

STATE OF MICHIGAN

COURT OF APPEALS

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BRIAN M. COHEN and MR. ALAN'S  
MEN'S BOOTERY, INC.,

Plaintiffs/Counter-  
Defendants/Appellants,

v

NEW YORK LIFE INSURANCE COMPANY,

Defendant/Counter-  
Plaintiff/Appellee.

UNPUBLISHED  
June 4, 1996

No. 171064  
LC No. 92 446702 CZ

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BRIAN M. COHEN and MR. ALAN'S  
MEN'S BOOTERY, INC.,

Plaintiffs/Counter-  
Defendants/Appellees,

v

NEW YORK LIFE INSURANCE COMPANY,

Defendant/Counter-  
Plaintiff/Appellant.,

No. 173296  
LC No. 92 446702 CZ

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Before: Wahls, P. J. and Reilly and O'Connell, JJ.

PER CURIAM.

Brian Cohen and Mr. Alan's Men's Bootery, Inc. purchased a disability income policy and a disability buy-out policy respectively from defendant New York Life Insurance Company (NYLIC). Following plaintiffs' unsuccessful attempt to recover on the policies, they filed this action for breach of contract against NYLIC and others to recover disability benefits. NYLIC counterclaimed for declaratory judgment or rescission of the policies. The trial court entered an order granting NYLIC's motion for summary disposition pursuant to MCR 2.116(C)(10) and rescinding the policies. That order was certified as final. In Docket No. 171064, plaintiffs appeal the order granting summary disposition as of right. In Docket No. 173296, NYLIC appeals as of right the court's order denying defendant's motion for costs and sanctions pursuant to MCR 2.625(A)(2), MCR 2.114 and MCL 600.2591; MSA 27A.2591. We reverse in Docket No. 171064 and affirm in Docket No. 173296.

The primary issue in this case is whether there was a genuine issue of material fact that Cohen made material misrepresentations in his answers to a questionnaire completed February 13, 1990. The following questions on the application are pertinent to this discussion:

3. During the past 10 years has such person consulted:

a physician or practitioner for, or been treated  
for, or had

a. elevated blood pressure, rheumatic fever,  
heart murmur, chest pain, angina, heart trouble,  
stroke or irregular pulse?

\* \* \*

g. psychiatric, emotional or mental health  
condition requiring medication or  
hospitalization?

\* \* \*

8. Other than as stated, has such person within past 5  
years had any illness or consulted any physician or  
practitioner for any reason, including routine or  
checkup examination?

Cohen answered Questions 3a and g "No." He answered Question 8 affirmatively and in the section for providing details, disclosed only that he had a routine physical.

NYLIC argues that plaintiff's answer to Question 8 was a misrepresentation because a psychologist falls within the definition of "practitioner" and Cohen failed to disclose that he had been treated by a psychologist<sup>1</sup>. We conclude that whether Cohen's failure to disclose his consultations with the psychologist constituted a misrepresentation is a question of fact properly decided by a jury.

We recognize that NYLIC is not required to show that Cohen's answer was given with the intent to deceive. An insurer need not show the insured's fraudulent intent in order to cancel an insurance policy where an applicant makes a material misstatement concerning prior medical history. *Legel v American Community Ins Co*, 201 Mich App 617, 618; 506 NW2d 530 (1993). Therefore, the appropriate focus is not on Cohen's interpretation of the question, but on how the question would be interpreted by the "ordinary lay mind" or "average layman." See *New York Life Ins Co v Modzelewski*, 267 Mich 293, 296; 255 NW 299 (1934); *Mutual Life Ins Co of New York v Geleynse*, 241 Mich 659, 662; 217 NW 790 (1928). Questions and answers in an application for insurance are to be construed liberally in favor of the insured. *Mutual Benefit Life Ins Co v Abbott*, 9 Mich App 547, 552; 157 NW2d 806 (1968).

In response to NYLIC's motion, plaintiffs attached a letter from Jean Casagrande, a professor and director of the University of Florida Program in Linguistics. Her letter states the following in regard to the meaning of "practitioner":

At stake, is the meaning of the word practitioner. In isolation, practitioner can apply to nearly any walk of life -- professionals, artists, and persons in any occupation. This general interpretation is the first meaning given in the Oxford English Dictionary. Specialized dictionaries, by contrast, will give specialized definitions. A medical dictionary will give a medical slant to the word, while a dictionary of another endeavor will give yet another. In my own discipline, I would call a practitioner someone who does field work, someone out collecting information on languages. Word meaning, therefore, is dependent on the discipline in which the word is found.

