TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-15-00378-CV

James Hansen, Appellant

v.

Lonnie Roach and Bemis, Roach & Reed, Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT
NO. D-1-GN-14-001213, HONORABLE KARIN CRUMP, JUDGE PRESIDING

MEMORANDUM OPINION

Appellant James Hansen sued appellees Lonnie Roach and Bemis, Roach & Reed (collectively, "Roach") for legal malpractice, alleging that Roach failed to timely file an appeal from a trial court's ruling in Hansen's suit against an insurance company. After a bench trial, the trial court ruled in Roach's favor and ordered that Hansen take nothing. Hansen appeals from the trial court's judgment. We will affirm.

BACKGROUND

Hansen is a former neurosurgeon.[1] On June 5, 2010, he suffered a severe injury while mountain biking that rendered him disabled and unable to return to work. Before June 5, 2010,

[1] Both the insurance-policy case and the legal-malpractice case were tried as bench trials with stipulated facts. The facts in this section are taken from the joint stipulation of facts that the parties filed in both cases and the other documents submitted in the legal-malpractice case that the parties stipulated would have been the record from the insurance-policy case if the judgment in that case had been timely appealed.

Hansen practiced neurosurgery through his professional association, Austin Neurosurgical & Spine Institute, P.A. ("Austin Neurosurgical"). Hansen was the only member and director of Austin Neurosurgical.

Before Hansen's injury, he had obtained two types of disability-insurance policies issued by The Northwestern Mutual Life Insurance Company. One type of policy was a disability-income policy, which replaces lost income resulting from disability. The other type was an overhead-expense policy that provides coverage for overhead expenses to allow the continuing operation of the insured's business if the insured person becomes disabled.[2] After his injury, Hansen submitted claims for benefits under both types of policies. Northwestern Mutual began paying Hansen monthly benefits under his disability-income policies but denied his claim for benefits under the overhead-expense policy. In November 2010, Northwestern Mutual informed Hansen in a letter that it was denying benefits under this policy because it had determined that "the operation of the business has ended." The letter stated:

> The business or professional practice that Dr. Hansen was engaged in at the time his disability started was that of neurosurgery. Dr. Hansen admits that he was the practice. Because he was a solo practitioner and he cannot perform the duties of his practice, there is no practice. Without a practice, the operation of the business (as that term is defined by the policy) has ended.

[2] Although Hansen purchased two overhead-expense policies, we will treat them as one because the trial courts and the parties have done so throughout both cases. The parties have stipulated that the combined maximum amount of benefits available under both policies would be $600,000.

Hansen retained Roach as his attorney and filed suit against Northwestern Mutual in December 2010, seeking to recover benefits under the overhead-expense policy. The case was tried to the bench on stipulated facts, which included the following, among others:

- Northwestern Mutual determined that Hansen "met the definition of Total Disability under both the Disability Income and Overhead Expense Policies from June 5, 2010" through the time of the stipulation.
- Hansen had not returned to his practice, treated patients, or performed surgeries after his injury on June 5, 2010.
- Austin Neurosurgical had not provided any medical services to patients after Hansen's injury on June 5, 2010.
- Hansen and Austin Neurosurgical had not employed any other neurosurgeons after the date of Hansen's injury to continue the operation of his business.
- No other neurosurgeons were practicing with Austin Neurosurgical before or after the date of Hansen's injury.
- Hansen terminated his medical-malpractice insurance coverage in October 2010.
- Hansen surrendered his Texas medical license on April 8, 2011.
- In answer to a question about when he "closed [his] practice" in a March 2011 deposition, Hansen testified, "[k]ind of officially about a month after my injury, so it would have been early July last year."
- Hansen testified in a June 2011 deposition that he had closed his office, that he did not have any employees, and that he had sent letters to all of his patients advising them that he was closing his practice.
- The total amount of possible benefits under the overhead-expense policy was $600,000.
- Hansen still had overhead expenses that exceeded the maximum benefit amount of $25,000 per month.

In its conclusions of law, the trial court determined that Northwestern Mutual had breached its contract with Hansen when it denied his claim under the overhead-expense policy and that Hansen was "entitled to recover monthly benefits under the terms of the policies." The trial court further concluded that under the policy's benefit-termination provision, Hansen's "entitlement to monthly benefits ended on the date he surrendered his medical license." The trial court ordered that Hansen was entitled to recover $201,827.96 in monthly disability benefits, $6,056.01 as a premium refund, $105,203.70 in statutory interest, and $80,000 in attorney's fees. Hansen informed Roach that he wanted to appeal the ruling. Roach filed the notice of appeal after the appellate deadline. This Court subsequently dismissed the appeal for want of jurisdiction. *See Hansen v. Northwestern Mut. Life Ins. Co.*, No. 03-13-00844-CV, 2014 WL 1279725 (Tex. App.—Austin Mar. 26, 2014, no pet.).

