmoving party. *Maiden*, *supra*. The moving party is entitled to a judgment as a matter of law when the proffered evidence fails to establish a genuine issue as to any material fact. *Id.* The grant or denial of a motion for summary disposition is reviewed de novo. *Travelers Ins Co v Detroit Edison Co*, 465 Mich 185, 205; 631 NW2d 733 (2001). Likewise, the interpretation of the unambiguous contractual language of an insurance policy is a question of law that is reviewed de novo on appeal. *Marlo Beauty Supply, Inc v Farmers Ins Group of Cos*, 227 Mich App 309, 316; 575 NW2d 324 (1998), modified on other grounds *Harts v Farmers Ins Exchange*, 461 Mich 1, 10-11; 597 NW2d 47 (1999).

> An insurance policy is much the same as any other contract. It is an agreement between the parties in which a court will determine what the agreement was and effectuate the intent of the parties. Accordingly, the court must look at the contract as a whole and give meaning to all terms. Further, "[a]ny clause in an insurance policy is valid as long as it is clear, unambiguous and not in contravention of public policy." This Court cannot create ambiguity where none exists. [*Auto-Owners Ins Co v Churchman*, 440 Mich 560, 566-567; 489 NW2d 431 (1992) (citations omitted).]
>
> Contract language is to be given its ordinary and plain meaning, and technical and constrained constructions should be avoided. The determination whether contract language is ambiguous is a question of law subject to review de novo on appeal. An insurance contract is clear if it fairly admits of but one interpretation. An insurance contract is ambiguous if, after reading the entire contract, its language can be reasonably understood in differing ways. Ambiguous terms in an insurance policy must be construed against the drafter and in favor of the insured. [*Wilkie v Auto-Owners Ins Co*, 245 Mich App 521, 524; 629 NW2d 86 (2001) (citations omitted).]

If an insurance contract's language is unambiguous, its construction is a question of law for the court. *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). An insurance policy and the statutes related to the policy must be read and construed together as though the statutes were a part of the contract. *Depyper v Safeco Ins Co of America*, 232 Mich App 433, 437; 591 NW2d 344 (1998), quoting *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 525, n 3; 502 NW2d 310 (1993).

In the instant case, Donna represented on the insurance application that, during the previous twenty-four months, she had not been treated for or diagnosed as having any of the medical conditions listed on the application. However, according to her undisputed medical records, during the previous twenty-four months, Donna had been treated for and diagnosed with several of the medical conditions listed on the application, including breast cancer, anorexia, and

degenerative joint disease. Insurers are permitted by MCL 500.2218 to void an insurance policy "where there has been a material misrepresentation of fact which affected either the acceptance of the risk or the hazard assumed by the insurer." *Wiedmayer v Midland Mut Life Ins Co*, 414 Mich 369, 374; 324 NW2d 752 (1982).

> A false representation in an application for insurance which materially affects the acceptance of the risk entitles the insurer to cancellation *as a matter of law*. [*Id.* at 375, quoting *General American Life Ins Co v Wojciechowski*, 314 Mich 275, 282; 22 NW2d 371 (1946) (emphasis in *Wiedmayer*).]

In order for an insurer to have the right to rescind an insurance contract based on fraud or misrepresentation, the insurance contract need not affirmatively provide for cancellation under such circumstances. *Wiedmayer*, *supra* at 375. "A misrepresentation is a false representation,[[1]] and the facts misrepresented are those facts which make the representation false." MCL 500.2218(2). Regardless of whether Donna believed that her representations in the insurance application were true, they were actually false. A false answer on an insurance application is a misrepresentation. See *Oade v Jackson Nat Life Ins Co of Michigan*, 465 Mich 244, 251-253; 632 NW2d 126 (2001).

In regard to the materiality of misrepresentations, MCL 500.2218(1) provides:

> No misrepresentation shall avoid any contract of insurance or defeat recovery thereunder unless the misrepresentation was material. No misrepresentation shall be deemed material unless knowledge by the insurer of the facts misrepresented would have led to a refusal by the insurer to make the contract. [MCL 500.2218(1).]

> [A] fact or representation in an application is "material" where communication of it would have had the effect of "substantially increasing the chances of loss insured against so as to bring about a rejection of the risk or the charging of an increased premium." [*Oade*, *supra* at 254 (citation omitted).]

Defendant presented evidence that it relied on Donna's misrepresentation through an affidavit of one of their claims coordinators that defendant would have denied Donna's insurance application if she had answered the medical history questions accurately. Plaintiff did not submit any evidence disputing that Donna's misrepresentations were material. Therefore, Donna's statements on the insurance application were material misrepresentations.

