IN THE COURT OF APPEALS OF IOWA

No. 2-377 / 11-1693
Filed August 8, 2012

BETTY YUNEK,
Plaintiff-Appellant,

vs.

CONTINENTAL CASUALTY COMPANY,
Defendant-Appellee.

Appeal from the Iowa District Court for Calhoun County, William D. Ostlund, Judge.

Plaintiff appeals the district court's grant of summary judgment in favor of the insurer that denied her benefits of a long-term care policy. **REVERSED AND REMANDED.**

Joel J. Yunek of Yunek Law Firm, P.L.C., for appellant.

Kent A. Gummert of Gaudineer, Comito & George, L.L.P., West Des Moines, and Jan M. Michaels and Stephen A. Skardon of Michaels & May, P.C., Chicago, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

TABOR, J.

This dispute arises from Continental Casualty Company's denial of benefits to Betty Yunek, the holder of a long-term care insurance policy. Yunek sued Continental, contending the insurer wrongly refused to pay for her care at the Shady Oaks Care Center in Lake City. The district court granted Continental's motion for summary judgment, deciding that no reasonable jury could find that Yunek was "chronically ill"—or more specifically that she required substantial supervision due to a "severe cognitive impairment"—under the terms of her policy.

On appeal, Yunek argues that summary judgment was improper because she produced statements from health care professionals who believed that she required substantial supervision due to her progressing dementia. Because Yunek's evidence established a genuine dispute over a material fact, we reverse the grant of summary judgment and remand for a trial on the merits.

I. Background Facts and Proceedings

Betty Yunek has carried long-term care insurance from Continental Casualty Company[1] since February 1998. Her policy covered extended care expenses in a nursing facility if required by chronic illness.

Yunek started experiencing memory problems in 2008. At that time, Yunek's primary care provider was Nancy Flink, a physician assistant at the McCrary-Rost Clinic in Lake City. On December 11, 2008, Flink diagnosed her eighty-year-old patient as having possible dementia and set up a consultation

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[1] The record also identifies the insurer as CNA Long-Term Care.

with neurologist Aamer Habib. On January 7, 2009, Dr. Habib examined Yunek, who described having trouble with her memory and difficulty thinking. Dr. Habib diagnosed her with mild Alzheimer's dementia.

Yunek lived with her husband—who acted as her caretaker—until his death in June 2009. After Yunek's husband died, Flink received telephone calls from Yunek's neighbors who expressed concern about her condition. Yunek's family members also realized she was not doing well living alone and were worried for her safety. Prompted by her deteriorating mental condition, Flink and Yunek's family persuaded her in July 2009 to move from her home to Shady Oaks, a long-term care facility.

On July 11, 2009, Joel Yunek, her son and attorney in fact, filed a claim under her Continental policy to provide for her care at Shady Oaks. The policy covered qualified long-term care in a nursing facility, including "[n]ecessary diagnostic, preventative, therapeutic, curing, treating, mitigating, and rehabilitative services . . . [as] required by a [c]hronically [i]ll individual." The policy defines "chronically ill" as being:

> [c]ertified by a licensed health care practitioner as:
>
> 1. Being unable to perform (without substantial assistance from another individual) at least 2 Activities of Daily Living for a period of at least 90 days due to a loss of functional capacity, or
>
> 2. Requiring substantial supervision to protect [the policy holder] from threats to health and safety due to severe Cognitive Impairment.

The policy defines a "licensed health care practitioner" as "[a]ny physician, registered professional nurse, or licensed social worker."

Continental denied Yunek's claim on September 22, 2009, finding she was not "chronically ill" under either prong of the policy's definition. On October 7, 2009, Joel Yunek asked Continental to reconsider its denial of benefits. He enclosed an October 2, 2009 letter from Flink, who certified that Betty Yunek met the definition of chronically ill and required "substantial supervision" to protect her because she had problems with memory, reasoning, and judgment caused by Alzheimer's dementia. Continental confirmed its denial of benefits about one month later.

On January 26, 2010, Joel Yunek sought to appeal the insurer's decision. In response, Continental requested additional information and clarification from Dr. Habib. The neurologist replied that Betty Yunek's living alone after her husband's death worsened her Alzheimer's dementia and sparked the need for "substantial supervision" to protect her health and safety. In March 2010, Continental once again upheld its original denial of benefits, citing no clinical evidence that Betty Yunek met the policy's definition of chronically ill.