Hansen filed this legal-malpractice suit against Roach for failure to file a timely appeal. In response to Hansen's requests for admissions, Roach admitted that he failed to timely file a notice of appeal and that his failure to do so constituted negligence. The legal-malpractice suit was tried to the bench on stipulated facts. At the legal-malpractice trial, Hansen contended that on appeal he would have sought and been awarded the approximately $400,000 in benefits remaining under the policy after April 8, 2011, arguing that his business did not end on that date because disposition of the business's liabilities (including monthly lease payments) and its assets was still continuing. The trial court ruled in favor of Roach, determining that the trial court in the insurance-policy case did not err in ruling that Hansen's entitlement to monthly benefits ended on April 8, 2011. The trial court also concluded that the "[c]ollection of accounts receivable did not constitute the 'continuing

operation of the Insured's business' within the plain meaning of the applicable provisions of the insurance policy between Northwestern Mutual Life Insurance Company and [Hansen]." Therefore, the trial court held that Roach's failure to file a timely appeal did not proximately cause harm to Hansen because Hansen would not have prevailed on appeal. This appeal followed.

ANALYSIS

On appeal, Hansen asserts that the trial courts in both the insurance-policy case and the legal-malpractice case erred by holding that the policy coverage terminated when Hansen voluntarily surrendered his medical license. In particular, he challenges the courts' construction of the phrase "end the business." As part of his challenge to the courts' policy construction, Hansen contends that the policy's provision of benefits for office overhead expenses should have extended throughout the period of the statutory winding up of his professional association. Hansen also argues that the courts erred by concluding that the policy coverage terminated when he surrendered his license because the trial court in the insurance-policy case held that Northwestern Mutual had breached the insurance contract.

Appellate legal malpractice

A legal-malpractice action requires proof of four elements: (1) the attorney owed the plaintiff a duty; (2) the attorney breached that duty; (3) the breach proximately caused the plaintiff's injuries; and (4) damages occurred. *Alexander v. Turtur & Assocs.*, 146 S.W.3d 113, 117 (Tex. 2004). If the malpractice action arises from prior litigation, the plaintiff bears the burden of proving that, "but for" the attorney's breach of duty, the plaintiff would have prevailed on the underlying

cause of action and would have been entitled to judgment. *See Stanfield v. Neubaum*, 494 S.W.3d 90, 96 n.3 (Tex. 2016); *Alexander*, 146 S.W.3d at 117-18. To discharge this burden, known as the "suit within a suit" requirement, the plaintiff must produce evidence explaining the legal significance of the attorney's failure and the impact this had on the underlying action. *Cantu v. Horany*, 195 S.W.3d 867, 873 (Tex. App.—Dallas 2006, no pet.); *see also Stanfield*, 494 S.W.3d at 96 n.3 (describing burden as "'suit within a suit' requirement").

There is no dispute as to the first two elements of Hansen's legal-malpractice claim: that Roach owed Hansen a duty and that Roach breached that duty. The dispute here focuses only on the two remaining elements: whether Roach's breach of his duty proximately caused Hansen injuries and whether damages occurred. We will address only the element of proximate cause because a determination of the proximate-cause issue necessarily determines whether damages occurred. As the Texas Supreme Court has explained:

> In cases of appellate legal malpractice, however, the determination of causation requires determining whether the appeal in the underlying action would have been successful. The plaintiff must show that but for the attorney's negligence the [plaintiff] would have prevailed on appeal. The rationale for requiring this determination is that if the appeal would not have succeeded and the trial court judgment would have been affirmed, the attorney's negligence could not have caused the plaintiff any damage. On the other hand, if the appeal would have succeeded in reversing the trial court's judgment and obtaining a more favorable result, then the plaintiff sustained damage because of the attorney's negligence.

Millhouse v. Wiesenthal, 775 S.W.2d 626, 627 (Tex. 1989) (citations omitted).