In plaintiff's motion for summary disposition and response to defendant's motion for summary disposition, he argued that there was evidence that Donna made her representations regarding her medical history in good faith and without fraudulent intent. "However, it is unnecessary for an insurer to show fraudulent intent in order to cancel an insurance policy where an applicant makes a material misstatement concerning prior medical history." *Legel v American*

[1] "A representation is a statement as to past or present fact, made to the insurer by or by the authority of the applicant for insurance or the prospective insured, at or before the making of the insurance contract as an inducement to the making thereof." MCL 500.2218(2).

Comm Mut Ins Co, 201 Mich App 617, 618; 506 NW2d 530 (1993). An insurer can properly cancel a policy for an innocent material misrepresentation when the insurance policy allows for it. *Id*. at 618-620. Therefore, we find that the fact that Donna's answers on the insurance application may have been innocent does not change our conclusion that they were material misrepresentations.

Although Donna made material misrepresentations on her insurance application, defendant did not make any attempt to cancel the Wojciechowskis' insurance before Donna died on September 24, 1997. Therefore, defendant's termination of the Wojciechowskis' insurance policy was not made within sixty days of the Wojciechowskis' application for the insurance policy. Accordingly, the question is whether the sixty-day provision in the insurance contract prevented defendant from terminating the insurance policy after sixty days when Donna provided false information on the application. We find that it did not.

The insurance contract states that defendant could terminate an applicant's insurance within sixty days of the application "[i]f it is the decision of the Company not to accept the risk *based on the evidence of insurability provided* . . . ." (Emphasis added.) This provision clearly means that defendant could terminate an applicant's insurance within sixty days based on the medical background information provided by the applicant, but it does not state that defendant had to terminate the insurance policy within sixty days based on information *not included* in the application, such as inaccurate omissions regarding the applicant's medical history. In fact, the insurance contract states, "You should understand that untruthful answers to these questions may cancel your insurance protection." We conclude that the sixty-day restriction in the insurance contract does not apply to this provision regarding the cancellation of insurance based on inaccurate answers. Instead, the sixty-day restriction on termination of insurance only applies to defendant's decision to terminate the policy based on the information provided by the applicant. There is no language in the insurance contract that disallows defendant from terminating an insurance policy after sixty days of the application when the termination is based on the applicant's providing of inaccurate information.

In this case, defendant decided not to terminate the Wojciechowskis' insurance based on the information provided by Donna that she had not been treated for or diagnosed with any of the listed medical conditions within the previous twenty-four months. However, because defendant found out after Donna's death that she had answered the questions about her medical history inaccurately, defendant had the right under the insurance contract to terminate Donna's insurance beyond sixty days of her application for the insurance.

Furthermore, the insurance contract contains the following statement regarding termination of an insurance policy:

> **WHAT THE CONTRACT IS AND HOW YOUR STATEMENTS AFFECT IT.** The Group Policy, the Application, and the Certificate of Insurance are the complete contract of insurance. All statements made by you in requesting insurance coverage from us are considered to have been made to the best of your knowledge and belief. No statement made by you can be used to void this insurance or deny a claim unless that statement is in writing and signed by you. *After your insurance has been in force for two years, no statement by you can be*

> *used to void this insurance or deny a claim unless that statement was made fraudulently*. [Italics added.]

This provision, when read together with the sixty-day provision of the insurance contract, gives further support for defendant's interpretation of the contract, which allows defendant to terminate the insurance contract based on inaccurate information after sixty days of the application. When read together, these two provisions of the contract set the following time restrictions on defendant: (1) defendant must terminate an insurance policy based on the information provided by the applicant within sixty days of the application for insurance; (2) defendant must terminate an insurance policy based on inaccurate information within two years of the insurance being active; and (3) defendant may terminate an insurance policy at any time based on an applicant's fraudulent statements.

In sum, defendant had the right to cancel the Wojciechowskis' insurance policy due to Donna's material misrepresentation concerning her medical history on the application for insurance. Therefore, the trial court erred in granting plaintiff's motion for summary disposition and denying defendant's motion for summary disposition. Given our disposition above, we need not address defendant's other issues on appeal. We reverse the trial court's order and remand with instructions to enter an order denying plaintiff's motion for summary disposition, granting defendant's motion for summary disposition, and dismissing plaintiff's complaint.

Reversed and remanded. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Kurtis T. Wilder