Joel Yunek then asked the Iowa Insurance Division to order an independent review of the decision. Continental complied with the request and submitted the claim decision to Clinix Healthcare, an independent insurance claims review provider for the division. Clinix found that the documentation submitted did not include certification by a licensed health care professional that Betty Yunek had a severe cognitive impairment and upheld Continental's denial of benefits.

Yunek filed a breach of contract claim against Continental on June 8, 2010. The suit sought the "daily benefit amount" allowed under her policy from the date of her admission to Shady Oaks to the time of judgment, plus return of premiums paid in the interim due to the waiver of premium provision of the policy, plus interest and costs, as provided by law. In early August 2011, Yunek filed and the court granted a motion to expand the period of the claim from July 2009 to April 2011.

Continental moved for summary judgment, addressing the claim through April 2011. Yunek filed a resistance to the summary judgment motion. The district court granted summary judgment for Continental. Yunek appeals.

II. Scope and Standards of Review

We review summary judgment orders for correction of legal errors. Iowa R. App. P. 6.907; *Hamm v. Allied Mut. Ins. Co.*, 612 N.W.2d 775, 777 (Iowa 2000). Summary judgment is proper only when the moving party demonstrates that the record is devoid of any genuine issue of material fact and that it is entitled to judgment on the merits as a matter of law. *Bill Grunder's Sons Constr. Co. v. Ganzer*, 686 N.W.2d 193, 196 (Iowa 2004). An issue involves a material fact when it may affect the outcome of the case and genuine when reasonable minds can resolve it differently. *Peak v. Adams*, 799 N.W.2d 535, 542 (Iowa 2011). In deciding whether the moving party is entitled to summary judgment, we review the evidence from the perspective most favorable to the nonmoving party and consider all reasonable inferences supported by the record. *Id.* at 542–43.

The construction and interpretation of an insurance policy is also a question of law. *Essex Ins. Co. v. Fieldhouse, Inc.,* 506 N.W.2d 772, 775 (Iowa 1993). If the language of a policy is susceptible to more than one interpretation it is ambiguous, and we must construe the meaning of the terms. *First Newton Nat'l Bank v. Gen. Cas. Co.,* 426 N.W.2d 618, 628 (Iowa 1988). We read ambiguous terms in the light most favorable to the insured, because insurance policies are contracts of adhesion. *Id.*

III. Analysis

A. Late Filing

Continental contends, in a footnote, that we should deny as untimely Yunek's appeal because she filed her proof brief on December 15, 2011, one day past its deadline. In support of this assertion, Continental cites Iowa Rule of Appellate Procedure 6.901(1)(a), which establishes deadlines for appellants' proof briefs. Relegating the discussion of an appellate claim to a footnote generally is not sufficient to preserve error. *See State v. Schweitzer*, 646 N.W.2d 117, 121 (Iowa Ct. App. 2002).

But even if we were to consider the timeliness of appellant's brief, we would look to rule 6.1202(1)(a), which states:

> When an appellant fails to comply with an appellate deadline, the clerk shall serve a notice stating that the appeal will be dismissed unless the appellant cures the default by performing the overdue action within 15 days of issuance of the notice. If the appellant fails to cure the default, the clerk shall enter an order dismissing the appeal.

In addition, rule 6.1202(2) states the penalty for failing to comply with an appellate deadline is a $150 fine to the attorney of a party receiving a default

notice from the Clerk of the Supreme Court. Because Yunek cured her default by filing the proof brief within fifteen days of the deadline as required by rule 6.1202(1)(a), we decline to follow Continental's suggestion that we dismiss this appeal as a remedy for the late filing.

B. Preservation of Error

Continental also asserts we should not reach the merits of this case for two reasons: (1) Yunek failed to specify in her brief how she preserved error; and (2) she did not preserve error on her appellate claim that the phrase "severe cognitive impairment" was ambiguous.