Standard of review

Even though the determination of the issue of proximate cause is usually a question of fact, in an appellate legal-malpractice case it is a question of law that we review de novo. *See id.*; *see also In re Humphreys*, 880 S.W.2d 402, 404 (Tex. 1994) ("[Q]uestions of law are always subject to de novo review."). The reason for this is that "[t]he question of whether an appeal would have been successful depends on an analysis of the law and the procedural rules. . . . Resolving legal issues on appeal is an area exclusively within the province of judges; a court is qualified in a way a jury is not to determine the merits and probable outcome of an appeal." *Millhouse*, 775 S.W.2d at 628. Consequently, to determine whether Roach's negligence in failing to file a timely appeal proximately caused Hansen harm, we must determine whether the appeal from his underlying insurance suit would have been successful if the appeal had properly been before this Court. *See id.* at 627-28.

Making this determination requires us to interpret the relevant provisions of the overhead-expense policy. We construe insurance policies according to the same rules of construction applied to contracts generally. *See RSUI Indem. Co. v. Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015). We focus on the plain language of the policy and give the words and phrases their ordinary and generally accepted meaning unless the policy shows the words were meant in a technical or different sense. *See id.*; *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008). The words and phrases are read in the context of the policy as a whole, giving effect to all of the words and provisions. *See RSUI*, 466 S.W.3d at 118.

Language that can be given a certain or definite meaning is not ambiguous, and we will construe it as a matter of law. *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983). We must enforce an unambiguous policy as written. *Don's Bldg. Supply*, 267 S.W.3d at 23. A policy is not ambiguous simply because the parties to a lawsuit offer conflicting interpretations of the policy's provisions. *Nassar v. Liberty Mut. Fire Ins. Co.*, 508 S.W.3d 254, 258 (Tex. 2017). A policy is ambiguous only if it remains subject to two or more reasonable interpretations after applying the pertinent rules of construction. *Id.*; *RSUI*, 466 S.W.3d at 119. Whether a policy is ambiguous is a question of law that we review de novo. *See Coker*, 650 S.W.2d at 394.

Construction of the policy

The central issue in this appeal is the construction of the termination provision in the overhead-expense policy. The policy provides that "[i]f the Insured ends the operation of the business while totally or partially disabled, benefits for Covered Overhead Expense and Waiver of Premium will end." Hansen's core argument is that both trial courts erred by holding that coverage under the policy terminated on April 8, 2011, when he voluntarily surrendered his medical license. With the principles of insurance-policy construction in mind, we turn to the key provisions of the policy.

The overhead-expense policy includes the following relevant provisions:

> **SECTION 1. GENERAL TERMS AND DEFINITIONS**
>
> This policy provides a monthly benefit for Covered Overhead Expense when the Insured is totally or partially disabled.
>
> . . . .

1.6 BUSINESS

Except as provided in sections 8.3 [change of policy] and 8.9 [cancellation of policy], the word 'business' means the Insured's business or the Insured's professional practice at the time disability starts.

1.7 COVERED OVERHEAD EXPENSE

Covered Overhead Expense is the total of monthly expenses that are normal and customary in the continuing operation of the Insured's business, as properly reported for federal income tax (FIT) purposes, with some exceptions as described below. . . .

. . . .

SECTION 2. BENEFITS

. . . .

2.2 MONTHLY BENEFIT FOR DISABILITY

. . . .

Benefit Termination or Adjustment.

If the Insured ends the operation of the business while totally or partially disabled, benefits for Covered Overhead Expense and Waiver of Premium will end.

Hansen contends that the phrase "ends the operation of the business" is ambiguous and that because it can reasonably be interpreted in more than one way, we must adopt the interpretation that he advances, even if the interpretation advanced by Northwestern Mutual appears to be more reasonable. *See Nassar*, 508 S.W.3d at 258; *Don's Bldg. Supply*, 267 S.W.3d at 23 (explaining that if policy "is susceptible to more than one reasonable interpretation, we will resolve any ambiguity in favor of coverage"). Hansen argues that the phrase "ends [. . .] the business" could reasonably mean the business ends in any one of the following situations: whenever he no longer

performs surgery; whenever he stops having patient contact; whenever he has terminated his last employee; whenever the business has collected all of its assets and retired all of its liabilities; whenever Austin Neurosurgical ceases to be an existing entity; or whenever he ceases to be a licensed physician. Hansen contends that we should construe the policy to mean that his business did not end when he surrendered his medical license, even though that was an event that required the winding up of Austin Neurosurgical under the Business Organizations Code, because the business had to continue until its debts were paid and its accounts receivable were collected.