Moreover, meaning is not exclusively found in dictionaries. Usage context is also quite telling. In the New York Life Insurance Company questionnaire which I examined, the word practitioner appears in a) a medical history questionnaire and b) is sandwiched between other questions about physical illnesses or diseases, c) occurs in a question as an alternative to the word physician, and d) is followed by an inclusion that restricts it [sic] meaning. These four contexts need to be examined in order.

a) The word practitioner in a medical history questionnaire will, in all likelihood, have a medical meaning. If the questioners intended to refer to a practitioner other than one involved in medicine, they should ask the question more specifically to the non-medical field, as is done in 3g in the same questionnaire.

b) Question # 8 of the questionnaire is likely to be understood by anyone as medical in nature, because it occurs between two other questions about medical problems. For the question to be understood otherwise, it would have to specifically refer to particular specialties, i.e. psychologist, psychiatrist [sic], attorney, philatelist. . . .

c) Furthermore, the word practitioner occurs as an alternative after the word physician. In alternative questions, linguistic studies show that alternatives are usually not totally unrelated. One will drink milk or soda, one will marry a rich or poor man, for love or for his money. One will consult a doctor or an attorney, play football or baseball, take a walk or stay home. These alternatives are not asystematic. One generally does [not] choose to take a walk or drink milk, to consult an attorney or play football, to marry for love or consult a doctor, even if we can concoct contexts for these behaviors. In the case of Question # 8, then, if physician is indeed interpreted as MD, as is illustrated in the first meaning of the word physician in the American Heritage Dictionary, then the word practitioner is much more likely to be interpreted as "not MD", (i.e. osteopathic, homeopathic, chiropractic, etc. doctor) than as a practitioner in psychology or a practitioner in stamp collection.

d) Context is also telling in question # 8 in yet another way. The tail end of the question includes the words "including check up or routine examinations". Surely, any alternative followed by that inclusion should be logical. Excluded, therefore, is the stamp collecting practitioner and the psychologist---neither of whom would be considered the right practitioner for a physical, even a routine physical, by any reasonable patient.

Context, therefore, is extremely important, and cannot be ignored in determining whether Question # 8 is sufficiently clear and avoids vagueness or ambiguity. My conclusion is that it is a good question if and only if practitioner is interpreted in a medical sense, exclusive of psychologist.

We believe that Professor Casagrande's letter creates a genuine issue of material fact whether Cohen's failure to disclose his psychotherapy was a misrepresentation. NYLIC has not suggested any reason why Professor Casagrande's opinion concerning the interpretation of Question 8 should be disregarded. Because the pertinent inquiry is an ordinary layperson's interpretation, and plaintiffs presented evidence creating a question of fact on that issue, summary disposition should not have been granted to NYLIC on this basis.<sup>2</sup>

NYLIC also argues that Cohen failed to disclose that he had heart palpitations in response to Question 3a. At oral argument, plaintiff's counsel conceded that Cohen's answer to this question was in error.

Plaintiffs argue that NYLIC should have been barred from asserting alleged misrepresentations other than those pleaded in its counterclaim. The only authority cited by plaintiff is *Abbott, supra*, which does not stand for this proposition. This Court will not search for authority to support plaintiff's argument.

Nevertheless, NYLIC was not entitled to summary disposition on this basis because it did present evidence supporting its assertion that the misrepresentation in response to Question 3 was material. The affidavit of the NYLIC's senior underwriting consultant does not mention Cohen's failure to disclose his heart palpitations. Rather it refers to Cohen's failure to disclose "extensive psychological counseling and treatment, psychological and emotional problems, and a longstanding history of psychological and emotional problems" and concludes that "had the medical history been properly represented [NYLIC] would not have issued [the policies.]" The insurer bears the burden of proving materiality. *Zulcosky v Farm Bureau Life Ins Co of Michigan*, 206 Mich App 95, 97; 520 NW2d 366 (1994). Because the consultant's affidavit did not mention Cohen's failure to disclose the heart palpitations, it is not clear whether NYLIC would have issued the policy had plaintiff correctly answered Question 3. In short, the affidavit presented by NYLIC does not establish that the nondisclosure of heart palpitations was material. Therefore, to the extent that the court granted summary disposition under MCR 2.116(C)(10), reasoning that there was no issue of fact regarding the materiality of the misrepresentation under Question 3, it was in error.

On cross-appeal, NYLIC contends that the trial court erred in denying its motion for sanctions pursuant to MCR 2.625(A)(2), MCR 2.114 and MCL 600.2591; MSA 27A.2591. Inasmuch as we find merit to plaintiffs' arguments as discussed above, we find no abuse of discretion on the court's denial of NYLIC's motion.

The order granting NYLIC's motion for summary disposition and the judgment of rescission are reversed. The order denying NYLIC's motion for taxation of costs and sanctions is affirmed.

/s/ Myron H. Wahls

/s/ Maureen Pulte Reilly

<sup>1</sup> NYLIC does not contend that Cohen's negative answer to Question 3g was a misrepresentation because Cohen's condition had not "require[d] medication or hospitalization" during the ten years before Cohen completed the application.

<sup>2</sup> The trial court's ruling does not indicate which of NYLIC's arguments was the basis for granting the motion.