Iowa Rule of Appellate Procedure 6.903(2)(g)(1) requires the argument section of an appellant's brief to include "a statement addressing how the issue was preserved for appellate review, with references to the places in the record where the issue was raised and decided." Continental is correct that Yunek's brief fails to comply with this rule. We are not bound to consider the position of a party who fails to follow the rules of appellate procedure, and such a failure can result in summary disposition. *See Hanson v. Harveys Casino Hotel*, 652 N.W.2d 841, 842 (Iowa Ct. App. 2002). But in some situations, as a matter of grace, we will decide an appeal despite rule violations, so long as we can do so without assuming a partisan role. *See State v. Stoen*, 596 N.W.2d 504, 507 (Iowa 1999); *Nadler v. Treptow*, 166 N.W.2d 103, 104 (Iowa 1969); *In re Estate of DeTar*, 572 N.W.2d 178, 181 (Iowa Ct. App. 1997). Because her brief is otherwise compliant with our rules, we opt to reach the merits of the summary judgment ruling.

We next address Continental's contention that Yunek never presented the issue of contract interpretation to the district court. Specifically, Continental argues Yunek waived the right to argue on appeal that the terms "severe" and "cognitive impairment" are ambiguous, because she did not raise that claim in resisting summary judgment in the district court.

The district court ruled the facts entitled Continental "to judgment under the clear terms of the policy." To reach this determination, the district court must have considered the meaning of the policy terms and detected no ambiguity. Because the district court contemplated whether the terms were ambiguous, we find the principles of error preservation are satisfied. *See Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 28 (Iowa 2005) (finding nonmoving party could raise issue on appeal that it did not advance before the district court because the district court considered the issue in ruling on motion for summary judgment).

C. Merits

Yunek's breach-of-contract suit against Continental hinges on the definition of "chronically ill" in the insurance policy. The policy defines a chronic illness in two ways; Yunek asserts that she meets the second of those definitions: that she has been "certified by a licensed health care practitioner as: . . . requiring substantial supervision to protect [herself] from threats to health and safety due to severe Cognitive Impairment." The policy defines cognitive impairment as "[a] deficiency in [the policy holder's] short- or long-term memory,

orientation as to person, place and time, deductive or abstract reasoning, or judgment as relates to safety awareness."

The qualifier "severe" is not defined in the policy. To determine the ordinary meaning of a contract term, we often resort to the dictionary. *See Harrington v. Univ. of N. Iowa*, 726 N.W.2d 363, 368 (Iowa 2007). In relation to a medical condition, "severe" means "to a great degree." Webster's New Collegiate Dictionary 1054 (1st ed. 1981). Accordingly, a "severe cognitive impairment" could reasonably be interpreted as a great degree of deficiency in any of the following: short-term memory, long-term memory, orientation to person, place, and time, deductive reasoning, abstract reasoning, or judgment as relates to safety awareness.

The district court decided that "the undisputed facts show Yunek did not meet the definition of cognitive impairment." The court found she was admitted to the care center with a diagnosis of "mild to moderate dementia" and quoted Dr. Habib's opinion that if she "were left alone at home she would get worse more quickly and may harm herself." But the court noted the policy language required the insured's need for substantial supervision be "due to" the factual existence of a severe cognitive impairment. The court did not find the evidence supported that connection, assessing her situation as follows: "Yunek required substantial supervision because she was a lonely and occasionally forgetful widow in declining health who ought not be left alone, but she did not require supervision because of the existence of any severe deficiency in memory, orientation, reasoning or judgment related to safety awareness."

The district court concluded that under the "clear terms" of Continental's policy, "no reasonable jury could find that she meets the definition of Chronically Ill."

On appeal, Yunek argues that a factual dispute does exist as to whether her Alzheimer's disease constitutes a "severe cognitive impairment" qualifying her for benefits. Yunek highlights evidence in the summary judgment record regarding her mental condition from physician assistant Nancy Flink, Dr. Habib, and Shady Oaks nursing director Dottie Dorman—none of which was discussed in the district court's ruling.

Flink wrote a letter dated October 2, 2009, stating

> Betty is afflicted with Alzheimer's dementia. She is able to perform some of the activities of daily living. She requires substantial supervision to protect herself due to her disease which affects both short term and long term memory orientation as to person, place and time, deductive and abstract reasoning and judgment as it relates to safety awareness.

Flink believed Yunek needed supervision when bathing, eating, dressing, taking medications, and so that she did not wander outside of a safe environment. In the letter, Flink "certified" that Yunek met the definition of "chronically ill" in the long-term care policy. The record also included Flink's deposition testimony that she provided primary care for Yunek for years and could see from their more recent interactions that her mental status was declining.