We do not agree that the phrase "ends the operation of the business" is ambiguous. "Unless the policy dictates otherwise, we give words and phrases their ordinary and generally accepted meaning, reading them in context and in light of the rules of grammar and common usage." *RSUI*, 466 S.W.3d at 118. We also "strive to give effect to all of the words and provisions so that none is rendered meaningless." *Id.* Hansen's proposed interpretations are not reasonable when considered in the context of the policy's definition of "business."

The policy defines "business" as "the Insured's business or the Insured's professional practice at the time disability starts." The policy's use of the disjunctive conjunction "or" between "business" and "professional practice" "signifies a separation between two distinct ideas." *See Spradlin v. Jim Walter Homes, Inc.*, 34 S.W.3d 578, 581 (Tex. 2000). The common meaning of the word "business" as used in the context of the policy's definition of "business" is "a usu. commercial or mercantile activity customarily engaged in as a means of livelihood . . . sometimes contrasted with the . . . professions . . . : occupation, position, trade, line" or "a commercial or industrial enterprise." *Webster's Third New Int'l Dictionary* 302 (2002). The common meaning of the word "practice" as

used in the context of the policy's definition of "business" is "[t]he carrying on or exercise of a profession or occupation, esp. of law, surgery, or medicine; the professional work or business of a lawyer or medical man." *The Compact Oxford English Dictionary* 1406 (2d ed. 1994). The common meaning of the word "professional" as used to describe "practice" in the context of the policy's definition of "business" is "[e]ngaged in one of the learned or skilled professions." *Id.* at 1440. In other words, the policy defines the word "business" to cover both the commercial enterprises of insureds involved in trade or other nonprofessional occupations and the professional practices of insureds such as doctors and lawyers.

Hansen was a licensed doctor and the sole member of his professional association, a neurosurgical practice. As defined by the Texas Business Organizations Code, "'[p]rofessional association' means an association, as distinguished from either a partnership or a corporation, that is: (A) formed for the purpose of providing the professional service rendered by a doctor of medicine, doctor of osteopathy, doctor of podiatry, dentist, chiropractor, optometrist, therapeutic optometrist, veterinarian, or licensed mental health professional; and (B) governed as a professional entity under this title." Texas Bus. Orgs. Code § 301.003(2). Accordingly, the "professional practice" part of the policy's definition of "business" applies to Hansen and to what he describes as the "Insured's business" at the time of the disability, Austin Neurosurgical.[3]

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[3] We note that one of the stipulated facts is that "[p]rior to June 5, 2010, *Dr. Hansen practiced neurosurgery, through his professional association,* Austin Neurosurgical & Spine Institute, P.A." (Emphasis added.) In his deposition testimony, Hansen described the work of his practice as evaluating patients referred by other doctors to determine whether they were surgical candidates, either performing surgery or not, and then sending the patients back to the primary-care doctors. He further explained that he did not have recurring patients and that his practice could not be sold to another doctor because "your name and your reputation is your practice."

The common meaning of the word "operation" as used in the policy is "the quality or state of being functional or operative." *Webster's Third New Int'l Dictionary* 1581 (2002). We conclude that Hansen's medical practice was no longer functional or operative after the date that he surrendered his medical license. Under the Texas Occupations Code, "[a] person may not practice medicine in this state unless the person holds a license issued under this subtitle." Tex. Occ. Code § 155.001. Thus, reviewing the policy as a whole and giving effect to all of the words and phrases, as we must, we conclude that Hansen "end[ed] the operation of the business" when he could no longer legally engage in his professional practice.

To the extent that Hansen argues that the "business" of Austin Neurosurgical has not ended as long as it owns assets, must pay its debts, and has accounts it is collecting, we disagree. Hansen attempts to distinguish between Austin Neurosurgical's "provision of medical services to the public," which could not continue after he surrendered his medical license, and the winding up of the financial affairs of the professional association, which he asserts constitutes a continuation of his business. The unambiguous definition of "business" in the policy draws no such distinction within an insured's single "business"; instead, the definition encompasses both practices providing professional services and commercial enterprises. But even if we were to consider the financial affairs of Hansen's practice separately from the practice's provision of medical services for the sake of argument, the disjunctive nature of the definition means that the phrase "ends the operation of the business" would apply to whichever part ended first. In Hansen's case, that means the ending date remains the date he surrendered his medical license. We overrule Hansen's issues contending

that the trial courts erred by holding that the policy coverage terminated when he surrendered his medical license.

Hansen further argues that the provisions in the Business Organizations Code that allow for a winding-up period for professional associations means that his business continues until the winding-up period is complete and a certificate of termination is filed. However, Section 11.052 of the Code provides as part of the winding-up procedures that the professional association "*shall . . . cease to carry on its business*, except to the extent necessary to wind up its business." Tex. Bus. Orgs. Code § 11.052 (emphasis added). The Code defines "business" as "a trade, occupation, profession, or other commercial activity." *Id.* § 1.002(5). In Hansen's case, his ceasing to practice the profession of medicine by surrendering his license is the event that required the winding up of his professional association because he was the sole owner. Under the Code, "[a] person may be an owner of a professional entity [which includes a professional association] only if the person is an authorized person." *Id.* § 301.007(a). A person is an authorized person with respect to a professional association only if the person is a professional individual. *Id.* § 301.004. "'Professional individual,' with respect to a professional entity, means an individual who is licensed to provide in this state or another jurisdiction the same professional service as is rendered by that professional entity." *Id.* § 301.003(5). Thus, after he surrendered his medical license, Hansen could act as owner of the entity "only for the purpose of winding up the affairs of the entity, including selling the outstanding ownership interests and other assets of the entity." *Id.* § 301.008(e) (duties and powers of owner who ceases to be licensed).

Although we have already concluded that Hansen ended the operation of his business when he surrendered his medical license and therefore is not entitled to benefits beyond that date, we further conclude that any expenses that Hansen incurred during the winding-up process would not be "Covered Overhead Expense" as defined in the policy. The policy defines "Covered Overhead Expense" as "the total of monthly expenses that are *normal and customary in the continuing operation* of the Insured's business." (Emphasis added.) Once Hansen became required to wind up Austin Neurosurgical, any expenses incurred could not be for the "continuing operation" of the business. *See id.* § 11.001(8) ("Winding up" is "the process of winding up the business and affairs of a domestic entity as a result of the occurrence of an event requiring winding up."). As the Code defines "winding up," expenses related to winding up are incurred only to terminate the entity. Therefore, they are not "normal and customary [expenses incurred] in the continuing operation" of the business. We overrule Hansen's issues contending that the policy should have provided overhead-expense benefits for the statutory winding-up period of his professional association.

Hansen presents an additional issue on appeal related to the trial court's conclusion in the insurance-policy case that Northwestern Mutual breached its contract with him when it denied him benefits. Hansen contends that after it breached the contract, Northwestern Mutual "could no longer insist that Hansen comply with the contract" and "could not rely on Hansen's post-breach conduct [of surrendering his medical license] as a 'fall-back' defense when its complete denial of liability failed." He argues that "[w]hat Northwestern Mutual was essentially arguing was that Hansen had to maintain his medical license during the entire period of coverage in order to receive the policy benefits, even though Hansen was physically incapable of performing surgery." He

asserts that Northwestern Mutual's breach excused him from any obligation to maintain his medical license. We agree that in general a material breach by one party to a contract excuses the other party from any further obligation to perform. *See Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam). However, Hansen's maintaining his medical license was not a performance requirement under the policy.[4] Under these facts, surrendering his medical license was merely an event that the trial courts determined ended the operation of his business under the policy. Thus, the legal principle upon which Hansen relies does not apply here. We overrule this issue.

We conclude that this Court would not have reversed the trial court's judgment in the insurance-policy case if Roach had timely perfected Hansen's appeal. Consequently, we conclude that Roach's failure to timely perfect the appeal did not proximately cause loss or harm to Hansen. Therefore, we overrule all of Hansen's remaining issues. *See Millhouse*, 775 S.W.2d at 627.

CONCLUSION

Having concluded that this Court would not have reversed the trial court's judgment in the insurance-policy case and that Roach's failure to timely perfect Hansen's appeal thus did not proximately cause loss or harm to Hansen, we affirm the trial court's judgment in the legal-malpractice case.

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[4] We note that the policy contemplates a potential "replacement" for the insured during a period of disability by providing that the "Covered Overhead Expense" benefits include the "salaries, employer-paid benefits and other compensation for the insured's replacement." In situations in which the insured brings in a replacement to substitute for him during the disability period, there is no requirement that the insured would have to maintain his own professional license.

Cindy Olson Bourland, Justice

Before Justices Puryear, Goodwin, and Bourland

Affirmed

Filed: May 31, 2017