Yunek also submitted evidence from Dr. Habib. On December 17, 2009, Dr. Habib wrote to the insurance company that Yunek "has been under my care since January of 2009 regarding her Alzheimer's dementia and for the same reason she needs supervision regarding her health and also safety." Dr. Habib

also opined in a February 1, 2010 letter that Yunek's dementia had progressed by December 2009 and that since her husband died "she requires substantial supervision to protect her from threats to her health and safety." The record likewise included Dr. Habib's deposition testimony that Yunek needed monitoring to be sure that she ate meals and took the medications that she was prescribed for serious physical ailments.

In addition, Yunek offered the deposition testimony of nurse Dorman, who described Yunek's attempts to leave the care facility unsupervised. Dorman testified that Yunek's cognitive decline had been the "topic of risk discussions" among the staff at the facility.

Continental argues on appeal that Yunek's witnesses are contradicted by her own admissions and medical and nursing records. We first address Continental's assertion that Yunek "admitted in response to an interrogatory that no doctor, physician's assistant or Licensed Health Care Practitioner had ever informed her that she suffered from a severe Cognitive Impairment." The district court declined to base its summary judgment ruling on that assertion, pointing out: "Yunek's admission only shows her ignorance of any impairment, not that some impairment did not in fact exist." We agree that Continental has taken Yunek's interrogatory answer out of context.

We also believe that Continental has mischaracterized Dr. Habib as giving "undisputed testimony" that Yunek "did not suffer from a severe cognitive impairment as of June 15, 2011." The neurologist said in his deposition that Yunek did not have a "severe stage of Alzheimer's dementia" by that date. Dr.

Habib testified that severe Alzheimer's is not necessarily the same as "severe cognitive impairment." According to the neurologist, the phrase "severe cognitive impairment" is not used by the medical community. The doctor explained: "[W]e only use the term like mild cognitive impairment, and then you go along the dementia. So I'm not sure what are the criteria when you call it severe cognitive impairment." Continental cannot show the absence of a genuine issue of material fact based on Dr. Habib's testimony. When we afford Yunek all legitimate inferences from Dr. Habib's testimony, we cannot accept Continental's claim that the assessments in Dr. Habib's letters are "belied by his medical opinion."

Continental strives to discredit Dr. Habib's views by noting that he composed the letters at Joel Yunek's request and did not have sufficient observations of Betty Yunek to back his concerns about her supervision. But credibility determinations are for the ultimate finder of fact. *Frontier Leasing Corp. v. Links Eng'g, LLC*, 781 N.W.2d 772, 776 (Iowa 2010). When considered in the light most favorable toward Yunek, the opinions expressed by the neurologist support a finding that her need for substantial supervision was related to her failing memory. Whether her cognitive impairment could be considered "severe" stands as a disputed question of fact. We believe that a reasonable jury could consider Dr. Habib's opinions and conclude that Yunek meets the definition of chronically ill in the insurance policy. Accordingly, summary judgment should not have been granted.

We also believe the evidence submitted from Flink and Dorman is sufficient to raise a genuine issue regarding Yunek's eligibility for long-term care benefits. The summary judgment order overlooked the opinions of these health care practitioners, including the letter from Flink in which she expressly certifies that Yunek, who has been her patient for ten years, requires substantial supervision due to her Alzheimer's dementia. "[A] trial court does not have the liberty on summary judgment to ignore evidence merely because it deems other evidence more credible." *Vargas-Colon v. Hosp. Damas, Inc.*, 597 F.Supp.2d 290, 295 (D. P.R. 2009); *see also Hand v. Cent. Transp., Inc.*, 779 F.2d 8, 11 (6th Cir. 1985) ("It is not the province of the district court on summary judgment to balance or ignore evidence submitted by either party, unless that evidence as a matter of law is without basis.").

We conclude that the evidence offered by Yunek's care givers revealing her inability to manage her medications and describing significant lapses in her short-term and long-term memory should have precluded the grant of summary judgment. Determining whether the symptoms she exhibited in these incidents reach the threshold for a "severe cognitive impairment" is a question for the jury. We find Continental failed to meet its burden and the district court erred in granting a summary judgment in its favor.

REVERSED AND REMANDED.